

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2015-004568

07/07/2017

HONORABLE DAWN M. BERGIN

CLERK OF THE COURT
L. Nelson
Deputy

DARRELL HULSING, et al.

LOREN R UNGAR

v.

TOWN OF CAVE CREEK, et al.

WILLIAM H DOYLE

BRIAN R HAUSER

TRIAL MANAGEMENT CONFERENCE

Courtroom ECB-713:

3:05 p.m. This is the time set for the Trial Management Conference. Plaintiffs, Darrell Hulsing, Meridy Hulsing, The Blackbird Trust Dated December 16, 2009, Darrell A. Hulsing and Meridy J. Hulsing as Trustees, Collin "TC" Thorstenson and The Collin L. Thorstenson Living Trust Dated June 9, 2016, are represented by counsel, Loren R. Ungar. Defendants, Town of Cave Creek and Usama Abujbarah, are represented by counsel, William H. Doyle and Brian R. Hauser.

Court Reporter, Marylynn LeMoine, is present and a record of the proceedings is made digitally.

LET THE RECORD REFLECT that the Court has determined that Plaintiffs' negligence *per se* claim is viable and may proceed. A ruling minute entry will follow.

The Court reviews its rulings on Defendants' (6) Motions Addressing Legal Issues:

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- Motion on Legal Issue One--whether the Town was required to submit construction plans to the board for review and comment pursuant to A.R.S. §48-3613(C). The Court has ruled that the Town was required to submit construction plans to the board for review and comment pursuant to A.R.S. §48-3613(C), which means that the Town violated §48-3613(A) **as a matter of law**.¹ However, the jury will determine under §48-3613(A) whether the Town's work diverted, retarded or obstructed the flow of waters in a watercourse.
- Motion on Legal Issue Two--whether Plaintiffs may pursue their negligence *per se* claim. As noted above, the Court has determined that the negligence *per se* claim may proceed.
- Motion on Legal Issue Three--whether the §48-3609(I)(2) exempts the Town from the requirements of §48-3613(A) for work on Vermeersch Road. The Court ruled on this issue in its Minute Entry dated July 6, 2017
- Legal Issue Four--whether the State is entitled to immunity. This issue will be addressed at trial.
- Legal Issue Five--whether Plaintiffs complied with the Notice of Claim statute and whether the Town waived any defense related to the Notice of Claim statute. The Court will review the supplemental briefing on this issue, but at this time anticipates resolving these issues at trial.
- Legal Issue Six--the required intent for Plaintiff's claims of trespass and nuisance. This issue will be addressed at the close of trial.

Oral Argument is presented on the Motions *in Limine*.

For the reasons set forth on the record,

IT IS ORDERED:

Plaintiffs' Motions *in Limine*

- Denying Plaintiffs' Motion *in Limine* Number One to Exclude Testimony Regarding Plaintiffs' Self-Help in Installing a Temporary Wall to Protect their Tenant. However, the defense may not elicit testimony regarding Plaintiffs' failure to obtain a permit, or make any argument to the jury regarding the lack of a permit.
- As to Plaintiffs' Motion *in Limine* Number Two to Preclude Testimony Regarding Defendants' Late Disclosed Affirmative Defenses, the only remaining issue is the

¹See Minute Entry dated July 6, 2017.
Docket Code 005

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Town's affirmative defense of inverse eminent domain. The Court will address this at trial.

- Denying Plaintiffs' Motion *in Limine* Number Three to Exclude Irrelevant Testimony of Non-Party Roy Hunt because Roy Hunt's anticipated testimony is relevant to the issues in this case. Plaintiffs' counsel reserves the right to make a non-disclosure objection prior to Mr. Hunt's testimony.
- Denying Plaintiffs' Motion *in Limine* Number Four to Exclude Unfounded Speculation that Plaintiffs Caused their Erosion Damage, with the qualification that Defendants may not elicit testimony or suggest that Mr. Thorstenson removed the vegetation on his property, or is contributorily negligent as a result of the removal of the vegetation.
- Denying Plaintiffs' Motion *in Limine* Number Five and allowing the Town to elicit testimony regarding the Erosion Hazard Zone designation. However, the Court will allow *voir dire* of the Town's witness outside the presence of the jury prior to his testimony, if requested.
- Denying Plaintiffs' Motion *in Limine* Number Six Regarding Plaintiffs' Knowledge/Repair of Erosion.

IT IS FURTHER ORDERED taking Plaintiffs' Motion *in Limine* Number Seven to exclude irrelevant testimony from Maricopa County Flood Control District Representatives under advisement.

Defendants' Motions *in Limine*

- Defendants withdraw their Motion *in Limine* No. 1 to Preclude Plaintiffs' Expert Witness Jay Josephs' Opinion of Value or, in the alternative, Motion for Rule 104, Arizona Rules of Evidence, Determination of the Admissibility of Expert Testimony of Jay Josephs.
- Granting Defendants' Motion *in Limine* No. 2 and excluding any evidence or testimony suggesting that the Engineering Department Files are missing.
- Defendants withdraw their Motion *in Limine* No. 3 to Preclude Evidence or Testimony Concerning Letter from the Army Corps of Engineers.

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- Defendants' Motion *in Limine* No. 4 to Preclude Plaintiffs' Argument or Evidence Regarding the Misdemeanor Conviction of Town of Cave Creek Employee Tyler Thurman is deemed moot as Plaintiffs' counsel advises that he does not intend to raise this issue at trial.
- Granting Defendants' Motion *in Limine* No. 5 and precluding Plaintiffs' claim for strict liability.
- Denying Defendants' Motion *in Limine* No. 6 to Preclude Plaintiffs' Never Disclosed Statutory Violation Claims.

Discussion is held regarding this Division's trial protocol and courtroom procedure.

IT IS FURTHER ORDERED that counsel shall confer and submit a stipulated preliminary jury instruction in the form of RAJI #14 no later than **July 14, 2017**. Counsel may email the instruction in Word format to this Division's Judicial Assistant Susan Whitaker at whitakers@superiorcourt.maricopa.gov.

Defense counsel points out that Plaintiffs have included instructions for negligent infliction of emotional distress and personal injury damages. The Court emphasizes that including an instruction for intentional infliction of emotional distress was clearly improper. Plaintiffs' counsel withdraws the instruction. As to the personal injury damages instruction, Plaintiffs' counsel states that the instruction submitted was modified from the RAJI. For purposes of expediency, the Court advises the parties that it will address this instruction at a later time, but instructs Plaintiffs' counsel to review the instruction and consider the legal standards applicable in this case.

Defense counsel makes an oral Motion *in Limine* to exclude any evidence, testimony or argument regarding any impact upon Plaintiffs from Defendants' alleged wrongdoing other than the diminution in value of their property or the cost of repairing it.

IT IS ORDERED granting the Motion and excluding any evidence, testimony or argument regarding any impact upon Plaintiffs from Defendants' alleged wrongdoing other than the diminution in value of their property or the cost of repairing it.

Counsel stipulate that the jury will consist of 10 persons, including 2 alternates; all 10 jurors will deliberate, with 8 of 10 required to return a verdict; if one juror cannot complete jury service, 7 of 9 will determine the verdict; if 2 jurors cannot complete jury service, 6 of 8 jurors will be required to return a verdict.

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Defense counsel demonstrates the computer presentation he will make during opening statement using flood control district aerial historical photos accessible through the internet. Plaintiffs' counsel has no objection.

IT IS FURTHER ORDERED affirming the 10-day Jury Trial scheduled to begin on **July 31, 2017 at 9:30 a.m.**, in this Division.

4:50 p.m. Hearing concludes.