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

827 N.W.2d 486

Filed March 15, 2013. No. S-11-060.

1. **Constitutional Law: Appeal and Error.** Constitutional interpretation is a question of law on which the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision by the trial court.
2. **Trial: Witnesses.** In a bench trial of an action at law, the trial court is the sole judge of the credibility of the witnesses and the weight to be given their testimony.
3. **Witnesses: Evidence: Appeal and Error.** An appellate court will not reevaluate the credibility of the witnesses or reweigh testimony but will review the evidence for clear error.
4. **Judgments: Appeal and Error.** The trial court's factual findings in a bench trial of an action at law have the effect of a jury verdict and will not be set aside unless clearly erroneous.
5. **Constitutional Law: Eminent Domain.** Inverse condemnation is a shorthand description for a landowner suit to recover just compensation for a governmental taking of the landowner's property without the benefit of condemnation proceedings.
6. **Eminent Domain: Property: Intent.** Inverse condemnation has been characterized as an action or eminent domain proceeding initiated by the property owner rather than the condemnor, and has been deemed to be available where private property has been actually taken for public use without formal condemnation proceedings and where it appears that there is no intention or willingness of the taker to bring such proceedings.
7. **Constitutional Law: Eminent Domain: Damages.** Because the governmental entity has the power of eminent domain, the property owner in an inverse condemnation cannot compel the return of the property taken; however, as a substitute, the property owner has a constitutional right to just compensation for what was taken.
8. **Eminent Domain: Property: Intent.** The threshold issue in an inverse condemnation case is to determine whether the property allegedly taken or damaged was taken or damaged as the result of the exercise of the governmental entity's exercise of its power of eminent domain; that is, was the taking or damaging for public use.
9. **Constitutional Law: Eminent Domain: Damages.** 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.
10. ____: ____: ____. Neb. Const. art. I, § 21, is not a source of compensation for every action or inaction by a governmental entity that causes damage to property. Instead, it provides compensation only for the taking or damaging

of property that occurs as the result of an entity's exercise of its right of eminent domain.

11. **Eminent Domain: Property: Proof.** In order to meet the initial threshold in an inverse condemnation case that the property has been taken or damaged for public use, it must be shown that there was an invasion of property rights that was intended or was the foreseeable result of authorized governmental action.

Petition for further review from the Court of Appeals, IRWIN, SIEVERS, and MOORE, Judges, on appeal thereto from the District Court for Platte County, ROBERT R. STEINKE, Judge. Judgment of Court of Appeals affirmed in part and in part reversed, and cause remanded with directions.

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

Erik C. Klutman and Mark M. 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.

William F. Austin, of Erickson & Sederstrom, P.C., for amicus curiae League of Nebraska Municipalities.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

NATURE OF CASE

James Henderson and Jamie Henderson sued the City of Columbus (the City) after raw sewage flooded into their home. They claimed that the flooding damaged their home and was the result of a malfunction of the city-run sanitary sewage system. After a bench trial on liability, the district court for Platte County found in favor of the City and dismissed the Hendersons' complaint, in which they had alleged theories of recovery based on negligence, inverse condemnation, nuisance, and trespass. The Hendersons appealed to the Nebraska Court of Appeals and assigned error to the district court's rulings with respect to negligence and inverse condemnation. The Court of Appeals affirmed the district court's order with respect to negligence, but reversed the portion of the order in which

the district court had found in the City's favor with regard to inverse condemnation. The Court of Appeals remanded the cause for further proceedings with respect to damages related to the inverse condemnation claim. *Henderson v. City of Columbus*, 19 Neb. App. 668, 811 N.W.2d 699 (2012).

We granted the City's petition for further review of inverse condemnation issues. We conclude, for reasons different than those relied on by the district court, that the Hendersons did not establish an inverse condemnation claim. We therefore reverse that part of the Court of Appeals' decision regarding inverse condemnation, and we remand the cause to the Court of Appeals with directions to affirm the district court's judgment in favor of the City and against the Hendersons on all theories of recovery.

STATEMENT OF FACTS

The evidence and facts are set forth in greater detail in the Court of Appeals' published opinion, *Henderson v. City of Columbus, supra*. We provide here a brief summary of facts relevant to the issues on further review. A heavy rainstorm hit Columbus, Nebraska, in the early morning hours of July 9, 2004. Later that morning, James went to his basement and saw that water mixed with raw sewage was flooding the basement. The sewage appeared to James to be coming from the basement floor drain, which was connected to the City's sanitary sewer system.

The Hendersons filed this action against the City and alleged that the sewer backup and subsequent damage were caused by a malfunction of the city-run sanitary sewage disposal system. They further alleged that 15 other homes suffered similar property damage on July 9, 2004, and that all the other homeowners had assigned their rights to sue the City to the Hendersons. As theories of recovery, they asserted negligence, inverse condemnation under the Nebraska Constitution, nuisance, and trespass.

At trial, the City's utility supervisor testified that in the early hours of July 9, 2004, he was called to respond to a "high alarm" at the sewer system's 26th Avenue lift station. The "high alarm" meant that sewage in the lift station

had exceeded a certain level and that action was needed to avoid an overflow. Records showed that a power failure had occurred, and evidence indicated that the power failure may have been the result of lightning. The supervisor took action, including resetting circuit breakers and starting the two pumps at the site, in order to handle the high volume of sewage in the lift station. After he reactivated the power, he believed the pumps were working properly. He checked manholes upstream of the lift station and found no backup; he did not check manholes downstream because he feared that removing manhole lids would allow rainwater to flood into the system. The Hendersons' home is located downstream from the lift station.

An expert retained by the Hendersons testified that sewage backups into homes including the Hendersons' could have been avoided if the utility supervisor had checked manholes downstream of the lift station before activating the pumps. He opined that turning on the two high-volume pumps overloaded the sanitary sewer system, forcing raw sewage into homes, and that the overload would not have occurred if the supervisor had taken alternative action such as turning on only one pump or pumping the sewage toward alternate routes.

The public works environmental services director for the City testified that during a high alarm, both pumps generally should be turned on because if only one pump were turned on it could cause backups upstream from the lift station. He testified at the August 2010 trial that he had worked for the City since February 2001 and had not seen issues like those that occurred in this case either before or since.

An expert retained by the City opined that excess water may have gotten into the sewer system as a result of flooding and that activation of the pumps at the 26th Avenue lift station was not a primary cause of any major backups. He noted that records indicated that the two pumps routinely worked together without causing backups. He stated that there were "decades of history" indicating that the pumps "had not caused those kinds of problems." He further stated that "over a long period of time," the pumps had been shown to "function quite well without ever causing backups."

Following a bench trial on liability, the district court found in favor of the City on all theories of recovery and dismissed the Hendersons' complaint with prejudice. With regard to inverse condemnation, the court found that the Hendersons had failed to prove what caused the sanitary sewer system to be overloaded with floodwater. The court further noted that there "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." The court concluded that the Hendersons had failed to prove that the City's "actions or inactions were the proximate cause of their damages," and the court therefore found in favor of the City and against the Hendersons with respect to inverse condemnation.

The Hendersons appealed to the Court of Appeals and claimed that the district court erred when it rejected their theories of recovery based on negligence and inverse condemnation. The Court of Appeals found no error in the district court's finding that there was no merit to the Hendersons' negligence theory of recovery and therefore affirmed that portion of the district court's order which had rejected the negligence theory and the other theories to which the Hendersons did not assign error on appeal. However, the Court of Appeals concluded that the district court erred when it rejected the Hendersons' inverse condemnation claim.

The Court of Appeals drew attention to a portion of the district court's order in which the court stated, "'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.'" *Henderson v. City of Columbus*, 19 Neb. App. 668, 687, 811 N.W.2d 699, 714 (2012) (emphasis omitted). The Court of Appeals determined that the finding was supported by the evidence and concluded that the City's action in reactivating the pumps caused the system which was already overloaded to back up and therefore was the proximate cause of damage to the Hendersons' property. The Court of Appeals reversed the portion of the district court's order in which it had rejected the inverse condemnation theory of

recovery and remanded the cause for a determination of damages related to inverse condemnation. *Henderson v. City of Columbus, supra*.

We granted the City's petition for further review.

ASSIGNMENTS OF ERROR

The City generally asserts that the Court of Appeals erred when it reversed the district court's order dismissing the inverse condemnation theory of recovery. The City's assignments of error focus on the district court's conclusions with regard to proximate cause.

We note that the Hendersons did not file a cross-petition seeking further review of the Court of Appeals' decision which affirmed the portion of the district court's order rejecting their theories of negligence, nuisance, and trespass.

STANDARDS OF REVIEW

[1] Constitutional interpretation is a question of law on which the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision by the trial court. *Pony Lake Sch. Dist. v. State Committee for Reorg.*, 271 Neb. 173, 710 N.W.2d 609 (2006).

[2-4] In a bench trial of an action at law, the trial court is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *McCully, Inc. v. Baccaro Ranch*, 284 Neb. 160, 816 N.W.2d 728 (2012). An appellate court will not reevaluate the credibility of the witnesses or reweigh testimony but will review the evidence for clear error. *Id.* Similarly, the trial court's factual findings in a bench trial of an action at law have the effect of a jury verdict and will not be set aside unless clearly erroneous. *Id.*

ANALYSIS

A Viable Inverse Condemnation Case Requires the Exercise of the Power of Eminent Domain.

The eminent domain provision of the Nebraska Constitution is central to our disposition of this case. Neb. Const. art. I, § 21, provides: "The property of no person shall be taken or damaged for public use without just compensation therefor."

We also refer to the Fifth Amendment to the U.S. Constitution, which provides: "[N]or shall private property be taken for public use, without just compensation."

[5-8] We have stated that inverse condemnation is a shorthand description for a landowner suit to recover just compensation for a governmental taking of the landowner's property without the benefit of condemnation proceedings. *Strom v. City of Oakland*, 255 Neb. 210, 583 N.W.2d 311 (1998). Inverse condemnation has been characterized as an action or eminent domain proceeding initiated by the property owner rather than the condemnor, and has been deemed to be available where private property has been actually taken for public use without formal condemnation proceedings and where it appears that there is no intention or willingness of the taker to bring such proceedings. *Krambeck v. City of Gretna*, 198 Neb. 608, 254 N.W.2d 691 (1977). Because the governmental entity has the power of eminent domain, the property owner cannot compel the return of the property taken; however, as a substitute, the property owner has a constitutional right to just compensation for what was taken. *Id.* As discussed below, the threshold issue in an inverse condemnation case is to determine whether the property allegedly taken or damaged was taken or damaged as the result of the exercise of the governmental entity's exercise of its power of eminent domain; that is, was the taking or damaging for "public use."

In concluding that the Hendersons had failed to prove a cause of action based on inverse condemnation, the district court determined that the Hendersons had not met "their burden to prove the City's actions or inactions were the proximate cause of their damages." The district court cited *Steuben v. City of Lincoln*, 249 Neb. 270, 543 N.W.2d 161 (1996), in which this court determined that there was no evidence that any actions or inactions on the part of the City of Lincoln were the proximate cause of the plaintiff's damages. Given the reasoning of the district court in the present case, the parties' arguments on appeal as well as the Court of Appeals' resolution of the appeal focus on proximate cause. The parties and the Court of Appeals explored whether the district court used the proper standards to determine proximate cause and

whether the evidence in this case established that the City's actions on July 9, 2004, proximately caused the damages to the Hendersons' property. Much of the argument addressed to this court also concerns proximate cause. However, we believe the focus on proximate cause is premature.

The initial question in an inverse condemnation case is not whether the actions of the governmental entity were the proximate cause of the plaintiff's damages. Instead, the initial question is whether the governmental entity's actions constituted the taking or damaging of property for public use. That is, it must first be determined whether the taking or damaging was occasioned by the governmental entity's exercise of its power of eminent domain. Only after it has been established that a compensable taking or damage has occurred should consideration be given to what damages were proximately caused by the taking or damaging for public use.

In the present case, we conclude below that regardless of whether the City's "actions or inactions" proximately caused the Hendersons' damages, given the district court's findings of fact, the Hendersons failed to establish the threshold element that their property was "taken or damaged for public use" by the City in the exercise of its power of eminent domain. See Neb. Const. art. I, § 21. Therefore, the Hendersons failed to establish that they were entitled to just compensation under the Nebraska constitutional clause regarding the taking or damage for public use. Albeit for different reasons, the district court's judgment in favor of the City on the Hendersons' inverse condemnation claim was correct and the Court of Appeals' reversal was error.

The Hendersons asserted as one of their theories of recovery that their property had been damaged for public use by the City and that they were entitled to just compensation under Neb. Const. art. I, § 21. We note that the Hendersons also advanced theories of recovery based on negligence, nuisance, and trespass. However, issues related to those theories of recovery are not presented to us on further review and we therefore do not consider the merits of any of those alternate theories. Because we consider only whether the Hendersons established that they were entitled to just compensation under Neb. Const.

art. I, § 21, we review the jurisprudence related to actions for inverse condemnation.

As we have noted, the right to bring an inverse condemnation action derives from Neb. Const. art. I, § 21, which provides: "The property of no person shall be taken or damaged for public use without just compensation therefor." The 5th Amendment to the U.S. Constitution, made applicable to the states through the 14th Amendment, provides: "[N]or shall private property be taken for public use, without just compensation." A landowner is entitled to bring an action in inverse condemnation as a result of the self-executing character of the takings clauses of the U.S. and Nebraska Constitutions. *Whitehead Oil Co. v. City of Lincoln*, 245 Neb. 680, 515 N.W.2d 401 (1994).

Nebraska's constitutional right to compensation includes just compensation where property has been "taken or damaged" in the exercise of eminent domain, whereas the federal Constitution is limited to property that has been "taken." Therefore, the Nebraska right is broader than the federal right. *Scofield v. State*, 276 Neb. 215, 753 N.W.2d 345 (2008). Notwithstanding this difference in language between the state and federal Constitutions, we have analyzed other state constitutional issues related to eminent domain—including whether there has been a compensable taking or damaging for public use—by treating federal constitutional case law and our state constitutional case law as coterminous. *Id.*

[9] We have stated that 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 v. City of Oakland*, 255 Neb. 210, 583 N.W.2d 311 (1998). The Nebraska constitutional clause broadens the entitlement for just compensation beyond property that is actually "taken" by the governmental entity and includes compensation for property that is damaged in the sense that the market value of the property has been diminished even if the property is not actually taken.

Under the Nebraska Constitution, the requirement that property was taken or damaged "for public use" means that the taking or damage must be the result of the governmental

entity's exercise of its right of eminent domain. Not all damage to property by a governmental entity in the performance of its duties occurs as a result of the exercise of eminent domain. As the Wyoming Supreme Court stated in an unsuccessful inverse condemnation case: "It certainly will not be contended that every destruction of property or injury thereto by public officers or their agents, in the discharge of governmental functions, is covered by the constitutional guaranty [in Wyoming State Constitution providing for compensation in the exercise of eminent domain]." *Chavez v. City of Laramie*, 389 P.2d 23, 25 (Wyo. 1964). Earlier in *Chavez*, the opinion states: "Certainly the accident and consequent damage [in the case] served no public purpose, and there was absent a taking or damaging of property *for public use*." *Id.* at 24 (emphasis in original). The reasoning in this Wyoming case applies in Nebraska.

[10] To summarize, Neb. Const. art. I, § 21, is not a source of compensation for every action or inaction by a governmental entity that causes damage to property. Instead, it provides compensation only for the taking or damaging of property that occurs as the result of an entity's exercise of its right of eminent domain. Therefore, a threshold issue in an inverse condemnation case seeking compensation for damage to property is whether the actions that are alleged to have caused damage to property constitute an exercise of the governmental entity's right of eminent domain.

The City Did Not Exercise Its Power of Eminent Domain.

As we explained above, because both the federal and state Constitutions involve a "public use," we analyze the state constitutional issue of whether there has been a physical taking or damage "for public use" as the result of the exercise of eminent domain, as coterminous with federal constitutional law. The U.S. Supreme Court recently reiterated requirements for determining whether there has been a taking under the Fifth Amendment to the U.S. Constitution in *Arkansas Game and Fish Com'n v. U.S.*, ___ U.S. ___, 133 S. Ct. 511, 184 L. Ed. 2d 417 (2012). As an initial matter, the Court repeated

the fundamental principles in its Takings Clause jurisprudence, noting that "[t]he Takings Clause is 'designed to bar 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.'" 133 S. Ct. at 518 (quoting *Armstrong v. United States*, 364 U.S. 40, 80 S. Ct. 1563, 4 L. E. 2d 1554 (1960)). The Court continued that "'[w]hen the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner.'" *Id.* (quoting *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 122 S. Ct. 1465, 152 L. Ed. 2d 517 (2002)). Given the issue in the case, the opinion in *Arkansas Game and Fish Com'n* focused on the duration and foreseeability of the alleged taking. The discussion of these considerations is helpful to the resolution of the present case.

At issue in *Arkansas Game and Fish Com'n* was "whether government actions that cause repeated floodings must be permanent or inevitably recurring to constitute a taking of property." 133 S. Ct. at 518. The Court concluded that government-induced "recurrent floodings, even if of a finite duration, are not categorically exempt from Takings Clause liability." 133 S. Ct. at 515. The temporary nature of the flooding at issue in *Arkansas Game and Fish Com'n* did not automatically exclude it from being a compensable event under the Takings Clause and the order of dismissal therein was reversed and the cause remanded. While time or duration was the relevant factor in determining the existence of a compensable taking at issue in *Arkansas Game and Fish Com'n*, the Court further stated that "[a]lso relevant to the takings inquiry is the degree to which the invasion is intended or is the foreseeable result of authorized government action." 133 S. Ct. at 522. This additional factor of intention or foreseeability is of particular importance in the case before us.

With regard to the intentional or foreseeable results of the acts of the governmental entity, the Court in *Arkansas Game and Fish Com'n* cited *Ridge Line, Inc. v. U.S.*, 346 F.3d 1346, 1355 (Fed. Cir. 2003), in which the U.S. Court of Appeals for the Federal Circuit distinguished takings cases from tort cases

and stated that "a property loss compensable as a taking only results when the government intends to invade a protected property interest or the asserted invasion is the 'direct, natural, or probable result of an authorized activity and not the incidental or consequential injury inflicted by the action.'" This is consistent with *Horstmann Co. v. United States*, 257 U.S. 138, 146, 42 S. Ct. 58, 66 L. Ed. 171 (1921), in which the Court stated that "it would border on the extreme to say that the Government intended a taking by that which no human knowledge could even predict."

The Court in *Arkansas Game and Fish Com'n* also cited *Matter of Chicago, Milwaukee, St. Paul and Pacific*, 799 F.2d 317, 325-26 (7th Cir. 1986), in which the U.S. Court of Appeals for the Seventh Circuit stated that "despite the contention that all torts by the government are takings . . . the [U.S.] Supreme Court has distinguished the two" and that "[a]ccidental, unintended injuries inflicted by governmental actors are treated as torts, not takings." For completeness, we note that the observation in *Matter of Chicago, Milwaukee, St. Paul and Pacific* outlining a distinction between inverse condemnation and torts is consistent with Nebraska jurisprudence. See, *Western Fertilizer v. City of Alliance*, 244 Neb. 95, 504 N.W.2d 808 (1993); *Dishman v. Nebraska Pub. Power Dist.*, 240 Neb. 452, 482 N.W.2d 580 (1992); *Kula v. Prososki*, 219 Neb. 626, 365 N.W.2d 441 (1985) (under certain facts, plaintiff may bring both tort action and inverse condemnation action, but not every tort action is viable inverse condemnation case).

[11] Under the federal cases referred to above, in order to meet the initial threshold in an inverse condemnation case that the property has been taken or damaged "for public use," it must be shown that there was an invasion of property rights that was intended or was the foreseeable result of authorized governmental action. The reasoning in these federal cases is applicable to the present case brought under the Nebraska Constitution.

The City refers us to cases from other states that support the foregoing principles of inverse condemnation. *City of Dallas v. Jennings*, 142 S.W.3d 310 (Tex. 2004), involved sewage

which backed up into the homeowners' property. The Texas Supreme Court rejected an argument that "any intentional act can give rise to liability for an intentional taking" and instead held that

> when a governmental entity physically damages private property in order to confer a public benefit, that entity may be liable under [the Texas Constitution's takings clause] if it (1) knows that a specific act is causing identifiable harm; or (2) knows that the specific property damage is substantially certain to result from an authorized government action—that is, that the damage is "necessarily an incident to, or necessarily a consequential result of" the government's action.

142 S.W.3d at 313-14. Article I, § 17, of the Texas Constitution refers to property that has been "taken, damaged, or destroyed for or applied to public use." The Texas constitutional provision is broader than the federal provision but similar to the Nebraska provision, and we find *Jennings* useful.

Other states take a similar view to that of Texas under their state constitutions' takings clauses. *Electro-Jet Tool Mfg. v. Albuquerque*, 114 N.M. 676, 845 P.2d 770 (1992), involved damage resulting from drainage ditches. The New Mexico Supreme Court held that for an act to give rise to a claim under the state's just compensation clause, "the act must at least be one in which the risk of damage . . . is so obvious that its incurrence amounts to the deliberate infliction of harm for the purpose of carrying out the governmental projects." 114 N.M. at 683, 845 P.2d at 777. The New Mexico Supreme Court stated that the standard would be met where damage was intentionally caused or where the governmental entity was "acting with knowledge that the damage [from a public use] was substantially certain to result from the conduct." *Id.* Like Nebraska, article II, § 20, of the New Mexico Constitution provides for just compensation when private property is "taken or damaged for public use."

We note that our case law and that of other courts indicate that flooding may be a compensable taking when it is frequent. In *Dishman v. Nebraska Pub. Power Dist.*, 240 Neb. 452, 482 N.W.2d 580 (1992), this court determined that there

was a compensable taking when there was frequent flooding. Other states have also found viable inverse condemnation actions where there was recurring overflow onto private property. *Robinson v. City of Ashdown*, 301 Ark. 226, 783 S.W.2d 53 (1990), involved recurring sewage overflows onto the homeowners' property. The Supreme Court of Arkansas stated that the "benefit to the public in this case has been its use of the [homeowners'] home as an overflow dump for sewage" and "by failing to remedy the problem the city effectively chose to purchase the [homeowners'] property to the extent the value of that property was diminished by its actions." 301 Ark. at 232, 783 S.W.2d at 56. This is consistent with the statement in *Arkansas Game and Fish Com'n v. U.S.*, ___ U.S. ___, 133 S. Ct. 511, 184 L. Ed. 2d 417 (2012), that intention or foreseeability is a factor in determining whether there has been a taking, because the frequency of flooding could indicate that the taking or damaging of property is a known or foreseeable result of government action for public use.

In the present case, the district court determined that the Hendersons failed to establish a case for inverse condemnation by virtue of a failure of proof of proximate cause, but it also made certain findings of fact that are relevant to the factors we set forth above and important to the resolution of this case. Specifically, the court found that there "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."

The trial court's factual findings in a bench trial of an action at law have the effect of a jury verdict and will not be set aside unless clearly erroneous. *McCully, Inc. v. Baccaro Ranch*, 284 Neb. 160, 816 N.W.2d 728 (2012). The findings are supported by the evidence and are not clearly erroneous. The district court's findings support a conclusion that this was not a case where the City exercised its right of eminent domain, because when the City took action, there had not been recurring sewage backup, nor was it known or foreseeable that the action would take or damage private property.

In the present case, there was only evidence of a single event in which sewage flooded. The testimonial evidence shows that similar actions taken by the City had not caused a sewage backup at other times. The Hendersons did not present evidence that the City knew damage would occur or could have foreseen that its actions could cause damage to private property. Thus, the Hendersons did not establish that the City exercised its right of eminent domain by taking action that it knew or could foresee would result in the taking or damaging of private property. Although our reasoning differs from that of the district court, we conclude that it did not err when it concluded that the Hendersons failed to establish a claim for inverse condemnation under the Nebraska Constitution. The Court of Appeals erred when it reversed that portion of the district court's order rejecting the inverse condemnation theory of recovery.

CONCLUSION

Although our reasoning is based on the Hendersons' failure to show that the City exercised its right of eminent domain, and the district court's reasoning was based on the Hendersons' purported failure to show proximate cause, the district court correctly concluded that the Hendersons did not establish inverse condemnation. We therefore conclude that the Court of Appeals erred when it determined that the district court had erred in rejecting the Hendersons' inverse condemnation claim and reversed the district court's ruling and remanded the cause for a determination of damages for inverse condemnation.

Neither party sought further review of the Court of Appeals' decisions regarding issues other than inverse condemnation. We therefore affirm those portions of the Court of Appeals' decision in which it affirmed the district court's rejection of theories of recovery other than inverse condemnation. However, we reverse that portion of the Court of Appeals' decision in which it reversed the district court's rejection of the Hendersons' inverse condemnation claim. We remand the cause to the Court of Appeals with directions to affirm the

district court's order in which it rejected the entirety of the Hendersons' claims.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

CASSEL, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
JERRY WATSON, APPELLANT.
827 N.W.2d 507

Filed March 15, 2013. No. S-11-912.

1. **Constitutional Law: Witnesses: Appeal and Error.** An appellate court reviews de novo a trial court's determination of the protections afforded by the Confrontation Clause of the Sixth Amendment to the U.S. Constitution and reviews the underlying factual determinations for clear error.
2. **Constitutional Law: Due Process.** The determination of whether procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law.
3. **Judgments: Appeal and Error.** On questions of law, a reviewing court has an obligation to reach its own conclusions independent of those reached by the lower courts.
4. **Criminal Law: Due Process: Time.** A criminal defendant's claim of denial of due process resulting from preindictment delay presents a mixed question of law and fact.
5. **Evidence: Appeal and Error.** In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact.
6. **Motions for Mistrial: Appeal and Error.** Whether to grant a mistrial is within the trial court's discretion, and an appellate court will not disturb its ruling unless the court abused its discretion.
7. **Constitutional Law: Witnesses: Appeal and Error.** The Sixth Amendment to the U.S. Constitution guarantees the right of an accused in a criminal prosecution to be confronted with the witnesses against him or her, and the main and essential purpose of confrontation is to secure the opportunity for cross-examination.
8. **Criminal Law: Constitutional Law.** The federal Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense.
9. **Constitutional Law: Criminal Law: Due Process: Time.** The Due Process Clause of the Fifth Amendment protects a criminal defendant against unreasonable preindictment delay.