IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

Appeal No. 28525

IN THE MATTER OF DRAINAGE PERMIT 11-81, JASON MCAREAVEY,
APPLICANT,
and
IN THE MATTER OF DRAINAGE PERMIT 12-142,VERNON MCAREAVEY,
APPLICANT.

MARK DESCHEPPER,
Appellant,

vs.

THE BOARD OF COMMISSIONERS,
MINNEHAHA COUNTY, SOUTH DAKOTA,
Respondent-Appellee

JASON MCAREAVEY and **VERNON MCAREAVEY**,
Appellees.

MARK DESCHEPPER,
Plaintiff-Appellant,

vs.

VERNON R. MCAREAVEY and **MINNEHAHA COUNTY, SOUTH DAKOTA**,
Defendants-Appellees

Appeal from the Circuit Court, Second Judicial Circuit
Minnehaha County, South Dakota
The Honorable Mark E. Salter, Presiding

APPELLANT'S BRIEF

NOTICE OF APPEAL FILED FEBRUARY 12, 2018

A.J. Swanson
ARVID J. SWANSON, P.C.
27452 482nd Ave.
Canton, SD 57013
(605) 743-2070
E-mail: aj@ajswanson.com

Attorney for
MARK DESCHEPPER
Appellant & Plaintiff-Appellant

James E. Moore & James A. Power
WOODS FULLER SHULTZ & SMITH
P.O. Box 5027
Sioux Falls, SD 57117-5027
(605) 336-3890

Attorneys for
BOARD OF COMMISSIONERS,
MINNEHAHA COUNTY
Respondent & Defendant-Appellee

Vince M. Roche & Justin T. Clarke
DAVENPORT EVANS
HURWITZ & SMITH, LLP
P.O. Box 1030
Sioux Falls, SD 57101-1030
(605) 336-2880

Attorneys for
JASON MCAREAVEY and
VERNON MCAREAVEY
Appellees, and Defendant-Appellee

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INTRODUCTORY STATEMENT

Plaintiff and Appellant, Mark DeSchepper, will be referred to as "DeSchepper." Minnehaha County Board of Commissioners, having issued several agricultural drainage permits ("ADPs") at the heart of this case, is referenced as "County" or "County Board" with specific ADPs identified by County's docket number (*e.g.*, 08-71). ADP applicants, Vernon McAreavey and son, Jason McAreavey, are noted by their respective first names, or sometimes, including collectively, as "McAreavey."

DeSchepper's separate appeals from the County Board's approval of ADPs – Civ. 11-2729, a record somewhat longer than 1500 pages, and Civ. 12-3742 - 21 pages - were consolidated soon after the second "notice of appeal." Citation to the second case is "SR2," followed by page. Otherwise, the electronic settled record of the lead case, including hearings on the motions for summary judgment (July 6, 2015), the trial de novo on administrative appeal (July 26, 2016), and McAreavey's renewed motion for summary judgment (November 20, 2017) is cited "SR" and page. Exhibits are referenced as "Ex." followed by number, and SR page.

JURISDICTIONAL STATEMENT

The circuit court issued four pertinent orders (lettered A through D for identification, sometimes referenced as such and annexed also in the likewise lettered appendices):

Order	Date	Title	NOE Date	SR	App.
A	12-5-2015	Memorandum Opinion and Order (partial grant of summary judgment)	3-18-2016	570	A
B	12-13-2016	Memorandum Opinion and Order Re: Administrative Appeal (see Note)	12-26-2016	986	B

C	1-18-2018	Amended Findings of Fact, Conclusions of Law and Memorandum Opinion and Order Re: Administrative Appeal	1-22-2018	1197	C
D	1-18-2018	Order Granting Renewed Summary Judgment (final order)	1-18-2018	1191	D

(*Note:* Order B was embraced in DeSchepper's Petition for Allowance of Intermediate Appeal, # 28076, denied by Order of Supreme Court filed February 14, 2017, SR 1050.)

The present Notice of Appeal was filed February 12, 2018 (SR 1223). This Court has jurisdiction pursuant to SDCL 15-26A-3.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

1. Whether County's official control (drainage ordinance), allowing permits to be issued for subsurface water drainage, is consistent with the civil law rule of drainage codified at SDCL 46A-10A-20.

The trial court, in both Orders B and C, held in the affirmative.

Hendrickson v. Wagners, Inc., 1999 S.D. 74, 598 N.W.2d 507
Gross v. Connecticut Mut. Life Ins. Co., 361 N.W.2d 259 (1985)
Winterton v. Elverson, 389 N.W.2d 633 (1986)
Anderson v. Drake, 24 S.D. 216, 123 N.W. 673 (1909)
Thompson v. Andrews, 39 S.D. 477, 165 N.W. 9 (1917)
SDCL 46A-10A-20

2. Whether in authorizing drainage under official controls, the County is obliged to also apply SDCL 46A-10A-70, namely, drainage into natural depression must be carried "into a natural watercourse [or] into an established watercourse."

The trial court, in both Orders B and C, held that drainage discharge into a "natural depression" is sufficient.

Feistner v. Swenson, 368 N.W.2d 621 (S.D. 1985
Johnson v. Metropolitan Ins. Co., 71 S.D. 155, 22 N.W.2d 737 (1946)
SDCL 46A-10A-70
Attorney General's Opinion, 1995 S.D. Op. Atty. Gen. 21, 1995 WL 405544

3. Whether the County may assume drainage management functions for private drains of a scope beyond the bounds of the civil law rule or other drainage projects within the scope of Chapter 46A-10A.

The trial court, reading *Winterton* as approving the use of drain tile for subsurface water drainage, held the civil law rule is not necessarily the exclusive scope of drainage management by the County.

Winterton v. Elverson, 389 N.W.2d 633 (1986)
La Fleur v. Kolda, 71 S.D. 162, 22 N.W.2d 741 (1946)
Rumpza v. Zubke, 2017 S.D. 49, 900 N.W.2d 601
SDCL 46A-10A-20

4. Whether the County's determination in the matter of ADP 12-142, as the complaint in Civ. 11-2729 was pending, acting without leave of the circuit court, and exercising adjudicatory powers under the drainage ordinance in favor of McAreavey, is infirm due to bias, self-interest or inherent conflicts of interest.

The circuit court did not reach this issue in either Order B or Order C; the issues of County's bias, self-interest or conflicts of interest in the exercise of judicial powers, were raised in the Notice of Appeal in Civ. 12-3742 (SR2 1), and by *Appellant's Proposed Findings of Fact and Conclusions of Law* (SR 1011, specifically FOF # 42-49, and COL # 40, 43, 44, 48, 50), filed January 5, 2017.

Armstrong v. Turner County Bd. of Adjustment, 2009 S.D. 81, 772 N.W.2d 643

5. Whether DeSchepper must have expert testimony to establish his damages or injury from drainage activities consisting of subsurface tiling, emitting into a closed basin.

The trial court held in the affirmative in Order A; after subsequently inviting, within Order B, further submissions in light of *Magner v. Brinkman*, no further or contrary rulings were made as to this issue, eliminating the reference to *Magner* in the amended decision, Order C.

Magner v. Brinkman, 2016 S.D. 50, 883 N.W.2d 74

6. Whether the circuit court erred in determining that McAreavey is entitled to summary judgment as a matter of law on claims within the complaint?

The trial court, in Order D, held for McAreavey, granting summary judgment on all remaining claims of the complaint in Civ. 11-2729.

Rae v. Kuhns, 44 S.D. 494, 184 N.W. 280 (1921)
Lee v. Schultz, 374 N.W.2d 87 (S.D. 1985)

STATEMENT OF THE CASE

The legislature's delegation of "drainage management" to counties dates to 1985 (SDCL 46A-10A-20), and the County adopted "official controls" (drainage ordinance and plan). This may be the first case to this Court concerning county drainage management over a "private drain," defined in SDCL 46A-10A-1(18); it arises from DeSchepper's efforts to protect his quarter-section farm in the lower realms of Twin Lake's watershed (SW1/4, 17-103-52, Clear Lake Township, SR 97, SR2 3), a prairie pothole of 979 acres, embracing also the State's non-meandered 340-acre lake, and several farms of McAreavey. SR 97-8.

In 2011, McAreavey applied for an ADP, to connect subsurface drainage tile works installed under ADPs issued by the County's Administrative Official in 2008. SR 99. This was approved, prompting DeSchepper's appeal to Circuit Court under SDCL 7-8-27. *Id.* The filing includes a complaint with several causes of action for procedural irregularities in the 2008 ADPs, and harm from flooding; DeSchepper's complaint includes declaratory judgment (SR 104), injunctive relief for removal of the buried, perforated tile lines installed in 2008 and 2009 (SR 105), and damages from trespass. SR 106.

On the heels of the circuit court's ruling, in July 2012, on County and McAreavey's separate motions to dismiss, McAreavey sought another ADP, proposing to "combine" the 2008 ADPs, and to embrace also a previously denied permit. The County approved this ADP, too, over objections, with DeSchepper appealing. SR2 1. The cases were consolidated. SR 248.

County and McAreavey pursued motions for summary judgment, largely granted in December 2015 (Order A, App. A), the trial court concluding, in the main, DeSchepper *must* have expert testimony to support causation of damages – with other claims allowed to continue until the County ADP appeals are resolved. Trial de novo followed in July 2016, with a memorandum opinion filed December 2016 (Order B, App. B), upholding both ADP decisions in favor of McAreavey.

The circuit court's ruling (Order B), noting *Magner v. Brinkman*, 2016 S.D. 50, 883 N.W.2d 74, requested submissions on whether the prior ruling (Order A) – the need for expert testimony - should be reconsidered. Additional submissions were provided (DeSchepper, SR 1004, McAreavey, SR 1040). DeSchepper pursued a petition for intermediate appeal, # 28076, as to the trial court's affirmance of the County's approved ADPs and Order B; this petition was denied by Order filed February 14, 2017. SR 1050.

Finally, McAreavey renewed his motion for remaining civil claims. SR 1060. The motion was resisted, with a statement of material facts in dispute. SR 1119-1162. Hearing was held November 20, 2017; the trial court ruled from the bench in favor of McAreavey. SR 1603. On January 18, 2018, the trial court, on its own motion, entered amended findings of fact and conclusions of law related to the ADP appeals, previously ruled on in December 2016, eliminating the reference to the *Magner* decision (*cf.*, Order C, at 17, App. C, Order B, at 16, App. B). Other differences in Order C focus on the Supreme Court's decisions in *Department of Game, Fish and Parks v. Troy Twp.*, 2017 S.D. 50, 900 N.W.2d 840, and *Surat Farms, LLC v. Brule County Bd. of Comm'rs*, 2017 S.D. 52, 901 N.W.2d 365. DeSchepper agrees the ADP matters coming before the County in 2011 and 2012 were quasi-judicial in nature, and that trial de novo was appropriately employed

in the 2016 hearing. The outcome, being at odds with South Dakota's civil law rule of drainage, is disputed. Also on January 18, 2018, the Court entered an order (Order D, App. D) granting summary judgment to McAreavey on the remaining claims. DeSchepper seeks reversal of each order referenced.

STATEMENT OF THE FACTS

A. ADP Matters Prior to Filing Civ. 11-2729:

This case arises between dominant (McAreavey) and servient landowners (DeSchepper), both within the Twin Lake "prairie pothole" watershed, with focus on the County's no-notice issuance of ADPs in 2008, leading to McAreavey's installation (in 2008 and 2009) of perforated drain tiles, draining into or near Twin Lake. County officials concluded more drains were installed than authorized under the ADPs (Ex. 10, SR 901, labeled "McAreavey Drainage History," prepared by County officials, along with Ex. 11, SR 902, modified by DeSchepper, are helpful). McAreavey's early ADPs history – leading to ADP 11-81 – is related in DeSchepper's amended complaint and lettered exhibits (SR 94-121).

In August 2011, McAreavey proposed to expand his tile system, by means of ADP 11-81 (the current and proposed systems are depicted in "Exhibit A," SR 114, followed by minutes of the County Board's approval decision on a 4-1 vote, SR 115; see also Ex. 10, SR 901).

B. Initiation of Civ. 11-2729 (Appeal of ADP 11-81 and Complaint):

ADP 11-81 was appealed under SDCL 7-8-27 (SR 3, 94), including a complaint striking at the 2008 ADPs (declaratory judgment, SR 100, 104), and injunctive relief as

"all such drainage lines and works . . . comprise a violation of state law and the right inherent in the title held by Plaintiff." SR 94, 105, 111.

County and McAreavey moved to dismiss the complaint. SR 35, 161, 164. The ruling in July 2012 denied the motions (other than the fifth cause of action for civil penalty). Circuit Judge Tiede's memorandum, an accurate factual statement of the drainage dispute to that point (SR 227-239), finds the County's function was quasi-judicial. Having adopted an ordinance, the "duty . . . to enforce the provisions of SDCL Ch. 46A-10A is mandatory and not discretionary." SR 236.

C. ADP 12-142 (Proposal to Combine All Prior ADPs):

The ruling triggered an immediate response, as McAreavey filed for an additional permit. ADP 12-142 was presented to the County in September 2012. This ADP proposes to "combine" at least 2 prior "no hearing" permits (#08-71 and 08-68), and, implausibly, a previously denied permit, #09-150. The County's willingness to approve another ADP, with Civ. 11-2729 yet pending, is tainted by the personal interest of the adjudicatory body. The Board's minutes reflect a determination to proceed (even as one member correctly asserts "(t)he problems with this lake are huge and there needs to be an outlet established"). SR2 1, 7-8.

D. Initiation of Civ. 12-3742 (Appeal of ADP 12-142):

The County's additional approval resulted in the second appeal to Circuit Court. SR2 1, 7-8. Civ. 11-2729 and 12-3742 were then consolidated for discovery and trial. SR 248, SR2 17. For clarity, ADP 12-142 is to "combine" those issued in 2008 (and one denied in 2009), while ADP 11-81 proposes a lateral expansion of the 2008 tile system. The ADP 11-81 tile is not yet installed. The trial court's December 13, 2016 order (Order

B, at 3, App. B) is incorrect accordingly. With bracketed insertions, Order B (and, likewise, Order C) should read:

> At issue here are drainage applications designated as ADP 11-81 and ADP 12-142. The applications were considered and approved by the Commission at brief hearings held on August 9, 2011, and September 12, 2012. Currently, there are four 6-inch main drainage tiles that outlet into the direction of Twin Lake. Those tiles were installed as part of [ADPs issued in 2008 – and now proposed to be superseded by ADP 12-142] and are essentially perforated tubes[,] which are buried approximately three feet below the ground's surface. Though authorized by the Commission and not stayed by any order of this court, the McAreaveys have not installed the smaller lateral tiles contemplated in [ADP 11-81], pending the determination of this appeal.

E. Summary Judgment Motions and Ruling (2015):

McAreavey moved for summary judgment, asserting that as DeSchepper had no expert witness to establish that "McAreavey's tiling was the legal cause of Twin Lakes rising and flooding DeSchepper's land," movant was entitled to summary judgment. SR 342. County joined, moving for summary judgment on the complaint's counts for declaratory relief and inverse condemnation. SR 486. DeSchepper resisted, with a statement of material facts. SR 398, 538. The trial court's ruling (Order A, App. A) granted County's motion, while granting McAreavey's motion in part.

F. Trial De Novo - Evidence and Ruling (2016):

DeSchepper purchased his farm in 1998 (Ex. 1, SR 892) and had observed Twin Lake since. His role as servient owner is understood. SR 1304. There are no vested drainage rights as to the property. SR 1303. Photo maps reflecting "McAreavey Drainage History" (prepared by County, as modified by DeSchepper) show the ADP dockets by color codes and in relation to Appellant's farm and Twin Lake. Exs. 10, 11, SR 901, 902. The lake level rose (SR 1377-82), sufficient to soon bury the tile outlets installed by

McAreavey in 2008. SR 1381. As of 2011, the level of water in Twin Lake rose to the spill point at elevation 1,735.5 feet, with 50 acres of DeSchepper's farm under water. Ex. 36, SR 1360-1. Several photos show flooded conditions in April 2011. Ex. 8, 9, SR 1317.

Early in his career, Tim Kenyon, a hydrogeologist, drilled holes into Minnehaha County glacial till soils, including within a few miles of Twin Lake. SR 1388. Kenyon is senior consultant for Leggette Brashears & Graham, providing groundwater consulting services. SR 1385. Twin Lake is a kettle or closed depression, formed by ice chunks from the glacier during the DeSmet Advance. SR 1390, 1393-96; Ex. 6, 7, SR 897-98. Kenyon's Ex. 41 (SR 944) shows 979.3 acres in this watershed, with a spill point at 1,735.5 feet. DeSchepper testified this was reached and water flowed from April to August 2011 (SR 1314-18), receding some by time of trial. Kenyon's watershed exhibit notes both north and south bodies of Twin Lake, the latter at 1722 feet, and containing water, according to a 1964 USGS map (Ex. 4, SR 895), while the former is slightly deeper but dry. SR 1397. This feature "substantiates there's no subsurface flow of water through this glacial till." (*Id*.)

Water that "would have naturally evapotranspired back out into the atmosphere" is removed from the soil by tile. SR 1400. Water moves into the tile, flowing down grade into Twin Lake. (*Id.*) Water flows through a watercourse, and Twin Lake is not a watercourse. Water flows into Twin Lake, departing only by evapotranspiration (commonly, ET). SR 1422, 1424, 1436.

Jason McAreavey testified regarding his use of Dr. Hay's letter (Ex. 104, SR 946) in obtaining approval for ADP 11-81. Jason understood the tiling work would not add a significant amount of water to the lake. SR 1462. The tiles have no flow meters. SR 1466.

After installing in 2008 and 2009, Jason checked the drain exits until, fairly soon, all were buried in water. SR 1467. The exits remain underwater. SR 1466. Since 2011, the lake had fallen a foot or two. SR 1467. Jason has heard of the civil law rule, but didn't know if it applied to subsurface water; as to Twin Lake, he thought it was not a watercourse. SR 1471.

Dr. Gary Sands of University of Minnesota (Ex. 114, SR 956) testified for McAreavey and County, an expert in "artificial drainage, drain tiles, subsurface drainage across the Midwest and other portions of the U.S. and in other countries." SR 1475. Sands visited the McAreavey farm in 2014, finding the soils around Twin Lake are not unique. SR 1478-9. Sands focuses on water yield; based on one study in the Red River area of North Dakota (the flat lands of ancient seabed, Lake Agassiz, SR 1502), with drain tile, ET is increased, and the "water yield" from the tile and surface runoff is decreased. SR 1486. Later, Sands agreed, the potential impact of drainage under ADP 11-81 was not within his opinion. SR 1496-7.

Sands was unfamiliar with "civil law drainage rule." SR 1499-1500. Twin Lake is not a watercourse, but "a closed depression lacking a natural outlet." SR 1500. Why a landowner should not drain into a closed depression was unknown. SR 1501. Twin Lake presently embraces 341 acres of water. SR 1505. The question of "is there an adequate outlet (physical and legal)" requires an answer. SR 1510-1. Whether Twin Lake presented an adequate physical and legal outlet had not been considered (SR 1511), and Sands did not know whether it was adequate. SR 1518. The increase in ET – contributing to a decrease in water yield, as the North Dakota study found – pertains to an active growing season May - August. SR 1513.

The trial court ruled (Order B, App. B) the ADPs are within the civil law rule. Further written views as to the affect of *Magner v. Brinkman* on the partial summary judgment in Order A were invited by January 6, 2017. SR 889, App. B, at 16. DeSchepper timely responded (SR 1004, 1011), including submission of ninety-five findings of fact and some fifty conclusions of law (SR 1027-8), including:

> 5. The particular waters that McAreavey *may* discharge under the civil law rule – and which DeSchepper *must* receive – are *surface waters*. This is so and remains so – notwithstanding the fact the current statute (SDCL § 46A-10A-70) speaks of "water" without further qualification.
> . . . .
>
> 8. The water emitted by means of McAreavey's four tile lines, all associated with the 2012 Permit (which incorporate the 2008 Permits and 2009 Permits) – or the water to be emitted once the added tile representing the 2011 Permit is installed on some date hence – is *not* surface water.

In the closing moments below, the trial court amended and reissued its *Memorandum Opinion and Order re: Administrative Appeals* (Order B, initially filed December 13, 2016, App. B), with amended findings and conclusions (Order C, filed January 18, 2018, App. C).

Passing over DeSchepper's proposals, the order recognizes, without change from Order B (filed December 13, 2016), the drainage is *subsurface water* (*see* SR 1176, 1185-6). In reading *Winterton*, 389 N.W.2d 634, the court deems the rule is flexible, even *below* the surface. Order C, at 14, App. C.

G. Renewed Summary Judgment Motion (2017):

McAreavey renewed his motion for summary judgment for claims in DeSchepper's complaint. SR 1063. DeSchepper responded, with a statement of undisputed materials facts, and of materials facts, with newly discovered factual statements about McAreavey's drain tiling, explaining why *Winterton* references a drain

tile system that drains *only* surface water. (SR 1119-1162; Statement "U," at SR 1148, references the concept of "elevated inlet riser" in conjunction with buried, solid drain tubes, capable of draining *only* surface water.) The trial court ruled in favor of McAreavey. SR 1603; Order D, App. D.

H. Minnehaha County Abandons Drainage Management Efforts:

The County ended, for now, further adventures in drainage management by Ordinance MC49-17: "An Ordinance Repealing the 2010 Revised Drainage Ordinance of Minnehaha County, Repealing the Minnehaha County Drainage Plan, and Dissolving the Minnehaha County Drainage Board," adopted April 18, 2017, effective May 30, 2017. The repealing ordinance has strayed from Stipulation and Order signed by the trial court on August 11, 2017, SR 1055, but now appears at SR 1555.

STANDARD OF REVIEW

The circuit court reached the merits of appeals taken under SDCL 7-8-27, *et seq.* The standard of review for factual findings of a circuit court is clear error, and for legal conclusions, the standard is *de novo*. "When [the South Dakota Supreme Court] review[s] such actions of a board of county commissioners after an appeal to the circuit court, we apply the clearly erroneous standard to factual findings, but accord no deference to the legal conclusions of the circuit court." *Gregoire v. Iverson,* 1996 S.D. 77, ¶ 14, 551 N.W.2d 568, 570.

DeSchepper's complaint advances several claims – challenging the issuance of ADP in 2008 without notice or opportunity for hearing, and dominant owner's right to keep the installed tile (all drain tile having been installed prior to the filing of Civ. 11-2729, except for that proposed in ADP 11-81). Each claim has been dismissed under

summary judgment, SDCL 15-6-56. In reviewing the trial court's grant of summary judgment, this Court is "not bound by the trial court's factual findings and must conduct an independent review of the record." *Taggart v. Ford Motor Credit Co.*, 462 N.W.2d 493, 499 (S.D. 1990). "The evidence must be viewed most favorable to the nonmoving party; the burden of proof is upon the movant to show clearly there is no genuine issue of material fact and that he is entitled to judgment as a matter of law. Though the purpose of the rule is to secure when appropriate a just, speedy, and inexpensive determination of the action, summary judgment is not to be used as a substitute for a trial to either a court or jury where any genuine issue of material fact exists." *Feistner v. Swenson*, 368 N.W.2d 621 (S.D. 1985).

ARGUMENT

Jurisdiction over drainage management is delegated to those counties willing to adopt a drainage plan and ordinance. The proper scope of drainage management is that which conforms to the civil law drainage rule, i.e., surface water drainage. However, the ordinance (now repealed) fostered drainage beyond the rights and protections of the rule. The trial court adds its own blessing to each of the County's adjudications, accepting the opinion of an expert who, admittedly, hadn't heard of the civil law rule, and didn't claim to understand it, much less work within it.

Under the court's ruling, the proliferation of more perforated drainage tiles in this watershed seems assured; now in the tenth year of functioning, the drains inexorably extract, transport and expel subsurface waters. Permitted and installed without notice, these tiles (with more to come) will continue to emit subsurface water into a prairie

pothole. In the estimation of one county commissioner, Twin Lake is a mess ("problems . . . are huge," SR2 7-8) – and is likely to remain so, unless now reversed.

1. The trial court erred in holding that permits, issued under the County's drainage ordinance for subsurface water drainage, are consistent with the civil law rule codified at SDCL 46A-10A-20.

Having searched Chapter 46A-10A, SDCL for a definition of "surface water," the trial court concludes the rule, as codified, must be sufficiently flexible to permit "the type of water drained here – i.e. water captured by a drain tile located below the surface of the ground." Order B, at 13, App. B. But, such activities are beyond the civil law rule, as established in *Thompson v. Andrews*, 165 N.W. 9 (1917), and subsequent cases – several being referenced following.

A. Diffused Surface Water:

South Dakota cases fashion the civil law drainage rule. One type of water – diffused surface water or runoff – is embraced, within three broad categories of drainage-related activities: (1) trying to capture diffused surface water; (2) trying to avoid diffused surface water by obstructing or altering a natural watercourse; or (3) trying to dispose of unwanted diffused surface water. Deering, et al., *A Review of South Dakota Drainage Law*, S.D. Att. Gen., Rev. 2005, at 3. The activities described concern one kind of water – surface water.

In similar fashion, an earlier team of writers observed:

> Problems of drainage law fit into three typical categories: (1) rights to capture and use diffuse surface water; (2) rights to avoid the accumulation of diffused surface water; and (3) rights of landowners to drain their property of unwanted surface waters, be they diffused or confined.

Davidson, et al., *Drainage in South Dakota: Wetlands, Lucas, Watersheds, and the 1985 Drainage Legislation*, 42 S.D. Law Rev. 11 (1997).

B. Surface Water Defined:

According to Restatement (Second) of Torts (1979), § 846, the term "surface water is used to describe water that occasionally accumulates from natural sources and that has not yet evaporated, percolated into the earth or found its way into a stream or lake." Citing this section, *Gross v. Connecticut Mut. Life Ins. Co.*, 361 N.W. 2d 259, at 266 (1985), holds "The term does not comprehend waters impounded in artificial ponds, tanks, or water mains." In *Gross*, water gathered into an irrigation pond, collected from artesian wells and feedlots, was deemed *not* "surface water." The "water mains" in *Gross* seem comparable to gathering of subsurface water within below-grade tile mains, as are the issue in this case.

In *Hendrickson v. Wagners, Inc.*, 1999 S.D. 74, ¶ 19, 598 N.W.2d 507, and after considering *Anderson v. Drake*, 24 S.D. 216, 123 N.W. 673 (1909), the Court held: "A dominant estate holder has no right to discharge surface water by artificial means onto the property of another," and then, at ¶ 11, declared "[t]he civil law rules regarding rural surface water drainage have been codified in SDCL 46A-10A-20." The civil rule extends only to *surface water*, and only when that kind of water passes through the servient estate, rather than coming to rest upon the land.

C. Subsurface Water, or "Water that is not Surface Water":

What other kinds of water exist? As noted in Srstka, *Groundwater Pollution in South Dakota: A Survey of Federal and State Law*, 23 S.D. Law Rev. 698 (1978), there is subsurface water, or that which is "all water existing in the interstices, or openings, of rocks and soil." According to a chart, *Id.*, at 701, subsurface water is "suspended water," lying between the ground surface and the water table, with ground water below.

In *Anderson v. Drake*, 24 S.D. 216, 123 N.W.673 (1909), defendant had a flowing well, fed by a spring. A ditch was cut from the well to a basin, also on defendant's land, resulting in a continuous overflow onto plaintiff's land. Defendant maintained the overflow was "surface water." As to this claim, the Court observed:

> While we agree that water which has flowed out of a spring and spread over the land may become for all purposes, in the eyes of the law, "surface water," yet we cannot agree that such water, standing in a spring or wellhole fed by such spring, is "surface water." There can be no question but that such water is no more surface water prior to the time it leaves the spring or well, than it was surface water when it was flowing in a channel, or percolating through the soil, beneath the surface of the earth, and certainly no person can have a right to convert water, which was not surface water, into surface water, and then, as against third parties, claim the right to handle such water as though it had originally been surface water. *Id.*, 123 N.W. at 674.

This conversion ruling – *converting water not otherwise surface water into surface water* – set out in *Anderson v. Drake* remains valid and germane to this appeal.

The term "subsurface water" (or variations) appears rarely in the opinions of the South Dakota Supreme Court, and likewise in statutory or regulatory provisions. The case of *Boll v. Ostroot*, 25 S.D. 513, 127 N.W. 577, 579 (1910), has one such reference: "And the same rule holds good when applied to subsurface water passing through the earth by percolation." *Percolating waters*, according to *Black's Law Dictionary* (Rev. Fourth Ed.), are "[t]hose which pass through the ground beneath the surface of the earth without any definite channel, and do not form a part of the body or flow, surface or subterranean, of any water-course."

Two other South Dakota law sources mention "subsurface water." The first is SDCL 46A-11A-1, part of a short chapter adopted in 2015 (Mediation of Drainage Disputes). The opening sentence reads: "The Department of Agriculture shall establish

and administer a statewide mediation program to provide assistance to property owners who seek to use mediation as a method to resolves disputes over the *surface or subsurface* drainage of water." (Emphasis supplied).

The second source is *2010 Revised Drainage Ordinance of Minnehaha County*, effective November 30, 2010 (Ex. 112 – repealed effective May 30, 2017, as discussed above, at 14, SR 1555); Section 6.01.30, defines "drain" as "[a] means of draining either surface or subsurface water through a system of ditches, pipes or tiles, either natural, man-made or natural with man-made improvements." (The 2001 Drainage Ordinance used this definition.) The section defines the terms *closed drain, lateral drain, natural drain,* and *surface drain*. That of *closed drain* is "man-made drain or drainage scheme utilizing pipes, tiles or other materials and constructed in such a way that the flow of water is not visible," similar to SDCL 46A-10A-1(2), defining a "[c]losed drain" or "blind drain." The statutory provisions do not assert – as does (or *did*, actually) the County's ordinance – that a drain might be for *either surface or subsurface waters*. The ordinance (Ex. 112, SR 968), paying some homage to the civil law rule, requires, *inter alia*, that projects should drain into watercourses with sufficient capacity to handle the flow (*Id.*, Section 2.02, SR 975). Projects draining directly into one of fourteen flowing waters can be approved administratively, without hearing – but this list does *not* include Twin Lake (SR 971).

The trial court was troubled by the lack of distinction, noting, at 14, "the text of SDCL §§ 46A-10A-70 and 46A-10A-20 does not mention 'surface water' which is also not among the terms defined in SDCL § 46A-10A-1." Earlier, at 8, the trial court concluded:

> Our Legislature has codified the civil law rule of drainage at SDCL § 46A-10A-70. The principal tenets of the civil law rule are also present in the statute that governs local controls by drainage commissions or boards. See SDCL § 46A-10A-20.

This particular conclusion of the trial court is correct, but the circuit judge errs in further assuming (perhaps by misreading a key case in the long line flowing from the roots of *Thompson v. Andrews*) the civil law rule is one that might accommodate *either* surface or subsurface drainage, as the County's drainage ordinance implies. The civil law rule permits the drainage of *surface water* – as the cases uniformly say. No case suggests the rule – when administered via County's drainage management – can suddenly blossom beyond those confines.

D. The Ruling on Trial de novo:

Starting with SDCL 46A-10A-20, in six conjunctive parts, the trial court (Order C, at 10, App. C) finds the land receiving the drainage (DeSchepper) remains rural in character, and land drained is used in a reasonable manner. On the statute's third point – whether the drainage creates an unreasonable hardship or injury to DeSchepper – the court finds insufficient evidence. DeSchepper, after all, "admitted to the Commission he did not know to what extent the drain tile had added to the size of Twin Lake and acknowledged much of the increase was due to the wet climate." Without acknowledging the water drained is subsurface water (although concluding, at 11, the "tiles would drain only the relatively shallow areas beneath the surface"), the trial court proceeds as if the civil law rule is indifferent to the distinction.

On the statute's fourth inquiry – "the drainage is natural and occurs by means of a natural water course or established water course" – the trial court concluded the drainage is natural, it "includes only water from the Twin Lake watershed which flows in the

direction it would naturally." Order C, at 12, App. C. While Appellant agrees water flows downhill, the trial court ignored the specific geomorphic testimony of Kenyon, whose early professional work included drilling the local terrain and recording soil content. Kenyon identified the soils in the DeSmet Advance's terminal moraine, high in clay content, so that lateral movement of water is nil. SR 1397. With perforated tile inserted, subsurface water enters the tile and quickly moves downhill into the lake.

The trial court (Order C, at 12) further found:

> Though, as indicated, the exact quantity of water drained into Twin Lake before and after the tiling is unknown, the Commission's determination that there is little or no increase in the water drained into Twin Lake is based upon sound, competent evidence. The Commission essentially selected what the court has now determined to be the better scientific view that the water drained by the tiles is no more than the amount that would be drained by natural drainage over the land in the Twin Lakes watershed during periods of precipitation and runoff.

No known component of the rule places the burden on servient owner to measure, record, calculate and theorize about how much water is moved by the dominant owner's drainage works. Witness Kenyon says none of the data exists (SR 1429), and notably, neither County nor McAreavey (along with their shared expert who, surprisingly, didn't know the meaning of the civil drainage rule) bothered to produce any. It seems enough that, by Appellant's testimony (and McAreavey's son), after installation of tile lines (in 2008 and 2009), only a few months passed before the water of Twin Lake rose to bury all of the tile exits. SR 1466-7.

At trial in 2016, the exits remained buried, although the lake level peaked in August 2011. Any suggestion that DeSchepper must measure the flow begs the question, and skips this feature – *all of the water moving through the tile lines is subsurface water*, and where in the original environment, according to witness Kenyon, lateral movement of

water through the soil is nil. No rule of drainage or property law requires that DeSchepper must also accept *subsurface waters*. Further, even with surface waters, the provisions of SDCL 46A-10A-70 must be satisfied, a statute requiring more than merely draining into a natural depression.

The trial court's discussion focuses on the inquiry in SDCL 46A-10A-20 (4), namely, the "drainage is natural and occurs by means of a natural water course or established water course." That tile lines are construed a natural function, by means of a natural watercourse, seems implausible – but this is trial court's reasoning, beginning at 14, pushing the civil rule in dramatic, new directions. In footnote 2, however, the court accepts the drainage conducted here - approved by County in the Twin Lake watershed – is likely beyond the rule's traditional embrace (i.e., surface water):

> DeSchepper reasons, by negative implication, that the inapplicability of the civil law rule necessarily means that the Commission acted unlawfully. The court has difficulty in accepting this argument because it is not clear that the civil law rule preempts all other lawful drainage inquiries. *See e.g. First Lady*, 2004 SD 69, 681 N.W.2d 94 (authorizing urban drainage rule which does not conform to the civil law rule applied to rural drainage). (Order C, at 14, note 2, App. C).

If there is some lawful drainage theory, beyond the rule laid down in *Thompson v. Andrews*, requiring the servient owner to accept subsurface water, tell us now.

The trial court, at 14, reads *Winterton v. Elverson*, 389 N.W.2d 633 (1986) as authorizing the use of a "drainage tile system," the method used by the dominant owner. The facts are sparse, but the "system drained only surface water and discharged it into the natural drainage waterway." *Id.*, at 634. The *Winterton* Court seems pretty certain – saying so several times - the water passing into the tile system was surface water.

That a buried drainage system would drain *only* surface water is possible – by using a system of intake risers, along with the use of solid, non-perforated tile. DeSchepper described this drain tile system in unsuccessfully opposing McAreavey's renewed motion for summary judgment. SR 1119, 1124-5; Ex. B, with markings at SR 1132**.** The affidavits show that in *one specific instance*, the perforated tile installed by McAreavey used *one* elevated intake riser to accept *surface water*, although this was unmentioned at trial. *See* ¶ 19, SR 1126. This tile (part of # 08-71, in NE1/4, 17-103-52, as shown in Ex. 10, SR 901) is crisscrossed by lateral tiles (per # 09-150 – oddly, a *denied permit* that yet lives, courtesy of ADP 12-142).

Twin Lake, a closed basin with no regular outlet, has been described as such throughout this case. It is *not* a watercourse, the trial court having so found (Order C, at 15): "[t]he fact that Twin Lake is not a watercourse does not necessarily preclude the application of the civil law rule." The rule applied by the trial court, however, does not have the appearance of the civil law rule.

The trial court's opinion continues:

> DeSchepper's disagreement with this view brings with it the implicit argument that the terminal point of all permissible drainage must be a watercourse and not a closed basin. However, a careful examination of SDCL § 46A-10A-20(4)'s reference to "drainage" fails to reveal such a requirement. . . . These definitions lead the court to conclude that "drainage" as it is used in SDCL § 46A-10A-20(4) does not include the terminal point for the water that is drained, but rather the act or means of conveying the water to that point. Therefore, SDCL § 46A-10A-20(4) does not, itself, categorically prohibit local controls that would allow the drainage here, which ends at a lake that is unquestionably not a watercourse. (Order B, at 14-15, App. B; Order C, at 15-16**,** App. C.)

Appellant agrees with the trial court to this extent – (a) the terminal point of the drainage *is* Twin Lake, and (b) it is *not* a watercourse. The lake has *no* capacity to accept more

drainage. Drainage into a closed basin means the waters rise and fall, over and over. The trial court's view of "permissible drainage" has swallowed the rule; one is constrained to ask, *what drainage is no longer permissible*?

As stated in *Feistner v. Swenson,* 368 N.W.2d 621 (S.D. 1985), the dominant owner's right to drain is *conditional*, and "he must first show as claimed that he drained the water into a 'natural watercourse'." *Id*., at 623. As construed by the trial court, however, McAreavey's drainage on the order of an absolute right, not to be infringed. The trial court holds "it is not clear that the civil law rule preempts all other lawful drainage inquiries." (Order B, App. B, at p. 13, ff. 3.) What other lawful drainage is there, in these circumstances, outside of the civil rule? We think the answer is clear.

2. The trial court erred in holding that the County, in permitting subsurface drains, may allow drainage into a "natural depression," without also applying SDCL 46A-10A-70.

The trial court focuses on the rule outlined in SDCL 46A-10A-20, with but brief mention of SDCL 46A-10A-70. The two sections are not linked in the trial court's orders, but both are intended to work together.

The Attorney General's opinion, 1995 S.D. Op. Atty. Gen. 21, 1995 WL 405544, is helpful:

> [I]t should be recognized that SDCL 46A-10A-20 and 46A-10A-70 are essentially legislative adoptions of drainage principles developed from various South Dakota Supreme Court cases. For example, SDCL 46A-10A-70 follows the rules set forth in Thompson v. Andrews, 39 S.D. 477, 167 N.W. 9 (1917), wherein the South Dakota Supreme Court held that a landowner may drain land by means of artificial drains or ditches constructed wholly upon his/her own land in order to accelerate the flow of waters through an otherwise natural channel or drainage.
>
> The principles set forth in SDCL 46A-10A-20 are a codification of the various factors the courts have relied on to determine if drainage is proper under the test codified at SDCL 46A-10A-70. SDCL 46A-10A-20

> provides that drainage should not impose unreasonable hardship or injury to the owner of the land receiving the drainage. This is consistent with longstanding South Dakota court precedent providing that waters may not accumulate on the lands of another or be cast in unusual or unnatural quantities on a servient estate. Thompson v. Andrews; Johnson v. Metropolitan Life Insurance Company, 71 S.D. 155, 22 N.W.2d 737 (1946), Winterton v. Elverson, 389 N.W.2d 633 (S.D. 1986).
>
> SDCL 46A-10A-20 must therefore not only be read in harmony with SDCL 46A-10A-70, but both statutes must be considered in light of opinions of the South Dakota Supreme Court. In short, far from being inconsistent, SDCL 46A-10A-20 and SDCL 46A-10A-70 are a codification of drainage laws developed by the South Dakota Supreme Court over the last 80 years.

SDCL 46A-10A-70 is similar to a predecessor, SDCL 46A-10-31, cited in *Feistner*, 368 N.W.2d at 623, and in turn, similar to § 61.1031, SDC (1939), in effect during the era when the civil law rule was being further shaped. The statute provides:

> Subject to any official controls pursuant to this chapter . . . owners of land may drain the land in general course of natural drainage by constructing open or covered drains and discharging the water into any natural watercourse, into any established watercourse or into any natural depression *whereby the water will be carried into a natural watercourse, into an established watercourse or into a drain on a public highway,* conditioned on consent of the board having supervision of the highway. (Emphasis supplied.)

As the Court emphasized in *Johnson v. Metropolitan Life Ins. Co.*, 71 S.D. 155, 22 N.W.2d 737 (1946), a case for injunctive relief against defendant's drain and involving the predecessor to SDCL 46A-10A-70, quoting from the opinion in *Thompson v. Andrews*:

> It is to be noted in this case that the language by Judge Whiting is 'may discharge surface waters over . . .' and not on. (*Id.*, 22 N.W.2d at 740.)

The Court, in *Johnson*, also observed, quoting from *Mishler v. Peterson*, 40 S.D. 183, 166 N.W. 641 (1918):

> The conclusion in such case may be questioned if it carries with it the doctrine of absolute right of simply dumping surface water on the lower land as this is not in accordance with the statute. (*Id.*)

Yet, this is the conclusion entered below (ignoring for the moment the legal distinction between surface and subsurface waters). The trial court's writing finds Twin Lake an acceptable emission point, citing another case to support this view:

> Therefore, SDCL § 46A-10A-20(4) does not, itself, categorically prohibit local controls that would allow the drainage here, which ends at a lake that is unquestionably not a watercourse. *See also First Lady*, 2004 SD 69, ¶ 14, 681 N.W.2d at 100 ("South Dakota's surface water drainage under civil law allows property owners to drain into natural or established watercourses and *natural depressions*.") (Emphasis supplied.)

While the trial court accurately quotes from *First Lady*, the language quoted is *not* a full statement of the statute cited earlier in the text – SDCL 46A-10A-70. Drainage into a natural depression is a part of the rule's scope, but *only* when the water is further "carried into a natural watercourse, into an established watercourse or into a drain on a public highway." (SDCL 46A-10A-70.) This does not describe the waters now emitted into Twin Lake, and thus the trial court is in error.

3. The trial court erred in concluding the County may assume drainage management over "private drains" under a regime beyond the civil law rule.

The trial court, affirming the issuance of the ADPs, describes DeSchepper's opposition as "rest[ing] upon several seemingly independent reasons – e.g. the civil law rule does not apply to allow the drainage here because the water drained is not surface water, because Twin Lake is not a watercourse or because the drain tiles, themselves, are not natural watercourses." App. B, at 13. The court concludes the cases cited – whether viewed in isolation or together – do not support DeSchepper's position. In the midst of this quandary, the circuit court, footnote 3, at 13, then adds:

> DeSchepper reasons, by negative implication, that the inapplicability of the civil law rule necessarily means that the Commission acted arbitrarily or capriciously. The court has difficulty accepting this argument because it is not clear that the civil law rule preempts all other lawful drainage inquires. *See e.g. First Lady*, 2004 SD 69, 681 N.W.2d 94 (authorizing urban drainage rule which does not conform to the civil law rule applied to rural drainage).

The court accepts there must be some rural drainage regime for the dominant landowner's benefit, somewhere beyond the civil rule. This case seems the first to arrive at this Court concerning a County-issued drainage permit. That a drainage management scheme, resting on "official controls" for foundation, may reach beyond the confines of the civil law rule to manage subsurface water drains, seems more wishful than lawful.

The trial court accepts *Winterton v. Elverson*, 389 N.W.2d 633 (S.D. 1986) as approving any use of a drainage tile system. Order B, at 13, App. B; Order C, at 14, App. C. That such a system was installed is not in question; *Winterton* states the tile drained only "surface water" (389 N.W.2d at 634). This Court is cognizant of the distinction. In resistance to summary judgment (SR 1119), details of one, specific spot on McAreavey's farm are related, where a so-called "elevated intake riser," admits surface water, to the exclusion of other water, when used with buried, solid-tube tile. (In this one spot, McAreavey – briefly - is actually servient to DeSchepper, but the land shape quickly causes any surface flow to make an arc, flowing over McAreavey and back onto DeSchepper again – the general lay of the land is in the area of ADP 08-71, an upside-down "U" shape, as shown on Ex. 10, SR 901, a document prepared by County.) It seems likely *this* solid-tube, intake riser concept is *the* very system described in *Winterton*, since a buried perforated tile would drain subsurface waters. In contrast to *Winterton*, the

McAreavey tile system – notwithstanding the single riser described – is primarily focused on subsurface water; importantly, the dominant owner has never claimed otherwise.

County's official controls must follow the civil rule – there is no other applicable regime. In *Rumpza v. Zubke*, 2017 S.D. 49, ¶ 10, 900 N.W.2d 601, the decision recites the six parts of SDCL 46A-10A-20, and in footnote 3, states:

> Strictly speaking, SDCL 46A-10A-20 itself does not govern the rights and liabilities of these parties; that statute applies to "[o]fficial controls instituted by a [county drainage] board[.]" However, SDCL 46A-10A-20 correctly states the common-law rule developed through our caselaw, which does control this case. Thus, it is correct to say, as we did in *Hendrikson*, that SDCL 46A-10A-20 is a codification of the common law rules that apply in this case. *Hendrikson*, 1999 S.D. 74, ¶ 11, 598 N.W.2d at 510.

In *Surat Farms, LLC v. Brule County Board of Commissioners*, 2017 S.D. 52, 901 N.W.2d 365, whether the "reasonable use" or "civil rule" applied was argued. The servient owner altered the watercourse, caused injury to the dominant owner and claimed the former rule applied. Drainage permits are not at issue and the stated facts do not closely resemble this case. Neither *Rumpza* nor *Surat Farms* involve claims to rightfully drain *subsurface water* onto a servient owner. But, it is instructive that *Surat Farms*, at ¶ 21, had this to say:

> Surat's authorities also fail to support his legal argument that it had the right to back up water. Neither *First Lady* nor *Feistner* considered the extent of harm an upstream owner must tolerate from the backup of water caused by a downstream owner. Both cases concerned the amount of drainage the downstream estate must accept before the upstream estate's change in discharge is prohibited. Additionally, *Feistner* did not hold that natural drainage rights include the right to flood a neighboring property. On the contrary, we specifically stated that even a dominant owner's right to discharge does not include the right "to affect [a] neighbor's land in some way other than the way in which it had been affected before." *Feistner*, 368 N.W.2d at 623.

McAreavey drains subsurface water with artificial devices - perforated tile buried 3 feet beneath the surface - having done so since 2008. Water quickly rose, burying *all four of the tile exits*, enduring to the time of trial (July 2016). While observing the lake has huge problems and needs an outlet, the County Board (from and after March 2011) has consistently voted to keep the drains in place, while authorizing even more.

DeSchepper can't precisely state how many millions (billions?) of gallons of water would be present, captured within Twin Lake, *if* drain tile had not been installed in 2008. Nor, what will result when more tile is installed (as is proposed by means of ADP 11-81). What *is* known is the retained level of the lake rose higher, peaking in the period of April through August 2011. It is known these four tile mains convey *subsurface water*. The circuit court (at 11-12, App. B) is comforted the lake has declined some feet, as drier weather conditions prevailed. There is no sure answer - how much lower might Twin Lake be today, if the tile had not been installed? Precise models of the dominant owner's drainage actions are not the servient owner's burden to provide; as witness Kenyon observed, the necessary data, in any event, does not exist. SR 1429.

In *La Fleur v. Kolda*, 71 S.D. 162, 22 N.W.2d 741 (1946), the Court had surface water and the civil rule in mind, but apart from these crucial distinctions (this case concerns subsurface water, and the trial court accepting that some regime *other* than the civil law rule may pertain), this much seems apt to Twin Lake:

> Thus on principle the lower owner cannot complain if his basin is filled by natural drainage from upper land. And we think it not unsound to reason that the settler on lower land must have anticipated and understood that the watercourse across his land must carry an added burden of water as an incident of the improvement and reasonable use of the upper property. But such reasoning, in our opinion, supplies no support for a rule which permits the upper owner to transfer the burdens imposed by nature on his land to that of the lower owner. *Id.*, 744.

Within the context of *La Fleur*, and also *Feistner*, DeSchepper's land *is* affected in some new way – since 2008, the land at or near the low point of the pothole, is required to also accept whatever subsurface water is now freely emitted from McAreavey's lands. Trial testimony establishes the glacial till inhibits lateral movement of water within the soil profile; hence, the characteristics of the 1964 USGS map of Twin Lake (Ex. 5, SR 895), having "no subsurface flow," as described by Kenyon, with the north body, being both deeper and dry, even as the shallower south body contains water. SR 1397. With tile installed, however, the natural restrictions are gone. Subsurface water now moves readily – and quickly – into the lake, onto DeSchepper's farm. The civil rule has never held just a little more water is acceptable, nor that the dominant owner gets the benefit of all pushes in comparative volumes. Doing so in the name of the civil law rule – or some other regime not identified by the trial court - is error.

4. The trial court erred by failing to conclude the County's taking of jurisdiction over ADP 12-142, at a time claims were pending against County and McAreavey in Civ. 11-2729, was an infirm exercise of adjudicatory power due to bias, self-interest or inherent conflicts of interest.

The ADPs issued to McAreavey are in their tenth year of life. Initially, relevant permits # 08-68 (on the south side of Twin Lake, with exits leading directly into Twin Lake, once the water had further risen, as shown on Ex. 10, SR 901), and # 08-71 (on the north side of Twin Lake, exiting near the boundary of DeSchepper's farm – this part of DeSchepper's farm is underwater and indistinguishable from Twin Lake, according to trial testimony, Ex. 36, SR 933), were issued by the County's Administrative Official without notice to DeSchepper. (¶ 23, SR 101.) The permits referenced in this paragraph are referenced in pleadings as the "2008 Permits."

As the fact of the 2008 Permits (and tiling) became known, proceedings followed at the County level, some with notice to DeSchepper, others without. First, the County determined McAreavey installed *more* tile than authorized under the 2008 Permits. An application followed (referenced in the pleadings as the "2009 Applications") to legitimize the extra tile, ADP 09-150. Hearing was conducted on November 3 and 10, 2009 (SR 115-20); an excerpt from the latter date states:

> Commissioner Pekas commented on photos shown last week from 1937, during a time of drought showing one of the lakes as totally dry. From that time forward, the lakes began filling as two lakes and now have turned into one due to water draining into it for quite some time. The drainage tile may have accelerated that. Last week, the McAreaveys acknowledged that there was a misunderstanding in the application process, that they gave only general information on the projects, and that the work exceeded the expectations given to the Planning department. MOTION by Twedt, seconded by Hajek to deny drainage permit 09-149 and 09-150 because more tile than the staff envisioned was installed thus possibly increasing the scope of the drainage and the speed with which the drainage would occur. 3 ayes, Barth and Kelly – nay. (Ex. D, First Amended Complaint, SR 120.)

McAreavey himself challenged this very determination by an appeal to circuit court, later voluntarily dismissed. Ex. 20, SR 923. Oddly, this denied permit later comes back alive, as one of several enthusiastically embraced by ADP 12-142. *See* Ex. 110, SR 960.

In March 2011 (as water levels peaked), the County Board met, voting 4-0 to "take no action" against McAreavey. Minutes, SR 122, noted also in Ex. 31, SR 928. McAreavey followed in September 2011 with ADP 11-81, seeking to extend the tile already in the ground. DeSchepper filed Civ. 11-2729, immediately attacked by defendants as untimely (the time to appeal the 2008 Permits had expired – a really good argument, if one ignores the County afforded DeSchepper neither notice nor hearing, despite the ordinance's requirements).

Judge Tiede's ruling in late July 2012 (SR 194) stirred the defendants into action. Soon, McAreavey filed proposed ADP 12-142, a permit to supersede ("combine" was the term used) prior permits where tile was installed (excluding ADP 11-81, but embracing those challenged by DeSchepper in the amended complaint). The author of a memo to the Board portrays the effort to "combine" prior permits, instructing "[t]he new permits *must be approved* to allow the existing tile to remain installed." (Emphasis supplied - *see* Ex. 31, SR 928, at 929).

In essence, the defendants, applicant (McAreavey) and the body with adjudicatory power over drainage permits (County Board), pursued a new ADP that – *if granted* – would undercut DeSchepper's civil claims; quite effectively, given the circuit court's summary judgment rulings. The memo of County's planner (Ex. 31, SR 928) reflects coordination in wielding adjudicatory powers, as they prepared also to defend Civ. 11-2729. In closing moments of the ADP 12-142 hearing, held September 25, 2012, a Commissioner would comment: "[U]nfortunately the Board is *playing cleanup* and that both parties in the case have a valid concern. [Commissioner] stated that we are trying to move forward by having notice and hearing, which is what we are doing today." (Emphasis supplied – SR2 8.) The County Board's approval of ADP 12-142 seems foreordained.

DeSchepper's concerns for the processes employed, and the substantive law applied, by the County Board is clearly stated in the second notice of appeal:

> The Board's action approving Drainage Permit 12-142 is contrary to governing state law, the civil rule of drainage, and the 2010 Drainage Ordinance. While authorizing the drains already installed by virtue of and in excess of the 2008 Permits may assure the proprietors and operators of the McAreavey Farm a distinct benefit, while seeking to deflect from the County the obligation to seek judicial remedies against Vernon

> McAreavey, the presently installed devices on the McAreavey Farm – unless this Court directs otherwise, as a consequence of this action or that now pending in Civ. 11-2729 - will continue to drain into Twin Lake, contributing to additional, prolonged flooding of the DeSchepper Farm, as drained waters come to rest on the DeSchepper Farm, all to the permanent injury of Appellant's property interests and associated rights inherent in title.

(Notice of Appeal, ¶ 13, Civ. 12-3742, SR2 5.) The court passed over this important matter in both the December 2016 writing (Order B, App. B), and the January 2018 opinion (Order C, App. C). At the trial court's invitation (Order B, at 16, App. B), several proposed findings and conclusions focused on the Board's role - a hopelessly conflicted, self-interested adjudicator in ADP 12-142. (*See*, generally, SR 1011, findings of fact # 42-49, and conclusions of law, # 40, 43, 44, 48 and 50, among others.)

Armstrong v. Turner County Board of Adjustment, 2009 S.D. 81, 772 N.W.2d 643, held the county board of adjustment is an adjudicatory body, and members must be "free from bias or predisposition of the outcome and must consider the matter with the appearance of complete fairness." *Id.*, ¶ 21. The same is true when the County Board serves as the Drainage Board, and when considering ADP 12-142 (a hodge-podge of prior permits, both granted and denied), as a mechanism to derail civil claims in Civ. 11-2729. The planner's memo to the Board (Ex. 31, SR 928), and the Board's minutes (SR2 15), suggest an adjudicatory body concerned with personal interests and litigation outcomes (in light of Judge Tiede's July 2012 ruling). The Board's violations of the civil rule, with drainage filling a prairie pothole, and also taking up ADP 12-142, hoping to "combine" assorted permits even while Civ. 11-2729 was pending, did not trouble the trial court. Judicial indifference to whether the civil law rule is honored is error.

5. The trial court erred in holding that without expert testimony to support causation, DeSchepper cannot proceed with civil claims against County and McAreavey.

DeSchepper resisted summary judgment with a thirty-eight (38) paragraph, 12-page affidavit (and other filings and depositions, SR 395-493), asserting personal knowledge of his farm, extending back to the 1970s, and the affect the 2008 ADP tiles had upon Twin Lake, citing also the deposition testimony of McAreavey. Unmoved, the trial court ruled the "causation issues implicated here go beyond the court's lay understanding and can be sustained only with expert testimony." Order A, at 9, App. A.

Magner v. Brinkman, 2016 S.D. 50, 883 N.W.2d 74, was decided in July 2016. Brought to the court's attention soon after trial de novo concluded, the potential effect of *Magner* was noted in the closing sentence of the December 2016 opinion (Order B, App. B, at 16), but not thereafter. The trial court's holding seems at odds with a key conclusion in *Magner*:

> Plaintiff's testimony was sufficient to permit the jury to conclude Defendants caused the water invasion. Although Defendants' experts may have concluded that there was no evidence that the flooding resulted from Defendant's actions, we do not weigh the evidence in determining whether judgment as a matter of law is appropriate. *Alvine Family Ltd. P'ship*, 2010 S.D. 28, ¶ 18, 780 N.W.2d at 512. Even if we did, "[t]his state is not a trial-by-expert jurisdiction." *Bridge v. Karl's, Inc.*, 538 N.W.2d 521, 525 (S.D. 1995). *Id.*, ¶ 16.

As witness Kenyon observed, *none of the data exists* – such as rainfall, or water flow rates through the drain tile – to precisely establish conditions in the small world of Twin Lake, as affected by McAreavey's already accomplished and planned tiling projects. SR 1429. Absent historical data, are the injury claims of a servient owner unsupportable, even though personally observed? DeSchepper – not an expert, but

certainly an observant owner of his farm – is prepared to give evidence of his personal knowledge. The trial court's Order A is in error.

6. The trial court erred in ruling that McAreavey is entitled to summary judgment on DeSchepper's civil claims.

Several months following the trial court's affirmance of the County's approvals of both ADP 11-81 and 12-142, the County Board beat a hasty retreat from further drainage management duties. The trial court proceeded with final dismissal of DeSchepper's complaint by way of summary judgment (Order D, App. D) – including counts for injunctive relief and abatement of nuisance – by relying on the prior orders of December 5, 2015 (Order A) and January 18, 2018 (Order C, with no further mention of either Order B or the troubling question raised by *Magner*). Appellant remains staggered by the thought that, in Minnehaha County at this point in time (at least, until the drainage ordinance was repealed), the permissible scope of drainage embraced subsurface water, and it is also possible to escape the implications of SDCL 46A-10A-70, otherwise requiring that drainage into a natural depression be "carried into a natural watercourse, [or] an established watercourse." Presently, Twin Lake (and now, DeSchepper's farm) is a storage basin for emitted drainage, the circuit court having found it isn't a watercourse.

Further activities under these permits must be enjoined, otherwise the conditions at Twin Lake are likely to get worse, with flooding more prolonged than has been the case to date. Injunctive relief is an appropriate remedy to compel the dominant landowner to adhere to the civil law rule. *Rae v. Kuhns*, 44 S.D. 494, 184 N.W. 280 (1921).

While the drainage permits (ADPs) afford an illusion of legitimacy to the drainage work, the waters drained here are *subsurface waters*, from glacial till soils that otherwise inhibit lateral movement within the profile. McAreavey, in law, has no "legal

easement right," *Lee v. Schultz*, 374 N.W.2d 87, 90 (1985), to maintain or use these drains, and the County lacked actual, delegated authority to permit them. Injunctive relief is an appropriate remedy, requiring all drains be removed, should this Court reverse the trial court's affirmance of the ADPs – as we think it must.

CONCLUSION

Appellant requests that this Court reverse the trial court's four Orders (A, B, C and D, as arrayed in the appendices), orders which have dismissed, on summary judgment, DeSchepper's complaint for relief against the Defendants who have drained in violation of the civil law rule, while also affirming the County Board in its various determinations and resolutions for the issuance of ADP 11-81 (tile is not yet installed), and ADP 12-142 (the tile being in the ground, via ADP 08-68 and 08-71, and the curious ADP 09-150, which, though long dead, yet lives). The County Board has now fled from drainage management duties, abruptly repealing its ordinance. This Court, if remanding to the trial court any further question concerning the current validity of County's ADPs, should instruct the trial court to apply and follow the civil law rule.

Respectfully submitted:
MARK DESCHEPPER, Appellant

Date: April 11, 2018

/s/ A.J. Swanson

A.J. Swanson
ARVID J. SWANSON, P.C.
27452 482nd Ave.
Canton, SD 57013
(605) 743-2070
aj@ajswanson.com
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

In accordance with SDCL 15-26A-66(b)(4), I certify Appellant's Brief complies with the requirements set forth in South Dakota Codified Laws. This brief was prepared using Microsoft Word 2010, Times New Roman (12 point), and contains 9,714 words and 49,399 characters, excluding table of contents, table of authorities, jurisdictional statement, statement of legal issues and authorities, and certificates of counsel. I have relied on the word and character count of the word processing program to prepare this certificate.

Date: April 11, 2018 /s/ A.J. Swanson

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of Appellant's Brief in the above referenced case were served upon each of the following persons, as counsel for Respondent, Defendants and Appellees herein, such service being by U.S. Mail, and having been served also by electronic mail, at the addresses stated below:

James E. Moore james.moore@woodsfuller.com
James Power jim.power@woodsfuller.com
WOODS FULLER SHULTZ & SMITH P.C.
P.O. Box 5027
Sioux Falls, SD 57117-5027
Attorneys for Board of Commissioners & Minnehaha County

Vince M. Roche vroche@dehs.com
Justin T. Clarke jclarke@dehs.com
DAVENPORT EVANS HURWITZ & SMITH, LLP
P.O. Box 1030
Sioux Falls, SD 57101-1030
Attorneys for Vernon McAreavey & Jason McAreavey

Further, the original and two (2) copies of Appellant's Brief were transmitted via U.S. Mail to the South Dakota Supreme Court, 500 E. Capitol, Pierre, SD 57501, as well as filing by electronic service in Word format (appendices in portable document format) to the Clerk of the South Dakota at: SCClerkBriefs@ujs.state.sd.us. All service accomplished the date entered below:

Date: April 11, 2018 /s/ A.J. Swanson
A.J. Swanson, Attorney for Appellant

ARVID J. SWANSON, P.C.
27452 482nd Ave.
Canton, SD 57013
(605) 743-2070
aj@ajswanson.com

Appeal No. 28525

IN THE MATTER OF DRAINAGE PERMIT 11-81, JASON MCAREAVEY, APPLICANT,
and
IN THE MATTER OF DRAINAGE PERMIT 12-142,VERNON MCAREAVEY, APPLICANT.

Appellant's Brief

APPENDICES

Brief Ref.	Title:	Appendix:	Bates:
Order A –	Memorandum Opinion and Order	A	A-001 to A-015
Order B –	Memorandum Opinion and Order Re: Administrative Appeal	B	B-001 to B-016
Order C –	Amended Findings of Fact, Conclusions of Law and Memorandum Opinion and Order Re: Aministrative Appeal	C	C-001 to C-017
Order D –	Order Granting Defendant Vernon McAreavey's Renewed Motion For Summary Judgment	D	D-001 to D-003

STATE OF SOUTH DAKOTA) :SS COUNTY OF MINNEHAHA)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT

IN THE MATTER OF DRAINAGE PERMIT 11-81, JASON MCAREAVEY, APPLICANT, AN IN THE MATTER OF DRAINAGE PERMIT 12-142, VERNON MCAREAVEY, APPLICANT. **MARK DESCHEPPER,** *Appellant,* vs. **THE BOARD OF COMMISSIONERS, MINNEHAHA COUNTY, SOUTH DAKOTA,** *Respondent,* and **JASON MCAREAVERY AND VERNON MCAREAVEY,** Appellee.	Civ. 11-2729 Civ. 12-3742 (Consolidated Cases) **MEMORANDUM OPINION AND ORDER**
MARK DESCHEPPER, *Plaintiff,* vs. **VERNON R. MCAREAVEY and MINNEHAHA COUNTY, SOUTH DAKOTA** *Defendants.*	

This matter is before the court upon the motions of Defendant Vernon R. McAreavey ("McAreavey") and Defendant Minnehaha County, South Dakota, ("Minnehaha County" or "the County") seeking summary judgment as to the claims contained in Plaintiff Mark DeSchepper's First Amended Complaint.[1] The court conducted a hearing on the motions on July 6, 2015.

After fully reviewing the parties' arguments, reading all of their written submissions and the relevant authorities, and carefully considering the issues presented, the Court grants Minnehaha County's motion for summary judgment and grants McAreavey's motion in part.

FACTUAL BACKGROUND

Mark DeSchepper ("DeSchepper") is the fee owner of the Southwest Quarter, Section 17, Clear Lake Township, Minnehaha County. Vernon R. McAreavey ("McAreavey") is the fee owner of a portion of the north half, Section 20, and the northwest quarter, Section 17, Clear Lake Township, Minnehaha County. McAreavey's separate parcels are both immediately adjoining to the DeSchepper land, with DeSchepper's quarter-section lying in between the McAreavey parcels. The State of South Dakota ("State") is the fee owner of all or portions of the northeast quarter and the southeast quarter of Section 17, and that portion of the north half of section 20 not otherwise owned by McAreavey. The State's property is immediately north of the McAreavey land in Section 20, and immediately east of the DeSchepper land in Section 17.

[1] DeSchepper's pending appeals challenging the Commission's issuance of two agricultural drainage permits are not before the court.

Located on the State's property is a body of water known as Twin Lake.[2] This closed basin consists of two lakes, a shallower south depression with a relatively larger drainage area, and a deeper north pothole with a small drainage area, separated by an east-west strip of land owned by the State. Twin Lake has enlarged over the decades so that it presently lies, in part, upon DeSchepper's land and upon McAreavey's land.

McAreavey initially installed tiling in 2008 and 2009 for purposes of draining the subsurface waters of his land into or in the direction of Twin Lake. McAreavey was issued agricultural drainage permit ("ADP") 08-68 and ADP 08-71 by a Minnehaha County administrative official. In addition, McAreavey installed other drain tile works in 2009 without the benefit of a permit. His application seeking this authority was contained in ADP 09-150 which was denied by the Minnehaha County Board of Commissioners ("the Commission"). DeSchepper learned of the drain tiles, permitted and unpermitted, after their installation.

In 2011, Jason McAreavey[3] applied to the Commission seeking authority to expand the tile included in ADP 08-68. The Commission held a public hearing on the application on August 9, 2011, and ultimately adopted a motion to approve Jason McAreavey's application and issue ADP 11-81. DeSchepper received notice of ADP 11-81 and appealed its approval to this court as part of what is now Civil File Number ("CIV") 11-2729. With his appeal, DeSchepper also commenced a civil action, naming Vernon McAreavey and Minnehaha County as defendants. The

[2] Various submissions in the record also refer to this body of water as "Twin Lakes."
[3] Jason McAreavey is the son of Vernon McAreavey.

most recent version of his civil claims is contained in a First Amended Complaint in which DeSchepper seeks declaratory and injunctive relief as well as money damages, alleging McAreavey's drain tiling has caused Twin Lake to flood his land.

In 2012, McAreavey applied for ADP 12-142, which covered installed drain tile, permitted and unpermitted, in ADP 08-68, ADP 08-71 and the previously denied ADP 09-150. DeSchepper received notice of ADP 12-142, and his counsel appeared at a September 25, 2012, Commission hearing to present his client's concerns and opposition to the issuance of the permit. The Commission, however, voted to approve ADP 12-142.[4] DeSchepper appealed that decision which the clerk has designated as CIV 12-3742 which has been consolidated with the appeal and civil action in CIV 11-2729 pursuant to a stipulation among all counsel.

As is relevant here, DeSchepper's request for declaratory relief seeks to void drainage permits issued unilaterally by a Minnehaha County administrative official without notice. DeSchepper alleges that all drainage permits issued without notice or a hearing violate the County's 2001 Drainage Ordinance. However, the County argues that the claim for declaratory relief is moot because the 2008 permits were effectively voided by the approval of the superseding ADP 12-142 which was issued following proper notice and a hearing.

DeSchepper's First Amended Complaint also includes an inverse condemnation claim against the County and causes of action against McAreavey,

[4] The Commission also approved ADP 12-127, but the minutes attached to the notice of appeal in CIV 12-3742 indicate the tile does not drain to a Twin Lake watershed. In any event, the issuance of ADP 12-127 is not before the court.

which include claims of private nuisance, trespass, and injunctive relief.[5] The basis for the Defendants' motions for summary judgment on these claims turns on their argument that the undisputed facts indicate DeSchepper cannot establish the element of causation common to all his claims.

AUTHORITIES AND ANALYSIS

I. DeSchepper's Declaratory Judgment Claim is moot.

A case is moot when the issue presented is academic or nonexistent and when "judgment, if rendered, will have no practical legal effect upon the existing controversy." *Hewitt v. Felderman*, 2013 S.D. 91, ¶ 11, 841 N.W.2d 258, 262 (*quoting Investigation of the Highway Constr. Indus. v. Bartholow*, 373 N.W.2d 419, 421 (S.D.1985). "No consideration of policy of convenience should induce a court to render a decision which would be merely advisory." *Danforth v. City of Yankton*, 25 N.W.2d 50, 55 (S.D. 1946). Furthermore, procedural objections are moot when the requested procedures are subsequently provided. *See In Re J.J. and S.J.*, 454 N.W.2d 317 (S.D. 1990); *see also Gray v. Gray*, 958 So. 2d 955, 958 (Fla. Dist. Ct. App. 2007) ("Once the opposing party has received the benefit of notice and an opportunity to be heard at a hearing on the motion to dissolve, any issue regarding prior notice is moot."); *Knott v. Laythe*, 40 Mass. App. Ct. 911, 661 N.E.2d 1343 (1996) (summary process action rendered moot on appeal after dismissal for failure to give proper notice where new notice had been sent); *Natural Res. Def. Council,*

[5] The First Amended Complaint also included a claim for a civil penalty against McAreavey, but the claim was dismissed without objection in July of 2014. *See* Judge Tiede Order of 7/27/12.

Inc. v. U. S. Nuclear Regulatory Comm'n, 680 F.2d 810, 813 (D.C. Cir. 1982) ("In light of the Commission's repromulgation of the rule after providing notice and opportunity for comment, we conclude that this issue is now moot.").[6]

Here, any claim that the 2008 permits are void for lack of compliance with the notice and hearing requirements of the County's 2001 drainage ordinance is moot. When the Commission issued ADP 12-142, it supplanted all permits issued in 2008 without notice and also approved the installation of unpermitted drain tile which was the subject of the previously-denied ADP 09-150. ADP 12-142 was issued following proper notice and a hearing. In fact, DeSchepper appeared to object to the issuance of ADP 12-142 at the September 25, 2012, Commission hearing. Accordingly, DeSchepper's procedural challenges to past permits are no longer justiciable since a declaration of rights concerning the already-voided permits would have no practical legal effect.

DeSchepper's argument that the procedural claims for the 2008 permits remain live controversies is unsustainable. The argument posits that a decision vacating ADP 12-142 could revive the 2008 permits, thereby making the declaratory judgment action justiciable. However, if the court were to accept DeSchepper's argument and ultimately determine that ADP 12-142 violated the civil rule of

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[6] The same mootness principles that apply to any other lawsuit also apply to declaratory actions. *See Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1110 (10th Cir. 2010) ("Declaratory judgment actions must be sustainable under the same mootness criteria that apply to any other lawsuit"); *Koenig v. Se. Cmty. Coll.*, 231 Neb. 923, 926, 438 N.W.2d 791, 794 (1989) ("As in any other lawsuit, a declaratory judgment action becomes moot when the issues initially presented in the proceedings no longer exist or the parties lack a legally cognizable interest in the outcome of the action.").

drainage, the 2008 permits, which involved the tile works approved in ADP 12-142, would necessarily suffer from the same substantive infirmity and could not be reanimated into a separate, successive existence.

II. DeSchepper cannot prove causation for his damage claims involving nuisance, trespass, and inverse condemnation.

The standard for a trial court's determination of a summary judgment motion is well settled:

> Summary judgment will be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law... A disputed fact is not material unless it would affect the outcome of the suit under the governing substantive law.... When a motion for summary judgment is made and supported as provided in § 15–6–56, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in § 15–6–56, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Morris Family, LLC ex rel. Morris v. South Dakota Dept. of Transp., 2014 SD 97, ¶ 11, 857 N.W. 2d 865, 869 (quotations and embedded citations omitted).

DeSchepper's First Amended Complaint includes claims for money damages for nuisance, trespass and inverse condemnation, all in connection with his over-arching argument that McAreavey's tiling has caused Twin Lake to flood his land. The elements of each of these claims require proof that McAreavey's tiling actually caused Twin Lake to flood DeSchepper's land.

For instance, DeSchepper's trespass claim requires proof of causation.[7] "Causation is an essential element of ...trespass...claims." *Lore v. Suwanee Creek Homeowners Ass'n, Inc.*, 305 Ga. App. 165, 172, 699 S.E.2d 332, 338 (2010). *See also Moua v. Hastings*, No. A07-392, 2008 WL 933422, at *2-3 (Minn. Ct. App. Apr. 8, 2008) (concluding that there was no causal link between trespass and tragic injury that occurred).

DeSchepper's claim for damages due to an alleged nuisance must also be supported by evidence of causation. *See* First Amended Complaint at ¶68 (seeking damages for nuisance claim). Our code defines a nuisance both as an "[u]nlawful interfere[nce] with ... any ... basin" and also as conduct which "[i]n any way renders other persons insecure in ... the use of property." SDCL § 21-10-1(3)-(4). However, in order to receive compensation for any alleged "unlawful interference" or "rendering ... insecure[,]" DeSchepper must prove that the McAreavey drain tile works caused the inundation of his land which, in turn, led to discernible damages. *See Collins v. Barker*, 2003 S.D. 100, ¶ 17, 668 N.W.2d 548, 554 (under a common law nuisance theory, a plaintiff must prove another's "conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land..."); *see also* 4 *Modern Tort Law: Liability and Litigation* § 35:15 (2d ed.) ("Where the claim is

[7] Proof of causation is not necessary where a person intentionally enters upon the property of another without permission, but "proof of causation is required when a defendant intentionally causes something else to come upon the property of another without permission." *Sanderson v. Heath Mesa Homeowners Ass'n*, 183 P.3d 679, 683 (Colo. App. 2008).

predicated upon conduct, the conduct must be a proximate cause of the nuisance and any injury or damages must have been proximately caused by the nuisance.").

In addition, causation is also essential to DeSchepper's inverse condemnation claim against the County seeking damages. The South Dakota Supreme Court has held that the elements of an inverse condemnation claim are "government action, causation and result." *City of Brookings v. Mills*, 412 N.W.2d 497, 500 (S.D. 1987). "Even where abuses by the government can be established, a causal connection must be drawn between the government's actions and an individual's alleged loss: '[t]he actions of the defendant ... [must] *substantially contribute* [ ] to and accelerate[ ] the decline in value of plaintiff's property.'" *Id.* at 502 (emphasis in original) (*citing Heinrich*, supra, 90 Mich.App. at 700, 282 N.W.2d at 451; *Foster v. Detroit*, 254 F.Supp. 655, 665 (E.D.Mich.1966)).

The causation issues implicated here go beyond the court's lay understanding and can be sustained only with expert testimony. "Expert testimony is required when the subject matter at issue does not fall within the common experience and capability of a lay person to judge... In such a case the testimony of an expert is necessary to assist the fact-finder in reaching a decision." *Goebel* v. Warner Transp., 2000 S.D. 79, ¶ 33, 612 N.W.2d 18, 27 (*citing Caldwell*, 489 N.W.2d at 362; *Podio v. American Colloid Co.*, 83 S.D. 528, 162 N.W.2d 385 (1968)). Here, the question of whether the McAreavey drain tile caused Twin Lake to flood DeSchepper's land requires expert knowledge in hydrologic principles, hydrologic effects of subsurface tile drainage, and the role of precipitation and soil

characteristics on hydrology. *See Hendrickson v. Wagners, Inc.*, 1999 S.D. 74, 598 N.W.2d 507 (expert testimony supported conclusion that drainage onto plaintiff's property came from ditches that defendants intentionally dug and did not occur by means of a natural water course).

Other jurisdictions around the country have reached the same conclusion in similar cases. *See Menick v. City of Menasha*, 200 Wis.2d 737, 748 (1995) (expert testimony was required to prove causation in claim that city was responsible for flooding); *Garr v. City of Ottumwa*, 846 N.W.2d 865 (Iowa 2014) (establishing a causal link between the topographical changes and flooding required expert testimony); *Hendricks v. United States*, 14 Cl.Ct. 143, 149 (1987) ("Causation of flooding is a complex issue which must be addressed by experts."); *Davis v. City of Mebane,* 132 N.C.App. 500, 512 S.E.2d 450, 453 (1999) (holding expert testimony necessary to establish dam caused flooding); *Sweet v. C.B.G. Pontiac-Buick-Olds-GMC, Inc.*, 463 So. 2d 82, 85 (La. Ct. App. 1985) (upholding trial court's dismissal of plaintiffs' suit where plaintiffs failed to present expert testimony that natural drainage in area was changed by the work of defendants).

Applying these principles to this summary judgment determination means that DeSchepper must provide expert evidence sufficient to establish a genuine issue of material fact on the issue of whether McAreavey's tiling was a substantial factor that caused Twin Lake to increase in size, encroach upon his land and cause discernible damages. *See* S.D. Pattern Jury Instr. No. 20-10-30. Here, however, DeSchepper unquestionably cannot provide this showing.

DeSchepper's expert, Tim Kenyon, believes the drain tile has contributed to Twin Lake rising, but he has no opinion about the role the drained water has played. When asked if he could say that the McAreavey's drain tiling was a "substantial factor causing the lake to rise[,]" Kenyon replied, "[c]an't say it was substantial. Can't say it wasn't... It's unknown." Kenyon Depo. at p. 44. Kenyon also acknowledged that Twin Lake had been rising as early as 1997. *Id.* at 56. He further admitted that the water level of Twin Lake has actually receded five or six feet since 2011. *Id.* at 73. Kenyon also stated that he was unable to quantify the overland flow rate into Twin Lake before the drain tile was installed and compare it to the overland flow rate after the drain tile was installed. *Id.* at 75. He did not look at McAreavey's drain tile specifically, but relied upon his general knowledge of drain tile. He also acknowledges that there is no information available to quantify how much drainage flow a specific drain tile is producing. *Id.* at 72. For his part, DeSchepper, himself, admitted that no witness would be able to testify as to the overland flow rate comparison pre- and post-tiling because the site has not been specifically studied by anyone. Response to McAreavey Statement of Undisputed Material Facts at ¶ 13.

Simply stated, Kenyon cannot offer an opinion as to whether McAreavey's drain tiles have caused the compensable damages DeSchepper asserts, and a fact finder may not be left to speculate in this regard. Because expert testimony is necessary on this issue, DeSchepper cannot establish the existence of a genuine issue of material fact concerning this essential element common to his legal claims.

Given this failure of proof, the County and McAreavey are entitled to judgment as a matter of law on the trespass, nuisance (damages only) and inverse condemnation claims. *See Veblen Dist.,* 2012 S.D. 26 ¶ 7, 813 N.W.2d at 164 (summary judgment is appropriate where a plaintiff "failed to make a showing" to establish an essential element of his claim) (citation omitted).

III. DeSchepper's claims for injunctive relief and abatement of a nuisance survive summary judgment.

In addition to seeking money damages for his nuisance claim, DeSchepper also seeks to invoke "the Court's equitable powers of abatement[.]" First Amended Complaint at ¶ 68. The abatement of a nuisance is essentially injunctive relief, and the court cannot discern a fundamental difference between DeSchepper's claim for abatement of a nuisance and his separate claim for injunctive relief. See *Strong v. Atlas Hydraulics, Inc.*, 2014 SD 69, ¶ 11-21, 855 N.W.2d 133, 139- 142 (analyzing efficacy of injunctive relief ordered to address nuisance).

An injunction "should only be granted where, under the facts proven, it appears reasonably certain that the granting thereof will protect the party seeking it from some injury that would result in his damage." *Alsager v. Peterson*, 31 S.D. 452, 141 N.W. 391, 392 (1913). In order to sustain a claim for a permanent injunction, "[i]t is essential that plaintiff prove the causative link between the actions of the defendant and the injury complained of." *Foley v. City of Yankton*, 89 S.D. 160, 165, 230 N.W.2d 476, 479 (1975).

Even assuming, arguendo, that "causative link" approximates the standard for legal cause, the summary judgment analysis for DeSchepper's equitable claims

is still different from his legal claims. Although the court has no difficulty concluding that DeSchepper cannot, as a matter of law, sustain his burden to demonstrate that the McAreavey drain tiles caused him compensable damages, it is reluctant to conclude, at this pretrial stage, that DeSchepper cannot conceivably obtain injunctive relief. In the court's view, the difference lies, in part, in the unique nature of the relief.

The test for determining whether a trial court should exercise its discretion to grant injunctive relief is more nuanced, and less formulaic, than determining the existence of an essential element for a legal claim. Though codified at SDCL § 21-8-14, a permanent injunction remains an "inherently equitable action." *Strong*, 2014 SD 69, ¶ 12, 855 N.W.2d 133, 139; *see also* SDCL § 21-8-14 (listing four instances in which a permanent injunction may be granted). "Several guiding factors assist courts in deciding whether to grant or deny injunctive relief[,]" including the following:

> (1) Did the party to be enjoined cause the damage? (2) Would irreparable harm result without the injunction because of lack of an adequate and complete remedy at law? (3) Is the party to be enjoined acting in bad faith or is the injury-causing behavior an innocent mistake? (4) In balancing the equities, is the hardship to be suffered by the enjoined party ... disproportionate to the ... benefit to be gained by the injured party?

New Leaf, LLC v. FD Dev. of Black Hawk LLC, 2010 S.D. 100, ¶ 15, 793 N.W.2d 32, 35 (quoting *Knodel*, 1998 S.D. 73, ¶ 9, 581 N.W.2d at 507).

Here, even though DeSchepper cannot establish that the McAreavey drain tiling is the legal cause of his asserted damages, Kenyon has, nonetheless, testified

that the tiling is draining more water into a closed basin than would otherwise be the case and that has, to some unknown extent, caused the level of Twin Lake to rise. Viewing the facts in the light most favorable to DeSchepper, as the court must when deciding a summary judgment motion, this evidence may be sufficient to state an unspecified or intrinsic injury, though not cognizable as a claim for money damages.[8]

The injury may be slight or indiscernible, but its existence would at a minimum, if proven factually and shown to be unlawful, lead this court to conduct the fact-intensive injunction inquiry described above. This inquiry – including not only questions of causation, but also of bad faith or innocent conduct, the existence of irreparable harm and balancing the relative equities – depends upon facts not yet included in the record. The court anticipates that some of these facts will involve genuine issues material to the injunction analysis, if the court reaches the remedial question. At a minimum, the absence of the evidence at this point precludes judgment as a matter of law on DeSchepper's claim for injunctive relief.

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[8] The idea that a violation of the drainage ordinance could prompt at least a consideration of injunctive relief finds implicit support in other statutory provisions. Though injunctive relief is generally not available to "enforce a penal law," it may be considered in "case of nuisance" and "when specifically authorized by statute." SDCL §21-8-2(8). In this regard, SDCL § 46A-10A-44 authorizes the county commission to "recommend the county state's attorney seek an injunction" to enforce a "violation ... of an ordinance[.]" SDCL §46A-10A-44. Foreclosing the possibility of an injunction as a matter of law prior to consideration of the merits of the administrative appeals would effectively preempt any possibility that the Commission could later seek to enjoin McAreavey's tile works if the court ultimately vacated the decision in ADP 12-142 and remanded the matter to the Commission with instructions to take appropriate enforcement measures.

ORDER

Based on the foregoing, it is hereby ordered:

1. That Vernon McAreavey's Motion for Summary Judgment is granted in part;

2. That Minnehaha County's motion for Summary Judgment is granted;

3. That judgment shall be entered in favor of Vernon McAreavey and Minnehaha County as to the First Cause of Action listed in the First Amended Complaint;

4. That judgment shall be entered in favor of Vernon McAreavey as to the Third Cause of Action listed in the First Amended Complaint;

5. That judgment shall be entered in favor of Vernon McAreavey as to the and the Fourth Cause of Action listed in the First Amended Complaint insofar as the Fourth Cause of Action seeks money damages;

6. That judgment shall be entered in favor of Minnehaha County as to the Sixth Cause of Action in the First Amended Complaint;

7. That Vernon McAreavey's motion for summary judgment is denied as to the Second Cause of Action listed in the First Amended Complaint;

8. That Vernon McAreavey's motion for summary judgment is denied as to the Fourth Cause of Action listed in the First Amended Complaint insofar as the Fourth Cause of Action seeks equitable abatement of an alleged nuisance; and

9. That the clerk shall provide notice of this Memorandum Opinion and Order to counsel by depositing a copy in their courthouse mailboxes, electronic message or by first-class mail.

Dated this 5th day of December, 2015.

BY THE COURT:

Mark E. Salter
Circuit Court Judge

ATTEST:
Angelia M. Gries, Clerk of Court

By _____, Deputy

UNIFIED JUDICIAL SYSTEM
JUSTICE
STATE OF SOUTH DAKOTA

FILED
DEC 07 2015
Minnehaha County, S.D.
Clerk Circuit Court

STATE OF SOUTH DAKOTA) :SS COUNTY OF MINNEHAHA)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
IN THE MATTER OF DRAINAGE PERMIT 11-81, JASON MCAREAVEY, APPLICANT, AND IN THE MATTER OF DRAINAGE PERMIT 12-142, VERNON MCAREAVEY, APPLICANT. MARK DESCHEPPER, *Appellant,* vs. THE BOARD OF COMMISSIONERS, MINNEHAHA COUNTY, SOUTH DAKOTA, *Respondent,* and JASON MCAREAVEY AND VERNON MCAREAVEY, *Appellees.*	Civ. 11-2729 Civ. 12-3742 (Consolidated Cases) MEMORANDUM OPINION AND ORDER RE: ADMINISTRATIVE APPEAL
MARK DESCHEPPER, *Plaintiff,* vs. VERNON R. MCAREAVEY and MINNEHAHA COUNTY, SOUTH DAKOTA *Defendants.*	

B-001

This matter is before the court as an administrative appeal from the Minnehaha County Commission sitting as a local drainage board ("the Commission"). Mark DeSchepper ("DeSchepper") appeals the Commission's decisions to grant certain applications of Jason and Vernon McAreavey (collectively "the McAreaveys") to install subsurface drain tile on their agricultural land. The court conducted a hearing on the motions on July 26-27, 2016, and received post-hearing briefs from the parties thereafter.

After fully reviewing the parties' arguments, reading all of their written submissions and the relevant authorities, and carefully considering the issues presented, the court affirms the Commission's decisions to grant the McAreaveys' drainage applications.

BACKGROUND AND FINDINGS OF FACT

DeSchepper and the McAreaveys own land within Clear Lake Township in rural Minnehaha County in and around an inundated basin area known as Twin Lake. Twin Lake, as its name suggests, is actually comprised of north and south bodies, though the two are now joined into one contiguous lake.

Twin Lake lies principally upon Section 17 of Clear Lake Township and measures approximately 341 acres. Portions of Twin Lake and its 979-acre watershed extend into Sections 16, 18, 19, 20 and 21. DeSchepper owns and farms on the southwest quarter of Section 17. The McAreaveys own and farm the northwest quarter of Section 17 and also the northwest quarter of Section 20 at the south edge of Twin Lake. The State of South Dakota owns the eastern half-section of Section 17 on which much of Twin Lake lies.

At issue here are drainage applications designated as ADP 11-81 and ADP 12-142. The applications were considered and approved by the Commission at brief hearings held on August 9, 2011, and September 12, 2012. Currently, there are four 6-inch main drainage tiles that outlet into or in the direction of Twin Lake. These tiles were installed as a part of ADP 11-81 and are essentially perforated tubes which are buried approximately three feet below the ground's surface. Though authorized by the Commission and not stayed by any order of this court, the McAreaveys have not installed the smaller lateral tiles contemplated in ADP 12-142, pending the determination of this appeal.

Each of the four tile outlets lay entirely on the McAreaveys' land – three on the southern edge of Twin Lake, and the fourth on the northern portion of the Lake. This northern outlet is submerged by Twin Lake which inundates the McAreaveys' land at this point. In fact, Twin Lake's natural, but infrequently reached, spill point lies on this portion of the McAreaveys' land.

Twin Lake, itself, has experienced increases in its size during recent history, well before the installation of the tiles at issue here. The Lake reached its high point in 2011 – a period of heavy precipitation during which the lake crested at the spill point. However, after this wet period, the level of Twin Lake has stabilized and receded significantly, despite the presence and operation of the McAreaveys' drain tiles.

A principal factual issue, perhaps the singular most important issue, in this administrative appeal is whether the McAreaveys' drain tile works can or

will increase the amount of water drained into Twin Lake beyond that which would have resulted naturally. DeSchepper and Jason McAreavey differed on this point during the Commission's consideration of the applications, and the court allowed the parties to develop the issue further at the hearing by receiving expert testimony from Timothy Kenyon ("Kenyon") and Gary Sands, Ph.D. ("Dr. Sands").

Kenyon is a geologist who explained the soil conditions in and around Twin Lake and their geologic context. He concluded that the soil was not conducive to lateral subsurface drainage and, further, that Twin Lake is essentially a basin with a non-permeable floor. Therefore, Kenyon determined that the installation of artificial drain tiles resulted in a net increase of water to the Lake because "new" water was reaching it beyond what would have drained naturally. When pressed, however, Kenyon acknowledged his opinions lacked supporting data. They also failed to adequately contemplate the involvement of accepted hydrologic principles and research, beyond the area's geologic features.

Doctor Sands' views, however, utilized these principles and research. He is an agricultural engineer who teaches at the University of Minnesota and focuses his work and research on hydrology and the effects of drainage on crops. Using research, including field research, and the accepted water

balance formula,[1] Dr. Sands concluded that the McAreavey drainage tile is not, in all likelihood, affecting the total water yield draining into Twin Lake from its watershed. Though the tile increases subsurface drainage, it generally decreases surface runoff. Beyond this, the tiling generally increases crop production with a corresponding increase in evaporation and plant transpiration, commonly known as ET.

Though Dr. Sands allowed for the possibility that the tiles have had a negligible increase in total water yield, the "more probable scenario" is that the McAreaveys' subsurface drainage "may, in fact, decrease water flow to the lake (due to increased ET on the drained area)." Ex. 113 at 8 (emphasis in original). For this opinion, Dr. Sands relied upon a field study that suggested a decrease in total water yield. The studies suggesting a modest increase in water yield, he explained, are based upon computer modeling – not field studies.

For their parts, DeSchepper and the McAreaveys have divergent anecdotal views about the impact of the tiles upon Twin Lake. DeSchepper believes the tiles are increasing the water draining into Twin Lake, though he acknowledges he does not know how much and further acknowledges the rise in 2011 was due largely to the increased precipitation. He also understands the Lake has receded since that time as drier climatic conditions have prevailed.

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[1] The water balance formula or equation is a method of considering hydrologic balance amid a number of factors, including precipitation, soil evaporation, plant transpiration, surface runoff, change in soil moisture, deep seepage and, where applicable, artificial drainage. Ex. 115 at 1-2.

Jason McAreavey does not believe the drain tiles have increased the water drained into Twin Lake or its levels. He bases his view upon his consultations with experts during the application process. In addition, Jason McAreavey has lived in the Twin Lake area his whole life and now farms there. He reported that his land previously experienced surface erosion which has improved after the tiling. After the tiling, he testified that he can farm about 5-7 acres more on the north side of Twin Lake and 15-20 additional acres on the south edge of the Lake. Significantly, he explained that Twin Lake also inundates his farm land on the north and the south, and he would not act to increase its level.

ANALYSIS AND CONCLUSIONS OF LAW

I. Standard of review

This appeal is taken from final decisions of the Commission pursuant to SDCL § 7-8-27. Section 7-8-30 states that these types of administrative appeals to circuit court "shall be heard and determined de novo." SDCL § 7-8-30. However, that standard requires further explanation.

Though the trial de novo standard means "the circuit court should determine anew the question...independent of the county commissioner's decision[,]" the standard also contemplates substantial deference for factual findings made by the county commission:

> When we review such actions of a board of county commissioners after an appeal to the circuit court, we apply the clearly erroneous standard to factual findings, but accord no deference to the legal conclusions of the circuit court.

Coyote Flats, L.L.C. v. Sanborn Co. Comm'n, 1999 SD 87, ¶7, 596 N.W.2d 347, 349 (citations omitted).

Further, the issue to be determined by the circuit court in an appeal of a county commission decision is not whether the court would necessarily arrive at the same decision as the commissioners. Rather, the party appealing the commission's decision bears the burden of proving that the commissioners' decision was arbitrary and capricious. *Coyote Flats*, 1999 SD 87, ¶8, 596 N.W.2d at 349. An arbitrary and capricious decision is one which is "based on selfish, or fraudulent motives, or on false information, and is characterized by a lack of relevant and competent evidence to support the action taken." *Coyote Flats*, 1999 SD 87, ¶ 14, 596 N.W.2d at 351. During the appeal hearing here, the parties agreed that the Commission's use of the wrong legal standard to determine the McAreaveys' drainage application could conceivably constitute arbitrary and capricious action.[2]

II. The civil law rule of drainage permits the drainage at issue here, and the Commission did not act arbitrarily or capriciously.

South Dakota follows the civil law rule of drainage which generally "recognizes that the lower property is burdened with an easement under which the owner of the upper property may discharge surface waters over such lower property through such channels as nature has provided." *First Lady, LLC v. JMF Properties, LLC*, 2004 SD 69, ¶ 6, 681 N.W.2d 94, 96-97 (quoting *Thompson v. Andrews*, 39 S.D. 477, 165 N.W. 9, 12 (1917)). The decisions of

[2] DeSchepper acknowledged at the hearing that he was not alleging the members of the Commission had acted with selfish or fraudulent motives.

our Supreme Court further "qualify the civil law rule inasmuch as it is impermissible for a dominant landowner to collect surface waters, and then cast them upon the servient estate in 'unusual or unnatural quantities.'" *Winterton v. Elverson*, 389 N.W.2d 633, 635 (S.D. 1986) (citing *Thompson*, 39 S.D. at 492, 165 N.W. at 14; *Johnson v. Metropolitan Live, Ins. Co.*, 71 S.D. 155, 158, 22 N.W.2d 737 739 (1946); *Gross v. Conn. Mut. Life Ins. Co.*, 361 N.W.2d 259, 267(S.D. 1985)).

"[T]he civil law rule is conditioned upon the fact that the drainage must be accomplished without unreasonable injury to the servient estate." *Winterton*, 389 N.W.2d at 635 (citing *Thompson*, 39 S.D. 489, 165 N.W. at 13). The owner of the higher ground, or the dominant estate, "may not transfer the burdens imposed by nature on his land" to the owner of the lower ground, or the servient estate. *Id.* (citing *LaFleur v. Kolda*, 71 S.D. 162, 167, 22 N.W.2d 741, 744 (1946)).

Our Legislature has codified the civil law rule of drainage at SDCL § 46A-10A-70. The principal tenets of the civil law rule are also present in the statute that governs local controls by drainage commissions or boards. *See* SDCL § 46A-10A-20. Under the provisions of SDCL § 46A-10A-20, local drainage boards, or in this case the Commission, may provide for local drainage controls if:

(1) The land receiving the drainage remains rural in character;

(2) The land being drained is used in a reasonable manner;

(3) The drainage creates no unreasonable hardship or injury to the owner of the land receiving the drainage;

(4) The drainage is natural and occurs by means of a natural water course or established water course;

(5) The owner of the land being drained does not substantially alter on a permanent basis the course of flow, the amount of flow, or the time of flow from that which would occur; and

(6) No other feasible alternative drainage system is available that will produce less harm without substantially greater cost to the owner of the land being drained.

SDCL § 46A-10A-20.

Here, the Commission's decisions fit within these provisions and are not arbitrary or capricious. The specific subsections of SDCL § 46A-10A-20 are addressed in turn.

All of the land included within Twin Lake and its watershed is rural in character. The McAreaveys' land, which is being drained, is now being farmed and, thereby, used in a reasonable manner.

Assessing the relative hardship or injury is a fact-bound analysis that focuses principally upon determining support for DeSchepper's claim that the tiles, in fact, are injuring him by increasing the level of Twin Lake. When the record is examined closely, however, there is insufficient evidence to convince the court in this regard. Perhaps more to the point, there is insufficient evidence to establish that the Commission's decisions were based upon false information, "characterized by a lack of relevant and competent evidence[.]" *Coyote Flats*, 1999 SD 87, ¶ 14, 596 N.W.2d at 351. DeSchepper admitted to the Commission he did not know to what extent the drain tile had added to the size of Twin Lake and acknowledged much of the increase was due to the wet

climate. The Lake rose from the late 1990's even before the tiling and has receded several feet since.

Beyond this, the theory that the artificial draining at issue here has or will increase the volume of water is, on this record, speculative. Though a letter submitted to the Commission suggested tiling can potentially increase the volume of water drained by 5-10% "in some cases[,]" further development of the record, over the County's objection, indicates this estimate may not be the best indicator of what has or will happen in the Twin Lake area. Ex.104. As Dr. Sands described, the suggestion of increased water volume is based upon computer modeling which, in his view, is less optimal than a recent field study that points to a more likely scenario under which there is a decrease in total water drained because of increased ET. The court finds Dr. Sand's opinions to be sound and well-reasoned and accepts them in its analysis.

The court is not persuaded by Kenyon's testimony that fissures, or cracks, in the watershed ground around Twin Lake hold and store large amounts of water that, when drained by a tile, constitute "new water" introduced into Twin Lake. The theory is based upon geologic conclusions which, even if accurate, overlook principles of hydrology such as the water balance equation described by Dr. Sands. In addition, Kenyon's testimony failed to account for the fact that the tiles would drain only the relatively shallow areas beneath the surface and would not impact water contained in any deep fissures lying below the tile. Finally, Kenyon's theory about the fissures impacting drainage does not appear to be generally accepted as a

hydrologic phenomenon and seems to lack support in relevant literature or peer reviewed material.

In addition, the drainage for the McAreavey tiles is natural in the sense it includes only water from the Twin Lake watershed which flows in the direction it would naturally. Water has drained from the watershed, including the areas which are now tiled, since the Twin Lake basin was created by glacial advances and eventual dissipation. The presence of the tiles does not alter that course. There is, in other words, a "determinate route...by which water has been discharged upon a servient estate for a period of time, on such a regular basis and in such quantities as to make is predictably continuous activity." SDCL § 46A-10A-1(9).

Though, as indicated, the exact quantity of water drained into Twin Lake before and after the tiling is unknown, the Commission's determination that there is little or no increase in the water drained into Twin Lake is based upon sound, competent evidence. The Commission essentially selected what the court has now determined to be the better scientific view that the water drained by the tiles is no more than the amount that would be drained by natural drainage over the land in the Twin Lake watershed during periods of precipitation and runoff.

For similar reasons, the McAreaveys' drains do not substantially and permanently alter the course of flow, the amount of flow, or the time of flow from that which would naturally occur. The water drained from the McAreaveys' land follows a natural course to Twin Lake, and its flow

corresponds to the precipitation and runoff conditions, as evidenced by the fact that Twin Lake has receded in the drier years following 2011, despite the presence of the drain tiles. There was testimony at the appeal hearing by DeSchepper, suggesting that the flow from the tiles was different in character from natural drainage. Specifically, he testified that while walking on the icy surface of Twin Lake during the winter he moved toward the location of a tile outlet located entirely on the McAreaveys' land where he noticed the Lake's surface had not frozen. This evidence, however, is isolated to a single incident and lacks valuable context, such as whether the (submerged) outlet was, in fact, discharging water or reasonably could have been expected to, given the prevailing climatic and weather conditions at the time. Suffice it to say that this testimony is insufficient to render the Commission's decision arbitrary and capricious.

Finally, there was no other feasible alternative drainage system available that would produce less harm without substantially greater cost to the owner of the land being drained. This balancing of interests is allowed by the civil law rule of drainage, which contemplates a burden upon a servient estate. Here, what makes the analysis particularly noteworthy is the fact that part of the McAreaveys' land abuts Twin Lake along portions of its north and south banks. Therefore, any increase in the Lake's size adversely impacts the McAreaveys as it does DeSchepper. Regardless, there is no other system that DeSchepper has suggested for draining wet areas of the McAreaveys' land. Indeed,

DeSchepper's argument seems premised upon the idea that the McAreaveys' land should remain undrained.

In this regard, DeSchepper argues that there is a *per se* prohibition upon the tile drainage approved by the Commission. In his view, the drainage is categorically proscribed, without regard to the amount of water drained, because the civil law rule does not permit drainage into a closed basin. DeSchepper's supplemental, post-hearing brief contains an excellent exposition of South Dakota decisional law but fails to reveal a controlling case or statute that states such a rule.

Rather, DeSchepper's claim there can be no permissible drainage rests upon several seemingly independent reasons – e.g. the civil law rule does not apply to allow the drainage here because the water drained is not surface water, because Twin Lake is not a watercourse or because the drain tiles, themselves, are not natural watercourses.[3] However, South Dakota's decisional law, whether viewed in isolation or together, does not support DeSchepper's claim.

For instance, the cases do not, by their holdings, prevent the application of the civil law rule to the type of water drained here – i.e. water captured by a drain tile located below the surface of the ground. *See Winterton*, 389 N.W.2d at 634 (describing water drained by tile system as "surface water"). Nor does

[3] DeSchepper reasons, by negative implication, that the inapplicability of the civil law rule necessarily means that the Commission acted arbitrarily or capriciously. The court has difficulty accepting this argument because it is not clear that the civil law rule preempts all other lawful drainage inquiries. *See e.g. First Lady*, 2004 SD 69, 681 N.W.2d 94 (authorizing urban drainage rule which does not conform to the civil law rule applied to rural drainage).

our Legislature's codification of the civil law rule of drainage support DeSchepper's claim in this regard. Indeed, the text of SDCL §§ 46A-10A-70 and 46A-10-20 does not mention "surface water" which is also not among the terms defined in SDCL § 46A-10A-1.[4]

Further, the fact that Twin Lake is not a watercourse does not necessarily preclude the application of the civil law rule. DeSchepper's disagreement with this view brings with it the implicit argument that the terminal point of all permissible drainage must be a watercourse and not a closed basin. However, a careful examination of SDCL § 46A-10A-20(4)'s reference to "drainage" fails to reveal such a requirement. *See* SDCL § 46A-10A-20(4) (requiring "drainage" to be natural and by means of a natural or established watercourse). [5]

"Drainage" can be viewed as a nominative form of the verb "drain" which Black's Law Dictionary defines as the act of:

> conduct[ing] water from one place to another for the purpose of drying the former... To "drain," in its larger sense, includes not only the supplying of outlets and channels to relieve the land from water, but also the provision of ditches, drains and embankments to prevent water from accumulating.

Black's Law Dictionary, at 443 (5th ed.).

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[4] Section 46A-10A-70 does, however, allow the use of "covered drains" which seems akin to "closed" or "blind drains" which are defined, among other ways, as "drainage...utilizing...tiles...constructed in such a way that the flow of water is not visible." SDCL § 46A-10A-1(2); *see also Feistner v. Swenson*, 368 N.W.2d 621, 623 (S.D. 1985) (quoting the now-repealed SDCL § 46A-10-31 whose text seems to use "closed or blind drains" synonymously with "covered drains").

[5] DeSchepper's claim that the drain tile is not permitted under the civil law rule is foreclosed by the text of SDCL § 46A-10A-20(4) which allows for drainage by an established watercourse that can, under SDCL § 46A-10A-1(9), be "man-made."

It also seems possible that "drainage" could be viewed as the water produced by a drain which is similarly described in terms of conveying water. Black's defines the noun "drain" as "[a] trench or ditch to convey water from wet land; a channel through which water may flow off." *Id.*

These definitions lead the court to conclude that "drainage" as it is used in SDCL § 46A-10A-20(4) does not include the terminal point for the water that is drained, but rather the act or means of conveying the water to that point. Therefore, SDCL § 46A-10A-20(4) does not, itself, categorically prohibit local controls that would allow the drainage here, which ends at a lake that is unquestionably not a watercourse. *See also First Lady*, 2004 SD 69, ¶ 14, 681 N.W.2d at 100 ("South Dakota's surface water drainage under civil law allows property owners to drain into natural or established watercourses and *natural depressions.*") (emphasis supplied).

Our cases do, of course, prohibit the owner of a dominant estate from draining a pond and visiting the burdens of his land upon a servient estate. However, that is not what happened here. Though the areas drained by the McAreaveys were wet, they were not ponds of standing water which were simply transferred to Twin Lake. Further, the evidence, as indicated above, supports the Commission's view that the McAreaveys' tiles merely conduct the same amount of water to Twin Lake through a different means. Indeed, there is an insufficient showing in this record that there has been any water added to Twin Lake by virtue of the tiles, much less an amount that is unreasonable or "unusual or unnatural."

ORDER

Based on the foregoing, it is hereby ordered:

1. That the Commission's decisions to grant the McAreaveys' drainage permits are affirmed;

2. That this Memorandum Opinion shall constitute the court's findings of fact and conclusions of law pursuant to SDCL § 15-6-52(a);

3. That the parties may file, should they choose to do so, any additional or different proposed findings of fact and/or conclusions of law by Friday, January 6, 2017; and

4. That the parties shall by January 6, 2017, provide the court with their views as to whether the court should revisit its earlier decision granting partial summary judgment (excluding its mootness determination) to the McAreaveys in light of the South Dakota Supreme Court's subsequent decision in *Manger v. Brinkman*, 2016 SD 50, 883 N.W.2d 74.

Dated this 13th day of December, 2016.

BY THE COURT:

Mark E. Salter
Circuit Court Judge

ATTEST:
Angelia M. Gries, Clerk of Courts
By Dawn Olson, Deputy

FILED
DEC 13 2016
Minnehaha County, S.D.
Clerk Circuit Court

STATE OF SOUTH DAKOTA) :SS COUNTY OF MINNEHAHA)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT

IN THE MATTER OF DRAINAGE PERMIT 11-81, JASON MCAREAVEY, APPLICANT, AND IN THE MATTER OF DRAINAGE PERMIT 12-142, VERNON MCAREAVEY, APPLICANT. MARK DESCHEPPER, *Appellant,* vs. THE BOARD OF COMMISSIONERS, MINNEHAHA COUNTY, SOUTH DAKOTA, *Respondent,* and JASON MCAREAVEY AND VERNON MCAREAVEY, *Appellees.*	Civ. 11-2729 Civ. 12-3742 (Consolidated Cases) AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND MEMORANDUM OPINION AND ORDER RE: ADMINISTRATIVE APPEAL
MARK DESCHEPPER, *Plaintiff,* vs. VERNON R. MCAREAVEY and MINNEHAHA COUNTY, SOUTH DAKOTA *Defendants.*	

C-001

This matter is before the court as an administrative appeal from the Minnehaha County Commission sitting as a local drainage board ("the Commission"). Mark DeSchepper ("DeSchepper") appeals the Commission's decisions to grant certain applications of Jason and Vernon McAreavey (collectively "the McAreaveys") to install subsurface drain tile on their agricultural land. The court conducted a hearing on the motions on July 26-27, 2016, and received post-hearing briefs from the parties thereafter.

This court's Memorandum Opinion and Order Re: Administrative Appeal was filed with the clerk on December 13, 2016. Subsequently, the South Dakota Supreme Court issued its decision in *Department of Game, Fish and Parks v. Troy Twp.*, 2017 SD 50, 900 N.W.2d 840. This court has reconsidered, on its own motion, its original Memorandum Opinion and Order in lights of the *Troy Township* decision and now enters these Amended Findings of Fact, Conclusions of Law and Memorandum Decision and Order Re: Administrative Appeal.

After fully reviewing the parties' arguments, reading all of their written submissions and the relevant authorities, and carefully considering the issues presented, the court affirms the Commission's decisions to grant the McAreaveys' drainage applications.

BACKGROUND AND FINDINGS OF FACT

DeSchepper and the McAreaveys own land within Clear Lake Township in rural Minnehaha County in and around an inundated basin area known as Twin Lake. Twin Lake, as its name suggests, is actually comprised of north and south bodies, though the two are now joined into one contiguous lake.

Twin Lake lies principally upon Section 17 of Clear Lake Township and measures approximately 341 acres. Portions of Twin Lake and its 979-acre watershed extend into Sections 16, 18, 19, 20 and 21. DeSchepper owns and farms on the southwest quarter of Section 17. The McAreaveys own and farm the northwest quarter of Section 17 and also the northwest quarter of Section 20 at the south edge of Twin Lake. The State of South Dakota owns the eastern half-section of Section 17 on which much of Twin Lake lies.

At issue here are drainage applications designated as ADP 11-81 and ADP 12-142. The applications were considered and approved by the Commission at brief hearings held on August 9, 2011, and September 12, 2012. Currently, there are four 6-inch main drainage tiles that outlet into or in the direction of Twin Lake. These tiles were installed as a part of ADP 11-81 and are essentially perforated tubes which are buried approximately three feet below the ground's surface. Though authorized by the Commission and not stayed by any order of this court, the McAreaveys have not installed the smaller lateral tiles contemplated in ADP 12-142, pending the determination of this appeal.

Each of the four tile outlets lay entirely on the McAreaveys' land – three on the southern edge of Twin Lake, and the fourth on the northern portion of the Lake. This northern outlet is submerged by Twin Lake which inundates the McAreaveys' land at this point. In fact, Twin Lake's natural, but infrequently reached, spill point lies on this portion of the McAreaveys' land.

Twin Lake, itself, has experienced increases in its size during recent history, well before the installation of the tiles at issue here. The Lake reached its high point in 2011 – a period of heavy precipitation during which the lake crested at the spill point. However, after this wet period, the level of Twin Lake has stabilized and receded significantly, despite the presence and operation of the McAreaveys' drain tiles.

A principal factual issue, perhaps the single most important issue, in this administrative appeal is whether the McAreaveys' drain tile works can or will increase the amount of water drained into Twin Lake beyond that which would have resulted naturally. DeSchepper and Jason McAreavey differed on this point during the Commission's consideration of the applications, and the court allowed the parties to develop the issue further at the hearing by receiving expert testimony from Timothy Kenyon ("Kenyon") and Gary Sands, Ph.D. ("Dr. Sands") as well as testimony from the parties and other evidence.

Kenyon is a geologist who explained the soil conditions in and around Twin Lake and their geologic context. He concluded that the soil was not conducive to lateral subsurface drainage and, further, that Twin Lake is essentially a basin with a non-permeable floor. Therefore, Kenyon determined

that the installation of artificial drain tiles resulted in a net increase of water to Twin Lake because "new" water was reaching it beyond what would have drained naturally. When pressed, however, Kenyon acknowledged his opinions lacked supporting data. They also failed to adequately contemplate the involvement of accepted hydrologic principles and research, beyond the area's geologic features.

Doctor Sands' views, however, utilized these principles and research. He is an agricultural engineer who teaches at the University of Minnesota and focuses his work and research on hydrology and the effects of drainage on crops. Using research, including field research, and the accepted water balance formula,[1] Dr. Sands concluded that the McAreavey drainage tile is not, in all likelihood, affecting the total water yield draining into Twin Lake from its watershed. Though the tile increases subsurface drainage, it generally decreases surface runoff. Beyond this, the tiling generally increases crop production with a corresponding increase in evaporation and plant transpiration, commonly known as ET.

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in total water yield. The studies suggesting a modest increase in water yield, he explained, are based upon computer modeling – not field studies.

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Jason McAreavey does not believe the drain tiles have increased the water drained into Twin Lake or its levels. He bases his view upon his consultations with experts during the application process. In addition, Jason McAreavey has lived in the Twin Lake area his whole life and now farms there. He reported that his land previously experienced surface erosion which has improved after the tiling. After the tiling, he testified that he can farm about 5-7 acres more on the north side of Twin Lake and 15-20 additional acres on the south edge of the Lake. Significantly, he explained that Twin Lake also inundates his farm land on the north and the south, and he would not act to increase its level.

ANALYSIS AND CONCLUSIONS OF LAW

I. Standard of review

This appeal is taken from final decisions of the Commission pursuant to SDCL § 7-8-27. Section 7-8-30 states that these types of administrative appeals to circuit court "shall be heard and determined de novo." SDCL § 7-8-30. The South Dakota Supreme Court recently clarified when a circuit court may undertake a de novo review of an administrative decision and when it may not.

Applying separation of powers principles, the Supreme Court has held that a de novo review is appropriate where an administrative board's decision is quasi-judicial – but not where it is quasi-legislative. *Department of Game, Fish and Parks v. Troy Twp.*, 2017 SD 50, ¶ 20, 900 N.W.2d 840, 849. To conduct a de novo review of a quasi-legislative decision, regardless of statutory text permitting it, contravenes the separation of powers doctrine which defines the respective roles of the judicial and legislative branches of our state government. *Id.*

A circuit court considering an administrative appeal must first determine if the decision at issue is quasi-judicial or quasi-legislative. *Id.* at ¶ 21, 900 N.W.2d at 849. Quasi-judicial decisions are "those that could have been 'determined as an original action in the [circuit] court[.]'" *Id.* (quoting *Champion v. Bd. of Cty Comm'rs*, 5 Dakota 416, 430, 41 N.W. 739 742 (1889)). "Perhaps as good a criterion as any for determining what is judicial is merely to compare the action in question with the ordinary business of courts: that

which resembles what courts customarily do is judicial, and that which has no such resemblance is nonjudicial." *Id.* (citation omitted).

Here, the court need not linger on the question of whether the Commission's decision was quasi-judicial. In a recent, post-*Troy Township* decision, the Supreme Court held that "an adjudication of a land-drainage dispute between two landowners...[is] quasi-judicial." *Surat Farms, LLC v. Brule County Bd. of Comm'rs*, 2017 SD 52, ¶ 11, 901 N.W.2d 365, 369. The additional fact that DeSchepper has, in fact, brought a related civil action against Vernon McAreavey and Minnehaha County further confirms that the Commissioners' decision to grant the drainage applications at issue here were quasi-judicial determinations, and this court will undertake a de novo review.

As discussed above, this case was tried to the court before the Supreme Court's *Troy Township* decision, and this court issued its initial memorandum decision on January 13, 2017. It has subsequently considered the application of the *Troy Township* case and concluded that the two-day trial in July of 2016 provided a fully-developed trial court record that has enabled this court to conduct its de novo review.

II. The civil law rule of drainage permits the drainage at issue here, and the Commission did not act unlawfully.

South Dakota follows the civil law rule of drainage which generally "recognizes that the lower property is burdened with an easement under which the owner of the upper property may discharge surface waters over such lower property through such channels as nature has provided." *First Lady, LLC v. JMF Properties, LLC*, 2004 SD 69, ¶ 6, 681 N.W.2d 94, 96-97 (quoting

Thompson v. Andrews, 39 S.D. 477, 165 N.W. 9, 12 (1917)). The decisions of our Supreme Court further "qualify the civil law rule inasmuch as it is impermissible for a dominant landowner to collect surface waters, and then cast them upon the servient estate in 'unusual or unnatural quantities.'" *Winterton v. Elverson*, 389 N.W.2d 633, 635 (S.D. 1986) (citing *Thompson*, 39 S.D. at 492, 165 N.W. at 14; *Johnson v. Metropolitan Live, Ins. Co.*, 71 S.D. 155, 158, 22 N.W.2d 737 739 (1946); *Gross v. Conn. Mut. Life Ins. Co.*, 361 N.W.2d 259, 267(S.D. 1985)).

"[T]he civil law rule is conditioned upon the fact that the drainage must be accomplished without unreasonable injury to the servient estate." *Winterton*, 389 N.W.2d at 635 (citing *Thompson*, 39 S.D. 489, 165 N.W. at 13). The owner of the higher ground, or the dominant estate, "may not transfer the burdens imposed by nature on his land" to the owner of the lower ground, or the servient estate. *Id.* (citing *LaFleur v. Kolda*, 71 S.D. 162, 167, 22 N.W.2d 741, 744 (1946)).

Our Legislature has codified the civil law rule of drainage at SDCL § 46A-10A-70. The principal tenets of the civil law rule are also present in the statute that governs local controls by drainage commissions or boards. *See* SDCL § 46A-10A-20. Under the provisions of SDCL § 46A-10A-20, local drainage boards, or in this case the Commission, may provide for local drainage controls if:

(1) The land receiving the drainage remains rural in character;

(2) The land being drained is used in a reasonable manner;

(3) The drainage creates no unreasonable hardship or injury to the owner of the land receiving the drainage;

(4) The drainage is natural and occurs by means of a natural water course or established water course;

(5) The owner of the land being drained does not substantially alter on a permanent basis the course of flow, the amount of flow, or the time of flow from that which would occur; and

(6) No other feasible alternative drainage system is available that will produce less harm without substantially greater cost to the owner of the land being drained.

SDCL § 46A-10A-20.

Here, the Commission's decisions fit within these provisions. The specific subsections of SDCL § 46A-10A-20 are addressed in turn.

All of the land included within Twin Lake and its watershed is rural in character. The McAreaveys' land, which is being drained, is now being farmed and, thereby, used in a reasonable manner.

Assessing the relative hardship or injury is a fact-bound analysis that focuses principally upon determining support for DeSchepper's claim that the tiles, in fact, are injuring him by increasing the level of Twin Lake. When the record is examined closely, however, there is insufficient evidence to convince the court in this regard. DeSchepper admitted to the Commission he did not know to what extent the drain tile had added to the size of Twin Lake and acknowledged much of the increase was due to the wet climate. Twin Lake rose from the late 1990's even before the tiling and has receded several feet since.

Beyond this, the theory that the artificial draining at issue here has or will increase the volume of water is, on this record, speculative. Though a letter submitted to the Commission suggested tiling can potentially increase the volume of water drained by 5-10% "in some cases[,]" further development of the record, over the County's objection, indicates this estimate may not be the best indicator of what has or will happen in the Twin Lake area. Ex.104. As Dr. Sands described, the suggestion of increased water volume is based upon computer modeling which, in his view, is less optimal than a recent field study that points to a more likely scenario under which there is a decrease in total water drained because of increased ET. The court finds Dr. Sand's opinions to be sound and well-reasoned and accepts them in its analysis.

The court is not persuaded by Kenyon's testimony that fissures, or cracks, in the watershed ground around Twin Lake hold and store large amounts of water that, when drained by a tile, constitute "new water" introduced into Twin Lake. The theory is based upon geologic conclusions which, even if accurate, overlook principles of hydrology such as the water balance equation described by Dr. Sands. In addition, Kenyon's testimony failed to account for the fact that the tiles would drain only the relatively shallow areas beneath the surface and would not impact water contained in any deep fissures lying below the tile. Finally, Kenyon's theory about the fissures impacting drainage does not appear to be generally accepted as a hydrologic phenomenon and seems to lack support in relevant literature or peer reviewed material.

In addition, the drainage for the McAreavey tiles is natural in the sense it includes only water from the Twin Lake watershed which flows in the direction it would naturally. Water has drained from the watershed, including the areas which are now tiled, since the Twin Lake basin was created by glacial advances and eventual dissipation. The presence of the tiles does not alter that course. There is, in other words, a "determinate route...by which water has been discharged upon a servient estate for a period of time, on such a regular basis and in such quantities as to make is predictably continuous activity." SDCL § 46A-10A-1(9).

Though, as indicated, the exact quantity of water drained into Twin Lake before and after the tiling is unknown, the Commission's determination that there is little or no increase in the water drained into Twin Lake is based upon sound, competent evidence. The Commission essentially selected what the court has now determined to be the better scientific view that the water drained by the tiles is no more than the amount that would be drained by natural drainage over the land in the Twin Lake watershed during periods of precipitation and runoff.

For similar reasons, the McAreaveys' drains do not substantially and permanently alter the course of flow, the amount of flow, or the time of flow from that which would naturally occur. The water drained from the McAreaveys' land follows a natural course to Twin Lake, and its flow corresponds to the precipitation and runoff conditions, as evidenced by the fact that Twin Lake has receded in the drier years following 2011, despite the

presence of the drain tiles. There was testimony at the appeal hearing by DeSchepper, suggesting that the flow from the tiles was different in character from natural drainage. Specifically, he testified that while walking on the icy surface of Twin Lake during the winter he moved toward the location of a tile outlet located entirely on the McAreaveys' land where he noticed the lake's surface had not frozen. This evidence, however, is isolated to a single incident and lacks valuable context, such as whether the (submerged) outlet was, in fact, discharging water or reasonably could have been expected to, given the prevailing climatic and weather conditions at the time. Suffice it to say that this testimony is insufficient to render the Commission's decision unsound or impermissible.

Finally, there was no other feasible alternative drainage system available that would produce less harm without substantially greater cost to the owner of the land being drained. This balancing of interests is allowed by the civil law rule of drainage, which contemplates a burden upon a servient estate. Here, what makes the analysis particularly noteworthy is the fact that part of the McAreaveys' land abuts Twin Lake along portions of its north and south banks. Therefore, any increase in the Lake's size adversely impacts the McAreaveys as it does DeSchepper. Regardless, there is no other system that DeSchepper has suggested for draining wet areas of the McAreaveys' land. Indeed, DeSchepper's argument seems premised upon the idea that the McAreaveys' land should remain undrained.

In this regard, DeSchepper argues that there is a *per se* prohibition upon the tile drainage approved by the Commission. In his view, the drainage is categorically proscribed, without regard to the amount of water drained, because the civil law rule does not permit drainage into a closed basin. DeSchepper's supplemental, post-hearing brief contains an excellent exposition of South Dakota decisional law but fails to reveal a controlling case or statute that states such a rule.

Rather, DeSchepper's claim there can be no permissible drainage rests upon several seemingly independent reasons – e.g. the civil law rule does not apply to allow the drainage here because the water drained is not surface water, because Twin Lake is not a watercourse or because the drain tiles, themselves, are not natural watercourses.[2] However, South Dakota's decisional law, whether viewed in isolation or together, does not support DeSchepper's claims.

For instance, the cases do not, by their holdings, prevent the application of the civil law rule to the type of water drained here – i.e. water captured by a drain tile located below the surface of the ground. *See Winterton*, 389 N.W.2d at 634 (describing water drained by tile system as "surface water"). Nor does our Legislature's codification of the civil law rule of drainage support DeSchepper's claim in this regard. Indeed, the text of SDCL §§ 46A-10A-70

[2] DeSchepper reasons, by negative implication, that the inapplicability of the civil law rule necessarily means that the Commission acted unlawfully. The court has difficulty accepting this argument because it is not clear that the civil law rule preempts all other lawful drainage inquiries. *See e.g. First Lady*, 2004 SD 69, 681 N.W.2d 94 (authorizing urban drainage rule which does not conform to the civil law rule applied to rural drainage).

and 46A-10-20 does not mention "surface water" which is also not among the terms defined in SDCL § 46A-10A-1.[3]

Further, the fact that Twin Lake is not a watercourse does not necessarily preclude the application of the civil law rule. DeSchepper's disagreement with this view brings with it the implicit argument that the terminal point of all permissible drainage must be a watercourse and not a closed basin. However, a careful examination of SDCL § 46A-10A-20(4)'s reference to "drainage" fails to reveal such a requirement. *See* SDCL § 46A-10A-20(4) (requiring "drainage" to be natural and by means of a natural or established watercourse).[4]

"Drainage" can be viewed as a nominative form of the verb "drain" which Black's Law Dictionary defines as the act of:

> conduct[ing] water from one place to another for the purpose of drying the former... To "drain," in its larger sense, includes not only the supplying of outlets and channels to relieve the land from water, but also the provision of ditches, drains and embankments to prevent water from accumulating.

Black's Law Dictionary, at 443 (5th ed.).

It also seems possible that "drainage" could be viewed as the water produced by a drain which is similarly described in terms of conveying water.

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[3] Section 46A-10A-70 does, however, allow the use of "covered drains" which seems akin to "closed" or "blind drains" which are defined, among other ways, as "drainage...utilizing...tiles...constructed in such a way that the flow of water is not visible." SDCL § 46A-10A-1(2); *see also Feistner v. Swenson*, 368 N.W.2d 621, 623 (S.D. 1985) (quoting the now-repealed SDCL § 46A-10-31 whose text seems to use "closed or blind drains" synonymously with "covered drains").

[4] DeSchepper's claim that the drain tile is not permitted under the civil law rule is foreclosed by the text of SDCL § 46A-10A-20(4) which allows for drainage by an established watercourse that can, under SDCL § 46A-10A-1(9), be "man-made."

Black's defines the noun "drain" as "[a] trench or ditch to convey water from wet land; a channel through which water may flow off." *Id.*

These definitions lead the court to conclude that "drainage" as it is used in SDCL § 46A-10A-20(4) does not include the terminal point for the water that is drained, but rather the act or means of conveying the water to that point. Therefore, SDCL § 46A-10A-20(4) does not, itself, categorically prohibit local controls that would allow the drainage here, which ends at a lake that is unquestionably not a watercourse. *See also First Lady*, 2004 SD 69, ¶ 14, 681 N.W.2d at 100 ("South Dakota's surface water drainage under civil law allows property owners to drain into natural or established watercourses and *natural depressions*.") (emphasis supplied).

Our cases do, of course, prohibit the owner of a dominant estate from draining a pond and visiting the burdens of his land upon a servient estate. However, that is not what happened here. Though the areas drained by the McAreaveys were wet, they were not ponds of standing water which were simply transferred to Twin Lake. Further, the evidence, as indicated above, supports the Commission's view that the McAreaveys' tiles merely conduct the same amount of water to Twin Lake through a different means. Indeed, there is an insufficient showing in this record that there has been any water added to Twin Lake by virtue of the tiles, much less an amount that is unreasonable or "unusual or unnatural."

ORDER

Based on the foregoing, it is hereby ordered:

1. That the Commission's decisions to grant the McAreaveys' drainage permits are affirmed; and

2. That this Amended Findings of Fact Conclusions of Law and Memorandum Opinion shall constitute the court's findings of fact and conclusions of law pursuant to SDCL § 15-6-52(a).

Dated this 18th day of January, 2018.

BY THE COURT:

Mark E. Salter
Circuit Court Judge

ATTEST:
Angelia M. Gries, Clerk of Court

By _____ Deputy

UNIFIED JUDICIAL SYSTEM JUSTICE STATE OF SOUTH DAKOTA

FILED
JAN 18 2018
Minnehaha County, S.D.
Clerk Circuit Court

STATE OF SOUTH DAKOTA) : SS COUNTY OF MINNEHAHA)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT

IN THE MATTER OF DRAINAGE PERMIT 11-81 and 12-142, JASON MCAREAVEY, APPLICANT, MARK DESCHEPPER, Appellant, vs. THE BOARD OF COMMISSIONERS, MINNEHAHA COUNTY ,SOUTH DAKOTA, Respondent, and JASON MCAREAVEY and VERNON MCAREAVEY, Appellees.	49CIV11-002729 CIV. 12-3742 (Consolidated Cases) **ORDER GRANTING DEFENDANT VERNON R. MCAREAVEY'S RENEWED MOTION FOR SUMMARY JUDGMENT**
MARK DESCHEPPER, Plaintiff, vs. VERNON R. MCAREAVEY and THE BOARD OF COMMISSIONERS, MINNEHAHA COUNTY, SOUTH DAKOTA, Defendants.	

The above-entitled matter having come on for hearing before the Court, on November 20, 2017, the Honorable Mark E. Salter presiding, upon Defendant Vernon R. McAreavey's Renewed Motion for Summary Judgment on Abatement of Nuisance Claim and Injunctive

Relief; Plaintiff Mark DeSchepper appearing personally and by and through his counsel of record, A.J. Swanson; and Defendant Vernon McAreavey appearing personally and by and through his counsel of record, Justin T. Clarke, Davenport, Evans, Hurwitz & Smith, LLP; and the Board of County Commissioners, Minnehaha County, appearing by and through its counsel of record, James Power, Woods, Fuller, Schultz, & Smith, P.C.; and the Court having reviewed and considered all the pleadings, files, records, and arguments of counsel, and the Court having found that there are no genuine issues of material fact precluding summary judgment, being in all things duly advised, good cause appearing, it is hereby:

ORDERED, ADJUDGED, AND DECREED as follows:

1. The Court incorporates and restates its Memorandum Opinion and Order dated December 5, 2015, as if fully set forth herein.
2. The Court incorporates and restates its Amended Findings of Fact, Conclusions of Law and Memorandum Opinion and Order Re: Administrative Appeal dated January 18, 2018, as if fully set forth herein.
3. No genuine issues of material fact exist, and Defendant Vernon McAreavey is entitled to judgment as a matter of law.
4. Defendant Vernon McAreavey's Renewed Motion for Summary Judgment on Abatement of Nuisance Claim and Injunctive Relief is hereby granted.
5. Judgment shall be entered in favor of Defendant Vernon McAreavey on Plaintiffs' Second Cause of Action in his Amended Complaint;
6. Judgment shall be entered in favor of Defendant Vernon McAreavey on Plaintiff's Fourth Cause of Action in his Amended Complaint;

D-002

Dated at Sioux Falls, South Dakota, this 18th day of January, 2018.

BY THE COURT:

Mark E. Salter, Circuit Court Judge

ATTEST:

Angelia M. Gries, Clerk

By _____
Deputy

FILED
JAN 18 2018
Minnehaha County, S.D.
Clerk Circuit Court

D-003

IN THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

No. 28525

IN THE MATTER OF DRAINAGE PERMIT 11-81,
JASON MCAREAVEY, APPLICANT,
and
IN THE MATTER OF DRAINAGE PERMIT 12-142,
VERNON MCAREAVEY, APPLICANT

MARK DESCHEPPER,
Appellant,
vs.
THE BOARD OF COMMISSIONERS,
MINNEHAHA COUNTY, SOUTH DAKOTA
Respondent/Appellee,

JASON MCAREAVEY and VERNON MCAREAVEY,
Appellees.

MARK DESCHEPPER,
Plaintiff/Appellant,
vs.
VERNON R. MCAREAVEY and THE BOARD OF COMMISSIONERS,
MINNEHAHA COUNTY, SOUTH DAKOTA,
Defendants/Appellees.

Appeal from the Circuit Court
Second Judicial Circuit, Minnehaha County, South Dakota
The Honorable Mark E. Salter, Presiding Judge

BRIEF OF APPELLEES JASON MCAREAVEY AND VERNON MCAREAVEY

Notice of Appeal filed February 12, 2018

A.J. Swanson
Arvid J. Swanson, P.C.
27452—482nd Avenue
Canton, SD 57013
Telephone: (605) 743-2070

Attorneys for Plaintiff/Appellant Mark DeSchepper

Vince M. Roche and Justin T. Clarke
Davenport, Evans, Hurwitz & Smith, L.L.P.
206 West 14th Street
P.O. Box 1030
Sioux Falls, SD 57101-1030
Telephone: (605) 336-2880

Attorneys for Appellees Jason McAreavey and Vernon McAreavey

James E. Moore and James A. Power
Woods, Fuller, Shultz & Smith
P.O. Box 5027
Sioux Falls, SD 57117-5027
Telephone: (605) 336-3890

Attorneys for Respondent/Appellee Board of Commissioners, Minnehaha County, South Dakota

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PRELIMINARY STATEMENT

The record below is cited as "R". Trial exhibits from the July 26, 2016, trial *de novo* will be designated as "TE" followed by the applicable exhibit number. References to the trial *de novo* transcript will be designated as "TT" followed by the applicable page number. References to the Appendix will be designated as "App." along with the applicable page number. References to Appellant's Appendix will be designated as "Appellant's App." along with the applicable page number.

JURISDICTIONAL STATEMENT

Plaintiff-Appellant Mark DeSchepper ("DeSchepper") appeals from four Orders entered by the Circuit Court. First, DeSchepper appeals from the December 7, 2015, Memorandum Opinion and Order granting partial summary judgment to Defendants Vernon McAreavey and Jason McAreavey (collectively, "McAreaveys") and Defendant Minnehaha County ("County") on DeSchepper's First Amended Complaint. Appellant's App. A-001-15. Notice of Entry of the Order was given on March 18, 2016. R 570. DeSchepper also appeals the Circuit Court's Memorandum Opinion and Order RE: Administrative Appeal dated December 13, 2016, following a court trial where the Circuit Court affirmed the County's decisions to grant McAreaveys drainage permits. Appellant's App. B 001-16. Notice of Entry of the Order was given on December 29, 2016. R 986. DeSchepper also appeals the Circuit Court's Amended Findings of Fact, Conclusions of Law and Memorandum Opinion and Order Re: Administrative Appeal dated January 18, 2018 where the Circuit Court again affirmed the County's decisions to issue drainage permits to McAreaveys. Appellant's App. C-001-17. Notice of Entry of the Order was given on January 22, 2018. R 1203. Finally, DeSchepper appeals from a January 18, 2018, Order granting summary judgment to McAreaveys on the remaining claims in DeSchepper's

Amended Complaint. Appellant's App. D-001-3. Notice of Entry of the Order was given on January 19, 2018. R 1191. DeSchepper filed his Notice of Appeal on February 12, 2018. R 1223-24.

STATEMENT OF THE ISSUES

DeSchepper has raised six issues on appeal. However, the first four issues are all addressed by determining whether the Circuit Court properly affirmed the grant of the drainage permits after conducting a trial *de novo*. All four of those issues are addressed below in Issue Two.

1. Whether the Circuit Court properly granted partial summary judgment to McAreaveys on DeSchepper's claims for nuisance and trespass when the Circuit Court determined DeSchepper could not prove causation for alleged damages claims based upon nuisance and trespass?

The Circuit Court properly granted partial summary judgment when it determined DeSchepper could not prove causation for his alleged damages claims.

- SDCL § 15-6-56
- *Law Capital, Inc. v. Kettering*, 2013 S.D. 66, 836 N.W.2d 642
- *Veblen Dist. v. Multi-Cmty. Co-op. Dairy*, 2012 S.D. 26, 813 N.W.2d 161
- *Watson v. Great Lakes Pipeline*, 182 N.W.2d 314 (S.D. 1970)
- *Collins v. Barker*, 2003 S.D. 100, 668 N.W.2d 548
- *Foley v. City of Yankton*, 230 N.W.2d 476 (S.D. 1975)
- *Wells v. Howe Heating & Plumbing, Inc.*, 2004 S.D. 37, 677 N.W.2d 586
- *Goebel v. Warner Transp.*, 2000 S.D. 79, 612 N.W.2d 18
- *Steiner v. County of Marshall*, 1997 SD 109, 568 N.W.2d 627
- *Winterton v. Elverson*, 389 N.W.2d 633 (S.D. 1986)
- *Magner v. Brinkman*, 2016 S.D. 50, 883 N.W.2d 74

2. Whether the Circuit Court properly affirmed the grant of drainage permits by the County to McAreaveys?

After a trial *de novo*, the Circuit Court properly affirmed the grant of the drainage permits by the County to McAreaveys.

- SDCL § 46A-10A-70
- SDCL § 46A-10A-20
- SDCL § 46A-10A-1
- *Dep't of Game, Fish & Parks v. Troy Twp.*, 2017 S.D. 50, 900 N.W.2d 840
- *Oyen v. Lawrence County Comm'n*, 2017 S.D. 81, 905 N.W.2d 304
- *First Lady, LLC v. JMF Props., LLC*, 2004 SD 69, 681 N.W.2d 94
- *Thompson v. Andrews*, 39 S.D. 477, 165 N.W. 9 (1917)
- *Winterton v. Elverson*, 389 N.W.2d 633 (S.D. 1986)
- *Magner v. Brinkman*, 2016 S.D. 50, 883 N.W.2d 74
- *Johnson v. Metro. Live, Ins. Co.*, 22 N.W.2d 737 (S.D. 1946)
- *Gross v. Conn. Mut. Life Ins. Co.*, 361 N.W.2d 259 (S.D. 1985)
- *Rumpza v. Zubke*, 2017 S.D. 49, 900 N.W.2d 601

3. Whether the Circuit Court properly granted summary judgment to McAreaveys on DeSchepper's claims for injunctive relief and abatement of nuisance?

The Circuit Court properly granted summary judgment when it determined DeSchepper's claim failed as a matter of law as nothing done under express authority of a statute may be deemed a nuisance.

- SDCL § 21-10-2
- SDCL § 46A-10A-30
- SDCL § 46A-10A-33
- *Loesch v. City of Huron*, 2006 S.D. 93, 723 N.W.2d 694
- *Hedel-Ostrowski v. City of Spearfish*, 2004 S.D. 55, 679 N.W.2d 491
- *Kuper v. Lincoln-Union Electric Co.*, 1996 S.D. 145, 557 N.W.2d 748

STATEMENT OF THE CASE

This case arises out of a drainage dispute between neighboring landowners—McAreaveys and DeSchepper—due to drainage permits granted by the County to McAreaveys to install drain tile. R 3. DeSchepper brought an action to appeal the grant of the permits and asserted various causes of action attacking the County's decisions to issue the permits to McAreaveys and sought various forms of legal and equitable relief. R 94.

As against McAreaveys, DeSchepper alleged claims for injunctive relief and abatement of nuisance requesting the Circuit Court order the destruction of the drain tile, and sought damages for trespass and nuisance. (*Id.*) He also alleged a civil penalty claim,

which was dismissed by the Circuit Court. (*Id.*); R 202. His other claims included declaratory relief and inverse condemnation against the County. R 94. The crux of all of DeSchepper's claims is his allegation that the drain tile installed by McAreaveys in accordance with the drainage permits has increased the water level of Twin Lakes, causing him damage. (*Id.*)

McAreaveys and the County both moved for summary judgment on DeSchepper's Amended Complaint. McAreaveys based the motion upon DeSchepper's complete failure to offer any credible expert testimony to prove causation for his claims. The Circuit Court entered summary judgment in favor of McAreaveys on all causes of action alleged by DeSchepper except DeSchepper's claims for injunctive relief and abatement of a nuisance. Appellant's App. A-001-15.

Thereafter, on July 26, 2016, a court trial was held on DeSchepper's appeal of the issuance of the drainage permits. The Circuit Court conducted a trial *de novo*. The Circuit Court issued its memorandum opinion on December 13, 2016, affirming the issuance of the drainage permits. Appellant's App. B-001-16. However, the Circuit Court requested additional briefing as a result of the recently issued *Magner v. Brinkman* decision. Appellant's App. B-016. The parties submitted additional briefs on the issue. R 1004-10; 1040-47. DeSchepper also sought an intermediate appeal, which was denied. R 1050-51.

McAreaveys then renewed their motion for summary judgment on the remaining claims for injunctive relief and abatement of nuisance and sought to have the Circuit Court address the *Magner* decision at hearing on the motion. R 1060-62. McAreaveys requested dismissal of the remaining claims pursuant to SDCL § 21-10-2. After oral argument, the Circuit Court granted McAreaveys' motion and entered an Order dismissing the remaining claims. Appellant's App. D-001-3. The Circuit Court also entered Amended Findings of

Fact, Conclusions of Law, and Memorandum Opinion and Order RE: Administrative Appeal pursuant to this Court's decision in *Department of Game, Fish, & Parks v. Troy Township*, 2017 S.D. 50, 900 N.W.2d 840. Appellant's App. C-001-17. DeSchepper appeals the grants of summary judgment on the civil claims based upon nuisance and trespass, but does not appeal the grant of summary judgment on Count I, his claim for declaratory relief. He also appeals the Circuit Court's affirmance of the issuance of the drainage permits.

STATEMENT OF FACTS

The key issue in this case is whether McAreaveys' drain tile installed pursuant to permits issue by the County increased Twin Lake's level causing damage to DeSchepper. DeSchepper and McAreaveys own land within Clear Lake Township in rural Minnehaha County in and around an area known as Twin Lake. Appellant's App. C-003. Twin Lake, as its name suggests, is actually comprised of north and south bodies, though the two are now joined into one contiguous lake. (*Id.*)

Twin Lake lies principally upon Section 17 of Clear Lake Township and measures approximately 341 acres. (*Id.*) Portions of Twin Lake and its 979-acre watershed extend into Sections 16, 18, 19, 20 and 21. (*Id.*) DeSchepper owns and farms on the southwest quarter of Section 17. (*Id.*) McAreaveys own and farm the northwest quarter of Section 17 and also the northwest quarter of Section 20 at the south edge of Twin Lake. (*Id.*) The State of South Dakota owns the eastern half-section of Section 17 on which much of Twin Lake lies. (*Id.*)

At issue here are drainage applications designated as ADP 11-81 and ADP 12-142. (*Id.*) The applications were considered and approved by the County at hearings held on August 9, 2011, and September 12, 2012. (*Id.*) Currently, there are four 6-inch main drainage tiles that outlet into or in the direction of Twin Lake. (*Id.*) These tiles were

installed as a part of ADP 12-142 and are essentially perforated tubes which are buried approximately three feet below the ground's surface. (*Id.*); Appellant's App. A-004. Though authorized by the County and not stayed by any order of the Circuit Court, McAreaveys have not installed the smaller lateral tiles contemplated in ADP 11-81, pending the determination of this appeal. Appellant's App. C-003, A-003-04.

Each of the four tile outlets lay entirely on McAreaveys' land—three on the southern edge of Twin Lake, and the fourth on the northern portion of the Lake. Appellant's App. C-004. At the time of summary judgment, this northern outlet was submerged by Twin Lake which inundates McAreaveys' land at this point. (*Id.*) In fact, Twin Lake's natural, but infrequently reached, spill point lies on this portion of McAreaveys' land. (*Id.*)

Twin Lake, itself, has experienced increases in its size during recent history, well before the installation of the tiles at issue. (*Id.*) Twin Lake reached its high point in 2011—a period of heavy precipitation during which the lake crested at the spill point. (*Id.*) However, after this wet period, the level of Twin Lake has stabilized and receded significantly, despite the presence and operation of McAreaveys' drain tile. (*Id.*) Indeed, both DeSchepper and his own expert admitted as much during their testimony. TT 23-24, 145.

The principal factual issue in this case is whether McAreaveys' drain tile can or will increase the amount of water drained into Twin Lake beyond that which would have resulted naturally. Appellant's App. C-004. DeSchepper and Jason McAreavey differed on this point during the County's consideration of the drainage applications, and the Circuit Court allowed the parties to develop the issue further at the trial *de novo* by receiving expert testimony from Timothy Kenyon ("Kenyon") on behalf of DeSchepper and Gary Sands, Ph.D. ("Dr. Sands") on behalf of McAreaveys and the County, as well as testimony from the parties and other evidence. (*Id.*)

Kenyon is a geologist, not a hydrologist. (*Id.*) He opined that the soil was not conducive to lateral subsurface drainage and, further, that Twin Lake is essentially a basin with a non-permeable floor. (*Id.*) Therefore, Kenyon determined that the installation of drain tile resulted in a net increase of water to Twin Lake because "new" water was reaching it beyond what would have drained naturally. Appellant's App. C-004-5. When pressed, however, Kenyon admitted his opinions lacked supporting data. Appellant's App. C-005. He also failed to adequately contemplate the involvement of accepted hydrologic principles and research, beyond the area's geologic features, as he has little to no experience in this field. (*Id.*); TT 142-47. Indeed, Kenyon has little to no experience with hydrological effects of drain tile in agriculture. TT 144. In fact, he admitted drain tile does not come up in his practice very often at all. TT 143.

Additionally, and importantly, Kenyon admitted he could not say McAreaveys' tiling was a substantial factor causing Twin Lakes to rise, given that Twin Lakes had been rising since 1997, eleven years before McAreaveys installed any tile. App. 17-18; TT 135-36. Moreover, while Kenyon testified the lake's highest point was reached in 2011, he admitted it has actually *receded* five or six feet since that time. App. 19; TT 145. Kenyon admitted

he could not quantify the overland flow rate into Twin Lake before the installation of drain tile by McAreaveys and compare it to the overland flow rate after the drain tile was installed. App. 19; TT 147. He admitted he had no data to support his theory that more water entered Twin Lake as a result of the tiling. TT 147.

Contrary to Kenyon, Dr. Sands utilized hydrological principles and research. Appellant's App. C-005. Dr. Sands is an agricultural engineer who teaches at the University of Minnesota and focuses his work and research on hydrology and the effects of drainage on crops. (*Id.*) Using research, including field research, and the accepted water balance formula, Dr. Sands concluded that the McAreaveys drain tile is not affecting the total water yield draining into Twin Lake from its watershed. (*Id.*) The water balance formula or equation is a method of considering hydrologic balance amid a number of factors, including precipitation, soil evaporation, plant transpiration, surface runoff, change in soil moisture, deep seepage, and, where applicable, artificial drainage. (*Id.*) Though the tile increases drainage, it generally decreases surface runoff. (*Id.*) Beyond this, the tiling generally increases crop production with a corresponding increase in evaporation and plant transpiration, commonly known as evapotranspiration, or ET. (*Id.*)

Though Dr. Sands allowed for the *possibility* that the tiles have had a negligible increase in total water yield, the "more probable scenario" is that McAreaveys drain tile decreases "water flow to the lake (due to increased ET on the drained area)." (*Id.*) (quoting HE 113 at 8). Indeed, he testified as follows:

> Q. Dr. Sands, based upon what you've testified to here today and along with the questions asked and answered here for Mr. Power, based upon the studies that you have researched and been a part of, can you say to a reasonable degree of scientific probability that the drain tile in this case, which the McAreaveys have installed, does not increase the water yield into Twin Lakes?
>
> A. I feel pretty confident in saying that.

TT 197. Dr. Sands relied upon a field study that suggested a decrease in total water yield. Appellant's App. C-003. The studies suggesting a modest increase in water yield, he explained, are based upon computer modeling—not field studies. Appellant's App. C-006.

DeSchepper and McAreaveys have divergent anecdotal views about the impact of the drain tile upon Twin Lake. (*Id.*) DeSchepper believes the tiles are increasing the water draining into Twin Lake, though he acknowledges he does not know how much and further acknowledges the rise in 2011 was due largely to the increased precipitation. (*Id.*) He also understands Twin Lake has receded since that time as drier climatic conditions have prevailed. (*Id.*)

Jason McAreavey does not believe the drain tiles have increased the water drained into Twin Lake or its levels. (*Id.*) He bases his view upon his consultations with experts during the application process. (*Id.*) In addition, Jason McAreavey has lived in the Twin Lake area his whole life and now farms there. (*Id.*) He reported that his land previously experienced surface erosion which has improved after the tiling. (*Id.*) After the tiling, he testified that he can farm about 5-7 acres more on the north side of Twin Lake and 15-20 additional acres on the south edge of the Lake. (*Id.*) Significantly, he explained that Twin Lake also inundates his farm land on the north and the south, and he would not act to increase its level. (*Id.*) Simply stated, any increase in Twin Lake's size would also adversely impact the McAreaveys, not just DeSchepper. Appellant's App. C-013.

After hearing all evidence and receiving post-trial briefs, the Circuit Court concluded DeSchepper's theory that the drain tile has or will increase the volume of water was speculative. Appellant's App. C-011. Though a letter submitted to the County suggested tiling can potentially increase the volume of water drained by 5-10% "in some cases[,]" further development of the record demonstrated this estimate is not be the best indicator of

what has or will happen in the Twin Lake area. (*Id.* citing TE 104.) As Dr. Sands described, the suggestion of limited increased water volume is based upon computer modeling which, in his view, is less optimal than a recent field study that points to a more likely scenario under which there is a decrease in total water drained because of increased ET. (*Id.*) The Circuit Court found Dr. Sand's opinions to be sound and well-reasoned and accepted them in its analysis. (*Id.*)

Conversely, the Circuit Court rejected Kenyon's opinions. (*Id.*) Specifically, the Circuit Court rejected Kenyon's testimony that fissures, or cracks, in the watershed ground around Twin Lake hold and store large amounts of water that, when drained by a tile, constitute "new water" introduced into Twin Lake. (*Id.*) Stated another way, the Circuit Court rejected Kenyon's opinion that water is mysteriously "locked" into the ground and the drain tile at issue somehow mines that water. (*See id.*) The theory, even if hypothetically accurate, overlooks principles of hydrology such as the water balance equation described by Dr. Sands. (*Id.*) In addition, Kenyon's testimony failed to account for the fact that the tile would drain only the relatively shallow areas beneath the surface and would not impact water contained in any fissures lying below the tile. (*Id.*) Finally, Kenyon's theory about the fissures impacting drainage is not generally accepted as a hydrologic phenomenon and lacks support in relevant literature or peer reviewed material. (*Id.*)

In addition, the drainage for McAreaveys' tiles is natural in the sense it includes only water from the Twin Lake watershed which flows in the direction it would naturally. Appellant's App. C-012. Water has drained from the watershed, including the areas which are now tiled, since the Twin Lake basin was created by glacial advances and eventual dissipation. (*Id.*) The presence of the tiles does not alter that course. (*Id.*)

Though the exact quantity of water drained into Twin Lake before and after the tiling is unknown, the County's determination that there is little or no increase in the water drained into Twin Lake was based upon sound, competent evidence. (*Id.*) The County essentially selected what the Circuit Court has now determined to be the better scientific view that the water drained by the tiles is no more than the amount that would be drained by natural drainage over the land in the Twin Lake watershed during periods of precipitation and runoff. (*Id.*)

For similar reasons, McAreaveys' drain tile does not substantially and permanently alter the course of flow, the amount of flow, or the time of flow from that which would naturally occur. (*Id.*) The water drained from McAreaveys' land follows a natural course to Twin Lake, and its flow corresponds to the precipitation and runoff conditions, as evidenced by the fact that Twin Lake has receded in the drier years following 2011, despite the presence of drain tile. Appellant's App. C-012-13. Based upon these findings from the trial *de novo*, the Circuit Court affirmed the issuance of the drainage permits. Appellant's App. B-001-16, C-001-17.

STANDARDS OF REVIEW

This Court's standard of review regarding summary judgment is well-settled. Summary judgment is proper where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. SDCL § 15-6-56(c). *See also Law Capital, Inc. v. Kettering*, 2013 S.D. 66, ¶ 10, 836 N.W.2d 642, 645 (citations omitted).

> "When no genuine issue of material fact exists, summary judgment is looked upon with favor." *City of Lennox v. Mitek Indus., Inc.*, 519 N.W.2d 330, 332 (S.D. 1994) (citation omitted). Moreover, although the standards distinguish between the moving and non-moving parties,

> the more precise inquiry looks to who will carry the burden of proof on the claim or defense at trial. *Entry of summary judgment is mandated against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case,* and on which that party will bear the burden of proof at trial.

Veblen Dist. v. Multi-Cmty. Co-op. Dairy, 2012 S.D. 26, ¶ 7, 813 N.W.2d 161, 164 (citation omitted) (emphasis added).

"Summary judgment is a preferred process to dispose of meritless claims." *Horne v. Crozier*, 1997 S.D. 65, ¶ 5, 565 N.W.2d 50, 52 (citations omitted). It is a "venerable device in the pursuit of justice." *Id.* (citation omitted). It "should never be viewed as a disfavored procedural shortcut, but rather as an integral part of our rules as a whole, which are designed to secure the just, speedy, and inexpensive determination of every action." *Accounts Mgmt., Inc. v. Litchfield*, 1998 S.D. 24, ¶ 4, 576 N.W.2d 233, 234 (citation omitted).

As to the Circuit's Court's affirmance of the quasi-judicial act of issuance of the drainage permits, this Court reviews the Circuit Court's findings of fact for clear error and its legal conclusions *de novo*. *Oyen v. Lawrence County Comm'n*, 2017 S.D. 81, ¶ 7, 905 N.W.2d 304, 306-07 (citation omitted). The question is not whether this Court would have made the same findings the trial court did. *Stockwell v. Stockwell*, 2010 S.D. 79, ¶ 16, 790 N.W.2d 52, 59 (citation omitted). Rather, the Circuit Court's findings of fact are clearly erroneous only "when a complete review of the evidence leaves this Court with a definite and firm conviction that a mistake has been made." *In re Conservatorship of Gaaskjolen*, 2014 S.D. 10, ¶ 9, 844 N.W.2d 99, 101 (citations omitted).

ARGUMENT

Nowhere in DeSchepper's brief does he address the proverbial elephant in the room—McAreaveys' drain tile adds no additional water to Twin Lake, and in fact, likely reduces the amount of water reaching it. The Circuit Court made this critical finding

following a review of all the evidence. Even so, DeSchepper maintains McAreaveys' drain tile is unlawful, despite sustaining no injury. However, no drainage statute or common law rule establishes McAreaveys' drain tile is unlawful unless it unreasonably and negatively impacts DeSchepper.

Accordingly, the Circuit Court properly granted summary judgment on DeSchepper's damages claims, affirmed the issuance of the County's drainage permits to McAreaveys, and properly granted summary judgment on DeSchepper's injunctive relief and abatement of nuisance claims as nothing permitted by statute may be deemed a nuisance. This Court should affirm the Circuit Court on all issues.

1. The Circuit Court correctly granted summary judgment to McAreaveys because DeSchepper failed to meet his burden of proof on the issue of causation.

The Circuit Court determined expert testimony was necessary to prove causation for DeSchepper's claims for damages based upon nuisance and trespass. However, DeSchepper's expert could not provide an admissible opinion on causation. Therefore, the Circuit Court properly entered summary judgment on the damages claims against McAreaveys. This Court should affirm the Circuit Court.

Claims for trespass and nuisance require DeSchepper to prove that McAreaveys' tiling was the legal cause of Twin Lake rising and flooding DeSchepper's land resulting in his alleged damages. *Watson v. Great Lakes Pipeline*, 182 N.W.2d 314, 316 (S.D. 1970) (nuisance requires proof of causation); *Collins v. Barker*, 2003 S.D. 100, ¶ 17, 668 N.W.2d 548, 554 (same); *Special Force Ministries v. WCCO Television*, 584 N.W.2d 789, 793 (Minn. Ct. App. 1998) (stating that proximate causation is required to prove damages in trespass action); *Lore v. Suwanee Creek Homeowners' Ass'n, Inc.*, 699 S.E.2d 332, 338 (Ga. Ct. App. 2010) ("Causation is an essential element of . . . trespass . . . claims.").

In *Steiner v. County of Marshall*, this Court made plain the necessity of proving causation in cases like this:

> In addition, we acknowledge the changes made to Fort Road at least contributed to the increased flow of water, but was the increase more than the amount which would have resulted without the construction? In other words, would Intervenor's land flood solely because of the increase in precipitation? It is certainly possible County's operations did not produce any greater flooding (both in terms of volume and of velocity) than would have occurred had the new culverts not existed.

1997 S.D. 109, ¶ 28, 568 N.W.2d 627, 633–34 (citing 1 *Water and Water Rights* 9.02(c)(2) (interpreting *Key Sales Co. v. S.C. Elec. & Gas. Co.*, 290 F. Supp. 8 (D.S.C. 1968))).

This Court has repeatedly held that "expert testimony is required when the subject matter at issue does not fall within the common experience and capability of a lay person or judge." *Wells v. Howe Heating & Plumbing, Inc.*, 2004 S.D. 37, ¶ 18, 677 N.W.2d 586, 592 (citation omitted). "In such a case, the testimony of an expert is necessary to assist the fact-finder in reaching a decision." *Goebel v. Warner Transp.*, 2000 S.D. 79, ¶ 32, 612 N.W.2d 18, 26 (citation omitted). As one court has stated, the necessity of expert testimony is examined on a case-by-case basis according to the particular facts presented and is a determination left to the court's discretion. *See, e.g., Hill v. City of St. Louis*, 371 S.W.3d 66, 74 (Mo. Ct. App. 2012) (citing *Stone v. Mo. Dep't of Health and Senior Servs.*, 350 S.W.3d 14, 21 (Mo. 2011) (en banc)) ("[I]t is within the trial court's discretion to determine the 'necessity' of expert testimony, that is, whether the testimony is on subjects about which the fact finder lacks experience or is on subjects that will assist the trier of fact.").

Here, the Circuit Court concluded it required expert testimony to determine whether the installation of drain tile on McAreaveys' property was a substantial factor in bringing about the harm claimed by DeSchepper. Specifically, the Circuit Court stated the issue of causation in this case "requires expertise in hydrologic principles, hydrologic effects of subsurface tile drainage, and the role of precipitation and soil characteristics on hydrology,"

all which fall outside a layman's knowledge. Appellant's App. A-009-10. The Circuit Court cited a number of decisions involving drainage issues where courts have concluded expert testimony is necessary to prove issues outside of a lay man's knowledge. Appellant's App. A-010 (citing *Menick v. City of Menasha*, 547 N.W.2d 778 (Wis. 1995); *Garr v. City of Ottumwa*, 846 N.W.2d 865 (Iowa 2014); *Hendricks v. U.S.*, 14 Cl. Ct. 143 (1987); *Davis v. City of Mebane*, 512 S.E.2d 450 (N.C. Ct. App. 1999); *Sweet v. C.B.G. Pontiac-Buick-Olds-GMC, Inc.*, 463 So.2d 82 (La. Ct. App. 1985)).

Based upon these principles, the Circuit Court correctly concluded DeSchepper must provide expert testimony sufficient to establish a genuine issue of material fact as to whether McAreaveys' tiling was a substantial factor causing Twin Lake to increase in size, encroach upon his land, and cause damages. *See* S.D. Pattern Jury Instr. No. 20-10-30 ("However, for legal cause to exist, . . . the conduct complained of [must be] a substantial factor in bringing about the harm."). DeSchepper failed to make that showing and the Circuit Court properly granted McAreaveys summary judgment.

During his deposition, Kenyon admitted he could not say McAreaveys' tiling was a substantial factor causing Twin Lake to rise, given that the lake was rising as early as 1997. App. 17-18. He admitted the tiling's effect on Twin Lake was unknown. Simply put, he could not offer an opinion on causation. (*Id.* at 17.) Without expert testimony on the issue of causation, DeSchepper cannot prove an essential element of trespass or nuisance. *See Veblen Dist.*, 2012 SD 26, ¶ 7, 813 N.W.2d at 164 (citation omitted) (Entry of summary judgment is mandated against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case). The Circuit Court properly granted summary judgment to McAreaveys.

DeSchepper relies solely upon this Court's decision in *Magner v. Brinkman*,

claiming expert testimony is not required for him to prove causation. However, *Magner* and the present case differ significantly. In *Magner*, lay testimony was allowed on the issue of causation because specific events could be identified along with specific changes in water flow from one area of property to another area of property. 2016 S.D. 50, ¶¶ 15-16, 883 N.W.2d at 81-82. Put simply, the issue of causation in that case did not require scientific, technical, or other specialized knowledge. This Court simply held that it could not weigh the evidence and held that the plaintiffs' evidence was sufficient to uphold the jury's verdict. *Magner*, 2016 S.D. 50, ¶16, 883 N.W.2d at 82.

Contrary to *Magner*, all parties here presented expert testimony and DeSchepper's expert admitted he could he could not offer an opinion to support that McAreaveys' drain tile was a substantial factor causing Twin Lake's level to rise. There cannot be a genuine issue of material fact when DeSchepper's own expert cannot offer an admissible opinion on causation. Further, DeSchepper, himself, admitted to the Circuit Court when McAreaveys moved for summary judgment on the injunctive relief claim that he could not prove what amount of water allegedly was added to Twin Lake. R 1127 at ¶ 26. This admission is fatal, even if lay witness testimony could establish causation. DeSchepper is not entitled to a better version of the facts than admitted to by his expert or himself. *Trammell v. Prairie States Ins. Co.*, 473 N.W.2d 460, 463 (S.D. 1991) (citation omitted); *In re Kindle*, 509 N.W.2d 278, 283 (S.D. 1993) ("A party who introduces a witness to testify on his or her behalf, in the absence of contradictory evidence, is bound by such testimony.").

This case is not simply a matter of digging a trench after a significant rainfall to allow pooled water to flow to the servient tenement as in *Magner*. As the Circuit Court recognized "the question of whether the McAreaveys drain tile caused Twin Lake to flood DeSchepper's land" required expert knowledge. This stands in stark contrast to the

admission of lay testimony in the form of opinion in *Magner*. DeSchepper needed expert testimony to prove causation in this case and he failed to provide any to establish a genuine issue of material fact. The Circuit Court properly granted summary judgment on DeSchepper's trespass and nuisance claims seeking damages.

2. *The Circuit Court properly affirmed the grant of the drainage permits*.

The Circuit Court held a trial *de novo* allowing the parties to develop a significant record on the County's issuance of the drainage permits to McAreaveys. By doing so, the Circuit Court complied with this Court's directive outlined in *Department of Game, Fish, and Parks v. Troy Township*, 2017 S.D. 50, 900 N.W.2d 840. The Circuit Court applied the appropriate standard of a quasi-judicial action. After the trial *de novo*, the Circuit Court entered its Findings of Fact and Conclusions of Law and Memorandum Opinion affirming the issuance of the drainage permits.

DeSchepper raises four issues based upon the Circuit Court's ruling. All four of those issues are addressed within this section. The main arguments raised by DeSchepper are that (1) the civil law rule does not allow the drainage at issue because the drain tile does not drain not surface water, (2) the drain tile cannot discharge into Twin Lake, despite the drains being located wholly on McAreaveys' property, (3) perforated drain tile is illegal pursuant to the civil law rule of drainage, and (4) the County was somehow biased against him. The entirety of DeSchepper's argument simply ignores the findings of fact of the Circuit Court, specifically the key finding that the drain tile does not increase Twin Lake's level. Not once does DeSchepper explain how the Circuit Court's findings of fact are clearly erroneous. The Circuit Court's findings of fact are not clearly erroneous and there are no errors in the Circuit Court's application of the law to those facts. The Circuit Court properly affirmed the issuance of the drainage permits.

The Circuit Court properly determined the civil law rule of drainage permits the drainage at issue.

South Dakota follows the civil law rule of drainage with regard to rural property. This Court is asked to determine whether the Circuit Court properly affirmed the County's issuance of the drainage permits when it determined they were consistent with the civil law rule of drainage. That determination is a heavily fact-laden one. The Circuit Court determined the evidence supported the issuance of the permits as they complied with controlling law. This Court should affirm the Circuit Court.

Initially, DeSchepper tries to avoid his burden of proof by claiming the civil law rule of drainage does not place any burden on the servient estate during the trial *de novo*. However, this simply ignores that the party appealing the County' s decision bears the burden to show that the decision should be reversed. *See Troy Twp.*, 2017 S.D. 50, ¶ 24, 900 N.W.2d at 850-51. The Circuit Court properly placed the burden on DeSchepper.

Our Legislature has codified the civil law rule of drainage at SDCL § 46A-10A-70. The "rule recognizes that the lower property is burdened with an easement under which the owner of the upper property may discharge surface waters over such lower property through such channels as nature has provided." *First Lady, LLC v. JMF Properties, LLC*, 2004 SD 69, ¶ 6, 681 N.W.2d 94, 96-97 (quoting *Thompson v. Andrews*, 39 S.D. 477, 165 N.W. 9, 12 (1917)). The decisions of this Court further "qualify the civil law rule inasmuch as it is impermissible for a dominant landowner to collect surface waters, and then cast them upon the servient estate in 'unusual or unnatural quantities.'" *Winterton v. Elverson*, 389 N.W.2d 633, 635 (S.D. 1986) (citing *Thompson*, 39 S.D. at 492, 165 N.W. at 14; *Johnson v. Metropolitan Live, Ins. Co.*, 71 S.D. 155, 158, 22 N.W.2d 737 739 (1946); *Gross v. Conn. Mut. Life Ins. Co.*, 361 N.W.2d 259, 267 (S.D. 1985)).

"[T]he civil law rule is conditioned upon the fact that the drainage must be

accomplished without unreasonable injury to the servient estate." *Winterton*, 389 N.W.2d at 635 (citing *Thompson*, 39 S.D. 489, 165 N.W. at 13). Furthermore, drainage from a dominant estate is permissible if it can be accomplished "without injustice to another." *Thompson*, 165 N.W.2d at 13. Over a century ago, this Court stated:

> Certainly every person who acquires lands normally fitted for cultivation should have the right to render them permanently fitted therefor if he can do so without injustice to another; therefore one who acquires lands, over which a water course passes through which upper lands normally dry can be drained in accordance with "the general course of natural drainage," should be held to have acquired same knowing that good neighborliness and the common welfare required him to permit of the drainage of such upper lands through such water course conditioned only that such drainage be accomplished without unreasonable injury to his land.

Id. This fundamental principle is especially important in this case. It has also been recently approved by this Court in *Magner*: "[t]here is no requirement that the dominant property owner refrain from all draining that is adverse to the servient property; rather drainage must not create *unreasonable* hardship or injury to the owner of the land receiving the drainage[.]" 2016 S.D. 50, ¶ 24, 883 N.W.2d at 85 (citation omitted).

McAreaveys are allowed to improve their land without causing harm to others and DeSchepper must allow that drainage unless he can show it causes unreasonable injury to his land. *Id.* As noted throughout this brief, the key finding by the Circuit Court, based upon all the evidence, establishes McAreaveys' drain tile does not cause harm to DeSchepper's land and that the installation of the drain tile more likely results in *less* water reaching Twin Lake due to due to improved crop yield, evapotranspiration, and aeration of the soil. Indeed, Twin Lake has *receded* since McAreaveys installed the drain tile. The Court accepted this opinion from Dr. Sands and it forms the basis for compliance with the rule outlined above.

The principal tenets of the civil law rule are also present in the statute that governs

local controls by drainage commissions or boards. *See* SDCL § 46A-10A-20. These are the rules the Circuit Court applied to the facts presented at the trial *de novo*. In doing so, the Circuit Court properly determined the County's approval of the drainage permits fit within the six subsections of SDCL § 46A-10A-20.

DeSchepper focuses solely on the fact-bound inquiries made by the Circuit Court on subsection (4), thereby conceding the facts establishing the other subsections. (DeSchepper Brief at 18.) Subsection (4) evaluates whether "the drainage is natural and occurs by means of a natural water course or established water course[.]" SDCL § 46A-10A-20.

The Circuit Court concluded the drainage from the McAreaveys drain tile was "natural in the sense that it includes only water from the Twin Lake watershed which flows in the direction it would naturally. . . . The presence of tiles does not alter that course." Appellant's App. C-012. DeSchepper contends this finding ignores Kenyon's opinions regarding the geological features of the area. However, the Circuit Court specifically rejected Kenyon's opinions on this issue because they lacked supporting data and overlooked established principles of hydrology. The Circuit Court, as factfinder, was free reject Kenyon's opinions and accept Dr. Sands' opinions, which were based upon established principles of hydrology and data. The Circuit Court did just this. *See O'Neill v. O'Neill*, 2016 S.D. 15, ¶ 17, 876 N.W.2d 486, 494 (citations omitted) (This Court does not weigh the evidence or gauge the credibility of witnesses and the factfinder is free to accept or reject all, part, or none of any expert's opinion.).

Furthermore, DeSchepper attempts to twist the wording of SDCL § 46A-10A-20, contending drainage into Twin Lake is not consistent with the statutory phrase "by means of a natural water course or established water course." The Circuit Court correctly rejected this argument. Subsection (4) does not require the discharge point to be a natural water course

or established water course as DeSchepper contends. Rather, as the Circuit Court pointed out, the phrase describes how drained water is conveyed—by a natural water course or an established water course. Appellant's App. C-016. McAreaveys' drain tile meets this requirement. The drainage here is natural in the sense it includes only water from the Twin Lakes watershed flowing in a natural direction. The tile does not alter that course. As the Circuit Court determined, based upon the evidence, the water drains by means of an established water course: "a fixed and determinate route . . . by which water has been discharged upon a servient estate for a period of time, on such a regular basis and in such quantities as to make it a predictably continuous activity." Appellant's App. C-012 (citing SDCL § 46A-10A-1(9)).

DeSchepper has not demonstrated any clearly erroneous findings of fact in the Circuit Court's ruling. *See O'Neill*, *supra.* The most glaring error in DeSchepper's arguments is his continued failure to demonstrate that water reaches Twin Lake in some amount greater or at different timing or flow than prior to the drain tile, a heavily fact-based inquiry. As a result, he cannot demonstrate any injury requiring reversal of the Circuit Court's affirmance of the permits.

The drainage into Twin Lake is not prohibited as it does not cause any injury to DeSchepper.

Despite the Circuit Court's recitation of the abundant evidence supporting its decision, DeSchepper maintains the Circuit Court failed to harmonize SDCL § 46A-10A-70 and SDCL § 46A-10A-20 when it affirmed the drainage permits. The crux of his argument is Twin Lake is a natural depression that cannot accept drainage. DeSchepper recognizes these statutes were simply intended to codify common law principles, but he fails to recognize the disconnect between his argument and the actual principles at issue. Specifically, his argument again ignores the critical findings by the Circuit Court that DeSchepper's property suffers no injury as a result of the drainage and McAreaveys' drainage is reasonable. Therefore, it cannot violate the civil law rule of drainage.

The seminal decision in *Thompson* supports the drainage at issue here. *See* 165 N.W. at 13-14. This foundational opinion recognizes the right to artificially drain one's land within a basin as long as it does not cause injury to others and is done so reasonably. The drain tile at issue in this case follows the natural course of drainage and outlets at the same location as the natural drainage pattern on McAreaveys' land. Testimony from both Jason McAreavey and Dr. Sands demonstrated that the drain tile follows the natural course of drainage. The Court accepted this testimony. Additionally, Dr. Sands explained, it is more likely that *less* water is reaching Twin Lake as a result of the installation of the drain tile system due to improved crop yield, evapotranspiration, and aeration of the soil. Indeed, Twin Lake's level has decreased since the installation of the drain tile. The Circuit Court concluded McAreaveys' drain tile does not cause injury and the drainage is reasonable. As this Court stated recently, "[t]he circuit court—which is the sole judge of credibility in this case—apparently considered the witnesses credible, and we see no basis for concluding the court's findings are clearly erroneous." *Rumpza v. Zubke*, 2017 S.D. 49, ¶ 12, 900 N.W.2d

601, 606.

The Circuit Court never once espoused principles in violation of the statutes or common law on the civil rule of drainage. Indeed, DeSchepper admits in his brief the statutes are simply a codification of the drainage laws developed by this Court. DeSchepper would have this Court avoid reading the statutes in harmony and impose SDCL § 46A-10A-70 without reference to SDCL § 46A-10A-20. That is not the law and the Circuit Court properly harmonized the statutes and applied them.

Water naturally flowing off McAreaveys' land and via drain tile discharged into Twin Lake is surface water.

Abundant evidence was produced at trial demonstrating that the natural course of drainage from McAreaveys' property flows into Twin Lake. This is undisputed. As DeSchepper failed time and again to demonstrate that the drain tile increased the size of Twin Lake, he changed horse midstream. His new argument, never made at trial *de novo* or to the County during the hearings on issuance of the permits, claims this case turns on the difference between "surface water" and "subsurface water." He asserts the perforated drain tile installed by McAreaveys does not drain surface water, but only subsurface water. Therefore, he concludes it violates the civil law rule of drainage. The Circuit Court correctly rejected this argument.

Whether water is treated as "surface water" for the purpose of drainage is fact-intensive. *See First Lady*, 2004 SD 69, ¶ 8, 681 N.W.2d at 98. *See also Gross*, 361 N.W.2d at 266 (surface water is that which does not maintain its identity as a water body and is not contained and stored, such as in an irrigation pond). Here, surface water in drain tile does not become something else just because it cannot be seen. Otherwise, water in culverts would cease to be surface water, for example. Instead, the key factor when determining whether water is surface water is where it originates. As Dr. Sands thoroughly explained, the

water at issue originates on the surface. That is why *Winterton* recognizes that a drain tile system drains *surface* water. *Id*. at 634. The Circuit Court cited *Winterton*, noting it described water drained by a tile system as "surface water." Appellant's App. C-014.

As an additional point, the Circuit Court further explained that SDCL § 46A-10A-70 allows for the use of covered drains, which the Circuit Court determined were similar to "closed" or "blind drains" which are defined, in at least one way, as "drainage . . . utilizing . . . tiles . . . constructed in such a way that the flow of water is not visible." Appellant's App. C-015 (citing SDCL § 46A-10A-1(2)).

Rumpza also confirms the Circuit Court's view of perforated drain tile as a mechanism for draining surface water. In *Rumpza*, the circuit court made a specific finding of fact that the defendants installed perforated drain tile on their property. *See Rumpza v. Zubke*, No. 18Civ.13-000067, 2016 WL 9560206, at *1, ¶ 14 (S.D. Cir. Ct. Oct. 20, 2016) ("Defendants also installed perforated drain tile on their property so as to allow other low lying areas to be drained."). This Court further supported its statements from *Winterton* when it characterized the water from the perforated drain tile systems in *Rumpza* as surface water: "As in the present case, owner of the dominant estate in *Winterton* installed a drain-tile system that 'discharged [surface water] into the natural drainage way.'" *Rumpza*, 2017 S.D. 49, ¶ 14, 900 N.W.2d at 606-07 (quoting *Winterton*, 389 N.W.2d at 634). If DeSchepper's argument was correct, this Court should have ruled that the installation of perforated drain tile alone was sufficient to rule against those installing it without any need for additional analysis. Obviously, this is not the case and the use of perforated drain tile here is permissible. Rather, the question is the impact upon DeSchepper's property. Again, the Circuit Court rejected DeSchepper's contention that the drain tile had any impact on his land and DeSchepper's drainage was reasonable.

Numerous times in his brief, DeSchepper claims the tile system in *Winterton* was something different than the one at issue here and should be distinguished from McAreaveys' tile. However, there is no factual support in the record to make this suggestion let alone claim it as fact. His argument simply lacks any merit.

The water drained from McAreaveys' land constitutes surface water, as supported by case law and the abundant evidence produced at trial. Waters drained from McAreaveys' land are not "an underground reservoir of subsurface water" as DeSchepper erroneously contends, basing his argument on *Anderson v. Drake*, 123 N.W. 673 (S.D. 1909). In fact, *Anderson* states the exact opposite of what he claims. *Anderson* states water standing in a spring or well is not surface water and cannot be converted to surface water. DeSchepper would have the Court apply the inverse based upon this statement, although it does not support such a position. As Dr. Sands explained and as *Anderson* also supports, the key factor is where water originates.

Finally, DeSchepper's main point is to have this Court declare all drain tile illegal because drain tile drains something other than surface water. If that is the case, farmers all over eastern South Dakota will be required to remove their drain tile resulting in catastrophic damage to our agricultural economy. Obviously, this is neither the intent nor the letter of the law.

McAreaveys' drain tile drains surface water. This is a fact-intensive inquiry and the Circuit Court's findings will not be disturbed absent this Court's "definite and firm conviction that a mistake has been made." *In re Conservatorship of Gaaskjolen*, 2014 S.D. 10, ¶ 9, 844 N.W.2d at 101 (citations omitted). DeSchepper has failed to make such a showing. This Court should affirm the Circuit Court.

The Circuit Court did not err when it affirmed the issuance of ADP 12-142.

On Issue Four, DeSchepper contends the Circuit Court erred when it affirmed ADP 12-142 because the County's commissioners were biased, self-interested, or had conflicts of interest. This issue is directed solely at the County. Even so, the Circuit Court did not err. The County's commissioners were not biased, self-interested, or exercising improper motives when approving ADP 12-142. DeSchepper failed to present any evidence or argument at trial *de novo* suggesting improper motives like those claimed here. The Circuit Court properly concluded DeSchepper abandoned this issue. Appellant's App. B-007 n. 2. The Circuit Court should be affirmed.

Additionally, DeSchepper never even called anyone from the County to attempt to establish any alleged bias, improper motive, or conflict of interest. He presented no evidence to support this theory. During testimony offered by DeSchepper himself, he admitted he had no evidence to suggest the County's commissioners had any improper motive or purpose, such as financial gain when the County approved ADP 12-142. TT 76. DeSchepper further admitted his sole objection to McAreaveys' drain tile was his mistaken belief it increased the level of Twin Lake. TT 72. He simply presented no evidence of bias, conflict of interest, or any other improper purpose for approval of ADP 12-142. As stated above, a party cannot claim a better version of the facts than those to which he testified. *Trammell*, 473 N.W.2d at 463.

Furthermore, DeSchepper's own attorney admitted the alleged "false evidence" upon which he claimed an improper motive was not false evidence at all, but that the County's commissioners simply misapplied the law regarding drainage. This is a merits-based argument on the facts, not an improper motive argument. TT 243. Such an admission should be binding upon DeSchepper. *See Tunender v. Minnaert*, 1997 S.D. 62, ¶¶ 21-24,

563 N.W.2d 849, 853-54 (statements at closing may be a judicial admission); *Rosen's Inc. v. Juhnke*, 513 N.W.2d 575, 577 (S.D. 1994). (statements during opening constitute a judicial admission as a substitute for legal evidence).

DeSchepper failed to present any evidence or argument at trial *de novo* suggesting improper motives like those claimed here. The Circuit Court properly concluded DeSchepper abandoned this issue. The Circuit Court should be affirmed.

3. *The Circuit Court properly granted summary judgment on DeSchepper's Claims for Injunctive Relief and Abatement of Nuisance*.

As outlined above, the Circuit Court affirmed the grant of ADP 11-81 and ADP 12-142 and McAreaveys' installation of drain tile in conjunction with the permits. DeSchepper's claim for injunctive relief fails as a matter of law as nothing done under express authority of a statute may be deemed a nuisance. The Circuit Court properly granted summary judgment to McAreaveys on the remaining claims.

First, the Circuit Court determined DeSchepper's abatement of nuisance claim was essentially injunctive relief and the Court did not discern a fundamental difference between DeSchepper's claim for abatement and his separate claim for injunctive relief. Appellant's App. A-012. Therefore, the Circuit Court analyzed both claims as one.

The Circuit Court's affirmance of the drainage permits at issue provides the basis for entry of summary judgment in McAreaveys' favor. SDCL § 21-10-2 provides that "[n]othing which is done under express authority of a statute can be deemed a nuisance." Simply put, as DeSchepper's appeal failed, his claim for injunctive relief must also fail as nothing done under express authority of a statute may be deemed a nuisance. The County was statutorily authorized to grant McAreaveys a drainage permit and to enforce that permit. SDCL §§ 46A-10A-30; 46A-10A-33. SDCL § 46A-10A-30 authorizes counties to "adopt a permit system for drainage," which the County did by adopting the 2001 Drainage

Ordinance of Minnehaha County and the 2010 Revised Drainage Ordinance of Minnehaha County. When a drainage permit system is adopted, SDCL § 46A-10A-33 mandates that enforcement of the drainage permit system "shall" be done by the county.

Here, the Circuit Court determined McAreaveys' permits and the actions taken in compliance therewith were statutorily authorized. Because McAreaveys' permits and actions were statutorily authorized, they are exempt from being a nuisance under SDCL § 21-10-2. *See Loesch v. City of Huron*, 2006 S.D. 93, ¶ 13, 723 N.W.2d 694, 698 ("Statutorily authorized actions or maintenance are specifically exempt from being considered a nuisance under SDCL § 21-10-2."); *Hedel-Ostrowski v. City of Spearfish*, 2004 S.D. 55, ¶¶ 13-14, 679 N.W.2d 491, 496-97 (park and swing operated and maintained under statutory authority could not be deemed a nuisance pursuant to SDCL § 21-10-2, requiring dismissal of nuisance claim); *Kuper v. Lincoln-Union Electric Co.*, 1996 S.D. 145, ¶ 51, 557 N.W.2d 748, 762 ("[B]ased upon SDCL § 21-10-2, no action for nuisance lies here.").

Indeed, DeSchepper previously *agreed* that is the effect of the affirmance of the permits. R 686-87 ("If the Court determines they have been lawfully approved, in light of the fixed rules and standards (namely, the civil law rule of drainage), then there would be little point – at this juncture and this point in time – in pursuing the remaining relief sought in the complaint against McAreavey."). This is, in fact, the law. SDCL § 21-10-2 precludes any claim sounding in nuisance, which all of DeSchepper's claims do, including injunctive relief. McAreaveys' permit and the actions taken in compliance therewith are statutorily authorized as the Circuit Court determined when it affirmed the issuance of the permits.

While DeSchepper will likely claim the County's action to repeal the County's drainage ordinance should have some effect here, it does not. The drainage ordinance was passed in accordance with the appropriate statutes. The permits were granted in accordance

with the drainage ordinance while it was in effect and the issuance of the permits was affirmed by the Circuit Court. The argument is a red herring. The Circuit Court properly granted summary judgment to McAreaveys on DeSchepper's claims for injunctive relief and abatement of a nuisance.

CONCLUSION

This Court should affirm the Circuit Court on all issues.

Dated at Sioux Falls, South Dakota, this 29th day of May, 2018.

DAVENPORT, EVANS, HURWITZ & SMITH, L.L.P.

/s/ *Justin T. Clarke*

Vince M. Roche
Justin T. Clarke
206 West 14th Street
PO Box 1030
Sioux Falls, SD 57101-1030
Telephone: (605) 336-2880
Facsimile: (605) 335-3639
Attorneys for Appellees Jason McAreavey and Vernon McAreavey

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Brief of Appellees Jason McAreavey and Vernon McAreavey complies with the type volume limitations set forth in SDCL § 15-26A-66. Based on the information provided by Microsoft Word 2010, this Brief contains 8,090 words and 42,067 characters, excluding the table of contents, table of authorities, jurisdictional statement, statement of legal issues, any addendum materials, and any certificates of counsel. This Brief is typeset in Times New Roman (12 point) and was prepared using Microsoft Word 2010.

Dated at Sioux Falls, South Dakota, this 29th day of May, 2018.

DAVENPORT, EVANS, HURWITZ & SMITH, L.L.P.

/s/ *Justin T. Clarke*

Vince M. Roche
Justin T. Clarke
206 West 14th Street
PO Box 1030
Sioux Falls, SD 57101-1030
Telephone: (605) 336-2880
Facsimile: (605) 335-3639
Attorneys for Appellees Jason McAreavey and Vernon McAreavey

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing "Brief of Appellees Jason McAreavey and Vernon McAreavey" was filed electronically with the South Dakota Supreme Court and that the original and two copies of the same were filed by mailing the same to 500 East Capital Avenue, Pierre, South Dakota, 57501-5070, on May 29, 2018.

The undersigned further certifies that an electronic copy of "Brief of Appellees Jason McAreavey and Vernon McAreavey" was emailed to the attorneys set forth below, on May 29, 2018:

A.J. Swanson
Arvid J. Swanson P.C.
27452--482nd Avenue
Canton, SD 57013
aj@ajswanson.com
Attorneys for Appellant Mark DeSchepper

James E. Moore
Woods, Fuller, Schultz, & Smith, P.C.
PO Box 5027
Sioux Falls, SD 57117-5027
James.Moore@woodsfuller.com
Attorneys for Appellee The Board of Commissioners, Minnehaha County, South Dakota

James A. Power
Woods, Fuller, Schultz, & Smith, P.C.
PO Box 5027
Sioux Falls, SD 57117-5027
Jim.Power@woodsfuller.com
Attorneys for Appellee The Board of Commissioners, Minnehaha County, South Dakota

Dated at Sioux Falls, South Dakota, this 29th day of May, 2018.

DAVENPORT, EVANS, HURWITZ & SMITH, L.L.P.

/s/ *Justin T. Clarke*

Vince M. Roche
Justin T. Clarke
206 West 14th Street
PO Box 1030
Sioux Falls, SD 57101-1030
Telephone: (605) 336-2880
Facsimile: (605) 335-3639
Attorneys for Appellees Jason McAreavey and Vernon McAreavey

APPENDIX

A

STATE OF SOUTH DAKOTA) : SS COUNTY OF MINNEHAHA)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
IN THE MATTER OF DRAINAGE PERMIT 11-81 and 12-142, JASON MCAREAVEY, APPLICANT, MARK DESCHEPPER, Appellant, vs. THE BOARD OF COMMISSIONERS, MINNEHAHA COUNTY ,SOUTH DAKOTA, Respondent, and JASON MCAREAVEY and VERNON MCAREAVEY, Appellees.	CIV. 11-2729 CIV. 12-3742 (Consolidated Cases) **DEFENDANT VERNON MCAREAVEY'S STATEMENT OF UNDISPUTED MATERIAL FACTS**
MARK DESCHEPPER, Plaintiff, vs. VERNON R. MCAREAVEY and THE BOARD OF COMMISSIONERS, MINNEHAHA COUNTY, SOUTH DAKOTA, Defendants.	

Defendant Vernon McAreavey pursuant to SDCL 15-6-56, hereby submits the following statement of undisputed material facts in support of his Motion for Summary Judgment:

1. This case involves drainage permits granted by Minnehaha County to McAreavey to install a modest amount of drain tile. *See generally* Notice of Appeal (SDCL § 7–8–27) and First Amended Complaint for Declaratory Judgment, Injunctive Relief, Civil Penalty, and Damages on file herein.)

2. The tiling was installed in 2008, 2009, and 2010.

3. Generally speaking, DeSchepper brought this action to appeal the grant of the permits and asserted various causes of action attacking the County's decisions to issue other permits to McAreavey and seeking various forms of legal and equitable relief. (*See id.*)

4. DeSchepper seeks an injunction, claiming injury to his land and requests the Court order the destruction of McAreavey's tiling. (*See id.*)

5. He also seeks damages for trespass and nuisance. (*Id.*)

6. His other claims seek declaratory relief stating the permits issued by the County are null and void and that he is entitled to a civil penalty against McAreavey for draining water without a permit. (*Id.*)

7. The crux of all of DeSchepper's claims is that the drain tile installed by McAreavey has increased the water level of Twin Lakes causing him damage. (*See id.*)

8. In the course of the litigation, Deschepper disclosed Kenyon as his expert witness. (*See generally* Kenyon Deposition transcript.)

9. Kenyon claims to be a hydrogeologist. (Kenyon Depo. at 9.)

10. When asked about his experience with hydrologic effects of subsurface tile drainage in agriculture, like the drainage tile at issue, Kenyon admitted he had little experience. (*Id.* at 30.)

11. In fact, he admitted the installation of drain tile does not come up in his practice

very often at all. (*Id.* at 31.)

12. During his deposition, Kenyon admitted Twin Lakes was rising as early as 1997, eleven years before McAreavey installed any tile on his farmland. (*Id.* at 56.)

13. Kenyon admitted he could not quantify the overland flow rate into Twin Lakes before the installation of drain tile by McAreavey and compare it to the overland flow rate after the drain tile was installed. (*Id.* at 75.)

14. Moreover, while Kenyon testified the lake's highest point was reached in 2011, he admitted it has actually *receded* five or six feet since that time. (*Id.* at 73.)

15. Most importantly, Kenyon admitted he could not say the McAreavey tiling was a substantial factor causing Twin Lakes to rise, given that Twin Lakes had been rising since 1997. (*Id.* at 44.)

16. He admitted the tiling's effect on Twin Lakes was unknown. (*Id.*)

Dated at Sioux Falls, South Dakota, this 15th day of April, 2015.

DAVENPORT, EVANS, HURWITZ & SMITH, L.L.P.

Vince M. Roche
Justin T. Clarke
206 West 14th Street
PO Box 1030
Sioux Falls, SD 57101-1030
Telephone: (605) 336-2880
Facsimile: (605) 335-3639
Attorneys for Defendant Vernon R. McAreavey

CERTIFICATE OF SERVICE

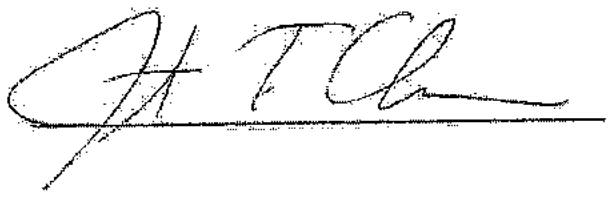
The undersigned, one of the attorneys for Defendant, hereby certifies that a true and correct copy of the foregoing "Defendant Vernon McAreavey's Statement of Undisputed Material Facts" was served by Odyssey file & serve upon:

A.J. Swanson
Arvid J. Swanson P.C.
27452 482nd Avenue
Canton, SD 57013
Attorney for Plaintiff Mark DeSchepper

Dennis McFarland
McFarland Law Office
505 West 9th Street #101
Sioux Falls, SD 57104
Attorney for Jason McAreavey and Vernon McAreavey

James E. Moore, Esq.
Woods, Fuller, Schultz, & Smith, P.C.
PO Box 5027
Sioux Falls, SD 57117-5027
Attorneys for Minnehaha County

on this 15th day of April, 2015.



B

STATE OF SOUTH DAKOTA) :SS COUNTY OF MINNEHAHA)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
IN THE MATTER OF DRAINAGE PERMIT 11-81, JASON MCAREAVEY, APPLICANT, and IN THE MATTER OF DRAINAGE PERMIT 12-142, VERNON MCAREAVEY, APPLICANT. MARK DESCHEPPER, *Appellant,* vs. THE BOARD OF COMMISSIONERS, MINNEHAHA COUNTY, SOUTH DAKOTA, *Respondent,* and JASON MCAREAVEY and VERNON MCAREAVEY, *Appellee.*	Civ. 11-2729 Civ. 12-3742 (Consolidated Cases) APPELLANT-PLAINTIFF'S RESPONSE TO MOVANT'S STATEMENT OF UNDISPUTED MATERIAL FACTS
MARK DESCHEPPER, *Plaintiff,* vs. VERNON R. MCAREAVEY and MINNEHAHA COUNTY, SOUTH DAKOTA, *Defendants.*	

MARK DESCHEPPER, as both Appellant and Plaintiff in the above referenced consolidated cases, by and through counsel, A.J. Swanson, submits the following response, in Part A, to the statement of undisputed material facts (response follows in bold print), as included

with the Motion for Summary Judgment of Defendant Vernon McAreavey, dated April 15, 2015, and, in Part B, providing a separate statement of those material facts as stated by Appellant-Plaintiff.

Part A.
Material Facts as Claimed or Stated by Movant:

1. This case involves drainage permits granted by Minnehaha County to McAreavey to install a modest amount of drain tile. **Admit that these cases "[involve] drainage permits granted by Minnehaha County," but deny the stated claim the cases merely entail a "modest amount of drain tile." The tiles installed by McAreavey, collectively, have the capacity to transmit more than 1.5 million gallons of water per day [see Affidavit of Mark DeSchepper, ¶ 32].**

2. The tiling was installed in 2008, 2009, and 2010. **Deny the claim that McAreavey installed tiling in 2010; otherwise, Admit this statement, so far as it goes. Further, the appeal of ADP 11-81, embraced in these cases, involves additional drain tile, not yet installed. Furthermore, Appellant-Plaintiff hastens to point out, the tile installed in these years (2008 and 2009) by Defendant was done without a legally effective drainage permit having been issued, and the work also exceeded the scope of the permits sought.**

3. Generally speaking, DeSchepper brought this action to appeal the grant of the permits and asserted various causes of action attacking the County's decisions to issue other permits to McAreavey and seeking various forms of legal and equitable relief. **Admit; although the implicit thought that summary judgment under Rule 56 is appropriate mechanism to deal with a county board appeal is disputed.**

4. DeSchepper seeks an injunction, claiming injury to his land and requests the

Court order the destruction of McAreavey's tiling. **Admit. DeSchepper further points out the County itself had demanded McAreavey destroy tiling by the Administrative Official's letter in November 2009, see "Exh. 23, Kappen Depo.," annexed as Exhibit 6, Affidavit of A.J. Swanson.**

5. He also seeks damages for trespass and nuisance. **Admit; the civil law rule of drainage, a concept of property law with tort and nuisance overtones, does not require acceptance Defendant's artificially drained water that, lacking a watercourse for transport, then pools, collects, gathers and remains on Appellant-Plaintiff's property.**

6. His other claims seek declaratory relief stating the permits issued by the County are null and void and that he is entitled to a civil penalty against McAreavey for draining water without a permit. **Admit generally, but would point out the civil penalty claim was dismissed by Circuit Judge Tiede's memorandum opinion of July 27, 2012.**

7. The crux of all of DeSchepper's claims is that the drain tile installed by McAreavey has increased the water level of Twin Lakes causing him damage. **Deny the characterization this case is entirely about an increase in water levels in Twin Lakes; in fact, the cases are about, *inter alia*, whether the County had the legal right, by statutory law and drainage ordinance, to proceed with an agricultural drainage permit (ADP) in these particular circumstances, to employ a procedure of administrative or ex parte issuance, without notice to Appellant-Plaintiff, and whether McAreavey, by virtue of an ADP, has a legal right, under statutory law and the drainage ordinance, to artificially drain waters into Twin Lakes, a water body which has no regular outlet and is not a watercourse, and for which "evaporation-transpiration" is the only diminishment.**

8. In the course of the litigation, DeSchepper disclosed Kenyon as his expert

witness. **Admit.**

9. Kenyon claims to be a hydrogeologist. **Admit.**

10. When asked about his experience with hydrologic effects of subsurface tile drainage in agriculture, like the drainage tile at issue, Kenyon admitted he had little experience. **Admit; however, the included implication that Kenyon is unqualified to testify about the subjects directly germane to the civil law rule of drainage is denied. Kenyon's testimony, in the main, is directed to the *characteristics* of terminal moraine glacial till (or stagnation moraine soils, as referenced Kenyon Depo, 51:12), that make up the soils in the drained area, as well as the farm of Appellant-Plaintiff, now otherwise inundated with water. Specifically, Kenyon's testimony demonstrates (a) artificially drained water collects upon Appellant-Plaintiff's farm, and would not otherwise reach the farm, as there is little-to-no lateral movement through the soils of Movant's farm, even though at a higher elevation, but for the installation of the tile, and (b) once gathered upon Appellant-Plaintiff's farm, it remains and does not recede except by evapotranspiration (commonly referenced as "ET").**

11. In fact, [Kenyon] admitted the installation of drain tile does not come up in his practice very often at all. **Admit, with the qualification that the soil characteristics of the site are paramount, and a subject well known to witness Kenyon, both as to the lands emitting artificial drainage and receiving same, particularly since the receiving body is not a watercourse, and the emitted artificial water does not pass through the lands receiving the drainage, but remains upon the lands of Appellant-Plaintiff.**

12. During his deposition, Kenyon admitted Twin Lakes was rising as early as 1997, eleven years before McAreavey installed any tile on his farmland. **Admit; actually, like many lakes in eastern South Dakota, Twin Lakes has been rising since approximately 1984 or**

1985, see Affidavit of Mark DeSchepper, ¶ 20, *et seq*. The question is whether McAreavey is lawfully entitled to drain into a closed basin, contributing those waters simply because the lake is already rising from other contributions (precipitation, snowmelt, etc.).

13. Kenyon admitted he could not quantify the overland flow rate into Twin Lakes before the installation of drain tile by McAreavey and compare it to the overland flow rate after the drain tile was installed. **Admit, with the proviso that neither can any other witness "quantify the overland flow rate before the installation of drain tile by McAreavey and compare it to the overland flow rate after the drain tile was installed." As stated by Kenyon, the "data does not exist to do that" [Kenyon Depo, 75:18]. This site has not been specifically studied in that manner by anyone, including County and Defendants (and the expert hired by Defendants). Furthermore, the "overland flow rate" comparison is legally irrelevant, as the law focuses on whether the tile emits artificial waters that are collected or gathered upon the servient estate, and whether the receiving body – Twin Lake – is a watercourse (it is not).**

14. Moreover, while Kenyon testified the lake's highest point was reached in 2011, he admitted it has actually receded five or six feet since that time. **Admit that Kenyon so testified, an estimate based on observation rather than measurement [Kenyon Depo, 73:13]; however, DeSchepper is the fact witness who has lived on the lake since 2009, and a direct observer of conditions and water levels, based on his ownership of land at Twin Lake, since 1997, with additional knowledge of the area going back several decades before that year. Kenyon lives on another lake to the north and west of Twin Lake. The lake remains in flooded condition and resting upon DeSchepper's Farm.**

15. Most importantly, Kenyon admitted he could not say the McAreavey tiling was a

substantial factor causing Twin Lakes to rise, given that Twin Lakes had been rising since 1997. **Disputed, in that whether the tile is a "substantial factor" in adding to the water level of Twin Lakes, as existing from time to time, is neither the issue nor the controlling rationale of the civil law rule of drainage. The witness did testify the tile is a factor in causing Twin Lake to rise. The witness has not conducted site specific studies, and nor has the County and McAreavey.**

16. He admitted the tiling's effect on Twin Lakes was unknown. **Admit, as far as water level is concerned; however, to the extent Movant asserts the tile, as installed in 2008, 2009 and 2010, does not emit water to the lake, or as proposed but not yet installed in the 2011 ADP, under appeal, this claim is disputed. Kenyon's testimony is that the tile causes Twin Lake to rise, although the amount of rise is unknown since the necessary data does not exist.**

Part B

Appellant-Plaintiff's Additional Statement Of Undisputed Material Facts:

Pursuant to SDCL § 15-6-56(c), Appellant-Plaintiff submits the following additional statements of undisputed material facts:

A. The County's drainage plan reflects special concerns for drainage in the western one-third of Minnehaha County, given more recent glaciation and less mature drainage patterns and relatively few streams. [MCDP, at 1 and 3, see "Exhibit I" to Affidavit of A.J. Swanson]

B. The drainage plan states the only areas where sufficient downstream watercourse capacity is likely to exist re those where the drainage outlets into named streams as delineated on the USGS topographical maps. [*Id.*, at 3]

C. The drainage ordinance lists 14 streams or rivers, shown on the USGS

topographical maps (section 1.06 of 2010 Drainage Ordinance); if the drainage outlets directly into one of those streams or rivers, the Administrative Official has authority to issue a drainage permit. [See drainage ordinance, Clerk's file]

D. Twin Lake is not one of those named streams or rivers within the ordinance; further, witness Kenyon testified Twin Lake, having no regular outlet, is not a watercourse. [Kenyon Depo. 77:20; Kenyon Report, at 7]

E. The soils around Twin Lake and the Twin Lake watershed represent a collapsed terminal moraine, from the late Wisconsin-age glacier; Kenyon, based on his professional work, observed that groundwater movement through such soils, laterally, is virtually nil, a matter of a few inches, which explains the USGS map of 1964, with the North Body holding no water and the shallower South Body, having water. [Kenyon Depo. 68:14-69:10; Kenyon Report, at 3]

F. The tile installed by McAreavey provides a subsurface pathway to Twin Lake that didn't previously exist; the water now flowing through the tile would not have previously entered Twin Lake, in Kenyon's opinion. [Kenyon Report, at 3, 6]

G. If the tile had not been installed, the subsurface water in the soil profile would be subject to evapotranspiration at that location, above and outside of the lake, rather than being collected and transported into Twin Lake; upon arriving in the lake, the only process for removing the water is evapotranspiration at that new location. [Kenyon Report, at 6; Kenyon Dep., 76:3-18]

H. Water, not previously reaching a water body, but now introduced by artificial means to a lake that is not otherwise a watercourse, will cause the lake to rise. [Kenyon Dep. 78:1-24; Kenyon Report, at 6]

ARVID J. SWANSON P.C.

Dated: June 2, 2015

/s/ A.J. Swanson

A.J. Swanson
27452 482nd Avenue
Canton, SD 57013
(605) 743-2070
E-mail: aj@ajswanson.com

Attorney for
MARK DESCHEPPER
Appellant-Plaintiff

CERTIFICATE OF SERVICE

The undersigned, as counsel for Mark DeSchepper, Appellant-Plaintiff, certifies that on the date entered below, a true and correct copy of *Appellant-Plaintiff's Response to Movant's Statement of Undisputed Material Facts*, was served via Odyssey (File & Service) ECF, addressed to counsel of record, as follows and on the date printed, a scan thereof having been also transmitted electronically via email the same date, as noted:

James E. Moore, Esq.
WOODS FULLER SHULTZ & SMITH P.C.
james.moore@woodsfuller.com
Attorney for Respondent Board & Defendant Minnehaha County

Dennis McFarland, Esq.
MCFARLAND LAW OFFICE
dcmclaw@hotmail.com
Attorney for Appellees-Defendants

Vince Roche, Esq.
Justin T. Clarke, Esq.
DAVENPORT EVANS HURWITZ & SMITH, P.C.
vroche@dehs.com
jclarke@dehs.com
Attorneys for Appellees-Defendants

Dated: June 2, 2015

/s/ A.J. Swanson
A.J. Swanson

C

DeSchepper v.
Board of Commissioners, et al.

Timothy L. Kenyon
January 30, 2015

Audrey M. Barbush, RPR
audrey@paramountreporting.com
605.321.3539

paramount reporting

Min-U-Script® with Word Index

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT

COUNTY OF MINNEHAHA) SECOND JUDICIAL CIRCUIT

IN THE MATTER OF DRAINAGE PERMITS 11-81 JASON MCAREAVEY, APPLICANT, and 12-142, VERNON MCAREAVEY, APPLICANT.

MARK DESCHEPPER,

Appellant,

vs.

Civ. 11-2729
Civ. 12-3742
(Consolidated Cases)

THE BOARD OF COMMISSIONERS, MINNEHAHA COUNTY, SOUTH DAKOTA,

Respondent,

and

JASON MCAREAVEY AND VERNON MCAREAVEY,

Appellees.

MARK DESCHEPPER

Plaintiff,

vs.

VERNON R. MCAREAVEY and MINNEHAHA COUNTY, SOUTH DAKOTA,

Defendants.

Deposition of: TIMOTHY L. KENYON
Date: January 30, 2015
Time: 10:00 a.m.

APPEARANCES

Mr. A.J. Swanson
Arvid J. Swanson P.C.
Canton, South Dakota

Attorney for the Plaintiff

Mr. James E. Moore
Woods, Fuller, Shultz & Smith
Sioux Falls, South Dakota

and

Ms. Sara E. Show
Minnehaha County State's Attorney's Office
Sioux Falls, South Dakota

Attorneys for Minnehaha County

Mr. Justin T. Clarke
Davenport, Evans, Hurwitz & Smith
Sioux Falls, South Dakota

Attorney for Vernon R. McAreavey;

ALSO PRESENT: Mark DeSchepper

REPORTED BY: Audrey M. Barbush, RPR

INDEX

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(The original transcript was provided to Mr. Clarke.)

-oOo-

STIPULATION

It is hereby stipulated and agreed, by and between the above-named parties through their attorneys of record, whose appearances have been hereinabove noted, that the deposition of TIMOTHY L. KENYON may be taken at this time and place; that is, at the offices of Davenport, Evans, Hurwitz & Smith, 206 West 14th Street, Sioux Falls, South Dakota, on the 30th day of January, 2015, commencing at the hour of 10:00 a.m.; said deposition taken before Audrey M. Barbush, a Registered Professional Reporter and Notary Public within and for the State of South Dakota; said deposition taken for the purpose of discovery or for use at trial or for each of said purposes, and said deposition is taken in accordance with the applicable Rules of Civil Procedure as if taken pursuant to written notice. Objections, except as to the form of the question, are reserved until the time of trial. Insofar as counsel are concerned, the reading and signing of the transcript by the witness is not waived.

-oOo-

TIMOTHY L. KENYON,

called as a witness, having been first duly sworn, testified as follows:

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Q Sure. Do you have any military experience?
A **No.**
Q I have to ask everyone this: Have you ever been convicted of a felony?
A **No.**
Q Sometimes that's an uncomfortable question.
A **It's easy to answer.**
Q When were you first contacted on this case?
A **It was in early October. I couldn't tell you the exact date, but the first week of October.**
Q Of 2014?
A **Yes, sir.**
Q Who contacted you?
A **Mr. Swanson.**
Q What were you asked to do on this case?
A **I was asked to review this file, the information that existed at the time, to see if it fit with my expertise.**
Q Your expertise being?
A **Hydrogeology.**
Q Have you worked with Mr. Swanson before?
A **No.**
Q When did you first meet Mr. Swanson?
A **That first week of October, I believe.**
Q So you didn't know him through any other organizations

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or any affiliations before this time?
A **I did not.**
Q Do you advertise your services to act as an expert witness?
A **No.**
Q Have you worked with Mr. DeSchepper before on any cases?
A **No.**
Q Anyone in his family?
A **No. Well, I don't know all of his family. So, none that I'm aware of.**
Q Fair enough. I'm handing you what's been marked as Exhibit 2. This was produced to us by Mr. Swanson as well. Could you identify this for me?
A **It's my résumé.**
Q If you want to look through that and just make sure that's a complete copy, I would appreciate that.
A **(Complied.) Yes, this appears to be a complete copy of the résumé I sent Mr. Swanson.**
Q Have there been any updates or changes to this since October, 2014?
A **Well, you can always add things to a résumé when you've got a lot of project experience. But, no, I wouldn't add anything to it necessarily.**
Q From what I gather, you have a degree in geology and in

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geological engineering. Is that correct?
A **Correct.**
Q When I look down here, it says you're a registered professional geologist in Minnesota, Nebraska, and Kansas. Is that right?
A **Correct.**
Q But not in South Dakota?
A **There is no registration in South Dakota.**
Q That was my next question was if there was a requirement for registration in South Dakota.
A **There's not only not a requirement. One doesn't exist.**
Q Are you a registered or a professional engineer?
A **No, I am not.**
Q I've had the opportunity to look through your résumé. Is it fair to say a large portion of your work has been devoted to solid waste management/landfill projects in recent years?
A **Yes.**
Q Looking at this, on Page 2 of your résumé, from '77 to '81 it says you were a driller/geologist at South Dakota Geological Survey. Can you just tell me a little bit about what that entailed?
A **As a driller and geologist, I drilled holes. I actually operated the drilling rig. Drilled the holes, logged the holes and, as a geologist, had more of a --**

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less of a hands-on in the drilling rig and more of a supervisory role while the driller drilled the holes.
Q When we're drilling holes, how deep are we going into the ground here? What are we studying?
A **Typically here in eastern South Dakota we were only a couple hundred feet because the Sioux quartzite's down there, and you just can't drill into it.**
Q You know what's there already essentially having the Sioux quartzite down that far?
A **Well, you drill down -- typically, depth is limited by the occurrence of that quartzite because it's very, very difficult to drill into; and there's really no reason to. So a couple hundred feet.**
Q Sure. The next position was in Dickinson, North Dakota; Sidney, Montana; and Gillette, Wyoming. Operations Supervisor at Western Company. What was that?
A **That was oil field services. We cemented, acidized, and fractured oil wells during the oil boom in the '80s.**
Q And now they're reopening them?
A **Now the oil boom of the teens is going away.**
Q The next work experience you have listed is Regional Environmental Manager for Twin City Testing Corporation in Sioux Falls. What was that?

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won't be allowed?
A. **No.**
Q. That's the easiest way to state it.
A. **Oh, okay.**
Q. Now, we've gone through quite a few cases here. Are there any other cases in the last five years where you were retained as an expert but you didn't end up testifying?
A. **I don't think so.**
Q. Have you ever testified in a case involving installation of drain tile like this one here, similar to this?
A. **The one here southwest of town where drain tile was to be installed.**
Q. In that residential development?
A. **Correct.**
Q. How many open cases do you have right now for providing expert work for attorneys?
A. **None -- this one.**
Q. This one?
A. **This one, yeah.**
Q. What do you charge for your expert services?
A. **$230 an hour.**
Q. $230 an hour?
A. **Yep.**

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Q. We mentioned you're planning to attend trial to testify in this case?
A. **Well, it's not my plan. If I'm required to be there.**
Q. Sure.
A. **I don't have a lot of planning power in this whole thing.**
Q. Understood. If you're asked to testify at trial, that's what you will do?
A. **Yes.**
MR. SWANSON: He's planning to attend trial.
THE WITNESS: Okay.
BY MR. CLARKE:
Q. Now, we talked a little bit about your experience and the case that you had southwest of town here. What other experience do you have with studying the effects of drain tile in soil in general?
A. **In general?**
Q. Um-hum.
A. **My entire body of work has dealt with movement of water, through soils, through the geology.**
Q. Specifically, then, with regard to agricultural installation of drain tile for farming practices.
A. **Not much.**
Q. Have you ever been involved in any field studies regarding the effects of drain tile?

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A. **I've read some papers. Not directly involved.**
Q. That was going to be my next question, if you had read any literature regarding the effects of drain tile in soil.
A. **Yes.**
Q. So in your practice how often would you say you address the installation of drain tile as an issue?
A. **It's not very often.**
Q. I haven't introduced it yet, I don't think. I said it, but I didn't -- I'm going to hand you what's been marked as Exhibit 3. Can you identify this for me?
A. **That's my report. At this point, if I can make a comment?**
Q. Sure.
A. **For full disclosure, there's a mistake in this report; and I want to point it out.**
Q. Let's do that immediately so that --
A. **Just so we're all on the same sheet of music.**
Q. Sure.
A. **And I don't know how this made it -- it's embarrassing.**
On Page 2 of the report, the second-to-the-last paragraph from the bottom where it talks about "This is consistent with direct observations of the area of the lakes conducted on October 7, 2014," it's October 31st. I apologize for the error and don't know how that made

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it through all the process.
Q. If that's the biggest error that you find, that's pretty impressive, I guess.
MR. SWANSON: What's the date, Tim?
THE WITNESS: The 31st. Halloween.
I just wanted to be accurate.
BY MR. CLARKE:
Q. And when did you prepare this report?
A. **In the weeks leading up to November 11th, which is the date of the report.**
Q. This report sets forth your final opinions in this case. Is that true?
A. **Opinions at the time, unless there's new information that comes to light.**
Q. That's what I was going to ask you. So, do you plan on giving any additional opinions that are not in this report?
A. **Right now there's no information that's come to light; so, unless that happens, no.**
Q. And you're not aware of any additional studies or anything that will be done at Twin Lakes that you would rely upon, are you?
A. **I'm not aware of any.**
Q. Now, we had listed the references earlier on Page, I believe, 7. Those are the ones that you cited in

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planted there. Right? We're not adding a discharge point?
A Or it goes into the lake.
Q Yes. I should have phrased that better.
All the water in the watershed goes into Twin Lakes, into the ground, into the atmosphere, or is used by the plants?
A Well, and if it's used by the plants, it ends up in the atmosphere.
Q Yes, agreed.
A Yeah.
Q So now with the tiled soils, then, when you're doing your report, did you take into consideration these studies that plants use more water, then, in the tiled condition?
A I looked at them, yes.
Q That didn't change any of your opinions?
A No.
Q I know you said you looked at some of the reports and some of the literature. Do you agree that the drain tile actually reduces surface runoff in low-permeability soils?
A No.
Q It doesn't do that?
A I do not agree with that.

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Q I believe Dr. Sands put in his report and cited some field studies that show that in a tiled condition there's actually less runoff in areas like the Twin Lakes. Do you disagree with that, those field studies?
A It was in his report. I don't recall it being specific to Twin Lakes.
Q Yeah, I believe it was more of a hydrological basis for his opinion that field studies have shown that in a tiled condition there's actually less runoff.
Would you agree with that?
A I don't recall any field studies in the Twin Lakes area.
Q Do hydrological principles not apply, then, in the Twin Lakes area, specific studies and things of that nature that have been done in other similar areas?
A No, they don't universally apply.
Q Now, you said here on Page 4 --
Do you have that in front of you?
A Yes.
Q There are a couple places you say the magnitude of the increase is unknown. I believe that's in reference to the amount of water that you claim is being brought into the lake by drain tile.
Is that accurate?

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MR. SWANSON: Counsel, where are you in this report?
MR. CLARKE: Sure. It's the last line in Paragraph 3 and then the last line in Paragraph 4.
MR. SWANSON: Oh, thank you.
BY MR. CLARKE:
Q Do you see that?
A Yes.
Q So, I probably should repeat my question.
In a few places in your report you say that the magnitude of the drain tile is unknown. Is that a fair and accurate assumption from your report?
A That's what I said.
Q With that, then, with it being unknown, you can't say then that the drain tile installed by the McAreaveys is a substantial factor in causing the lake to rise, can you?
A Without knowing that, it is causing the lake to rise. The question of how much is unknown.
Q I believe Mr. DeSchepper had stated --
And maybe it's in -- we'll get into those documents in a second.
-- but, that the lake had been rising since 1997.
Do you recall seeing that?
A I recall seeing that.

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Q And the McAreaveys weren't tiling then?
A Not to my knowledge.
Q So, with regard to that, the lake is already rising; we had other sources that are leading to the lake to rise?
A Yes.
Q So the McAreaveys' tiling, then can you say that it's a substantial factor causing the lake to rise, then, if the lake was already rising prior to them tiling?
A Can't say it was substantial. Can't say it wasn't.
Q Either way you can't say. That's fair?
A It's unknown.
Q Did you do any -- and I believe this is in some of the information. There are some additional drains installed. Is that right? A dairy or something?
A I believe there's another drain tile on the northeast side of the lake.
Q I think that was in there, too. I think it was a dairy, maybe.
A I think I saw that in the county information.
Q Yeah. Did you do any studies or do any investigation regarding that drain tile?
A No.
Q So you didn't do anything to determine the effect over there, what was going on with that drain tile?
A No.

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Q He kind of goes through there, then, explains the civil law rule of drainage and the legal theory.
Do you see that in the next paragraph?
A I do.
Q And then down here, Point 1, he mentions Bulletin 37, Geology of Minnehaha County?
A Yes.
Q By -- is it D. Tomhave?
A Yes.
Q He asks you to consider those items when making your report. And that's in your report. Right?
A Yeah, that's one of the references in my report, Dennis's work.
Q Had you planned on using that in your report before Mr. Swanson told you that he'd like you to look at it?
A I knew that would be one of my primary resources, having worked with Dennis Tomhave, yes. I knew that it was out there.
Q On the next page, I highlighted this. It states right at the top: "Evaporation, of course, doesn't begin to offset the rise, as you've noted with other lakes."
What did you note regarding other lakes? What does that mean?
A Are you talking about 0038?
Q Yes. I'm sorry.

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A Just so we're on the same page.
Q TK 0038.
A And which paragraph are you in?
Q At the very top of the page, it says: Evaporation, of course, doesn't begin to offset the rise, as you've noted with other lakes."
What did you note regarding other lakes?
A Really not much except there's a lot of lakes in the area that have come up.
Q Then the Geologic Map of South Dakota is Point 2?
A Yes.
Q And you used that in your report as well. Right?
A Yes.
Q Had you planned on using that in your report as well --
A Yes.
Q -- prior to him directing you to that?
A I was aware that it's out there. In fact, some of the work that I did went into the formulation of that map.
Q Then he mentions in Point 3, asks you to put in some discussion of the characteristics regarding the soils, that it would be important. Correct?
A Yes.
Q And you put that in the report? That's the beginning, I believe, that gives us the geology of the area, essentially?

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A Yes.
Q Now, in Paragraph 4 -- this is a bigger one -- states that: "We have overhead photos that would be of interest." Are we talking about these large photographs here?
A Yes. I believe so, yes.
Q And it states: "But I recognize these are of historical presentations only and do not mean the drain tile has actually been a major cause of this expansion." Do you see that?
A I do.
Q He goes on to explain his thoughts regarding the civil law rule of drainage and added contribution to the collection by artificial means.
Do you know independent of your work on this case what the civil law rule of drainage is? Do you have any experience with that?
A I had run across it before, yes.
Q And the use of the word "artificial" -- in the report you mention that a few times. Correct?
A Correct.
Q This is in Section 5; and I think I alluded to this earlier, that there's a note that the lake started rising when Mr. DeSchepper purchased the land in 1997.
Do you see that?

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A That's what it says.
Q So we know that the lake was rising before the McAreaveys began any permitting to tile. Correct?
A That's my understanding.
Q Sure. Now, at the bottom in Point 6 he asks you to put in your report -- he wants you to confirm that Twin Lakes is not a watercourse. Do you see that?
A I do.
Q And I believe on Page 3 you gave a definition of "watercourse." If you want to look, you can.
A Yes, I recall that.
MR. SWANSON: Page 3 of his report?
MR. CLARKE: His report.
THE WITNESS: Yes.
BY MR. CLARKE:
Q So that's a geologic definition of "watercourse," so I understand?
A Yes.
Q Do you know whether or not our South Dakota laws or statutes define "watercourse"?
A I believe there's several different definitions of "watercourse."
Q Do you know whether it's defined by statute or anything of that nature?
A I believe it is.

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Q By overland flow.
A **Yes. The answer to the last question was incomplete. Prior to the drain tile, it was natural. After the drain tile, there's a natural component and a drain tile component.**
Q Is it your understanding that the highest water level in Twin Lake was reached at some point in 2011?
A **Yes.**
Q Do you know how much the water level of Twin Lake has receded since 2011?
A **It appears to be on the order of five or six feet.**
Q What's that based on?
A **Just being out there and looking at the lake. I didn't measure it, but it appears to be five or six feet.**
Q And you were out there on October 31st of 2014?
A **Correct.**
Q Have you been there at any other time?
A **I've driven by there on the way home just to keep up with what's going on.**
Q As it relates to this case or just in general?
A **As it relates to this case just, you know, is it -- is the lake changing a lot? Is it frozen over? Just trying to remain familiar with the area.**
Q Do you have any knowledge of the crop production on McAreaveys' property before or after drain tile was

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installed?
A **No.**
Q There's a statement in the Sands report on Page 1 of 8, the third paragraph, first sentence: "The hydrologic effects of artificial drainage (both surface and subsurface) are complex."
Do you agree with that statement?
A **Yes.**
Q On Page 3 of the Sands report, the third paragraph indicates there that heavier poorly drained soils have smaller drainable porosity volumes, larger plant available water, and lower infiltration rates than lighter soils. Do you agree with that statement?
A **Not entirely.**
Q Tell me what you disagree with.
A **The statement is inaccurate in that it's grossly generalized. The type soil we have at Twin Lakes is composed predominantly of clay with organic material, and it has a pretty low rate of infiltration. Water tends to run off of it pretty easily.**
Q I'm not sure I understand the basis for your disagreement. The statement says that heavier soils, those with more clay, have lower infiltration rates. In other words, the water runs off more easily. I thought that's what you just said.

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A **I guess you're right. You're correct.**
Q And the last sentence, then, in that paragraph says that those soil properties can greatly affect how each precipitation event plays out. Do you agree with that?
A **Yes.**
Q On Page 2 there's an equation at the top of the page: P equals ET plus R plus Delta S plus Z.
Is that an equation that you're familiar with in your line of work?
A **Yes.**
Q Is it an equation that you agree with?
A **Yes.**
Q Mr. Kenyon, based on the work that you've done, are you able to quantify what the overland flow rate was into Twin Lake before the drain tile that the McAreaveys installed and compare it to the overland flow rate after the drain tile was installed?
A **No. Data does not exist to do that.**
Q Given that fact, on Page 3 of your report, the last sentence in the first full paragraph says: "Consequently, water that is discharged into the lakes from drain tiles is water that would not have naturally entered the lakes."
A **Correct.**
Q How can you say that is true if you don't know the

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overland flow rate before the drain tile and after the drain tile?
A **The hydrologic cycle of the glacial till and the soils that overlie it consists of recharge in the spring and the soil profile fills up, the discharge by evapotranspiration in the fall or in drier times. That's not surface runoff, and it doesn't have a component of surface runoff in it. And that stored water is the water that enters the lake, and that consists or that represents the new water source, if you will.**
In a natural condition, that water never gets to the lake. It evapotranspires out and goes into the atmosphere. In a drained condition, when that water infiltrates into the soil, instead of staying there until it evaporates, it goes down the drain tile to the lake. So it's that stored water that represents the new source of water to the lakes.
Q My understanding from your testimony was that the amount of water beneath the surface of the soil affects the overland flow rate.
A **You misunderstood.**
Q Is that not correct?
A **That is not correct.**
Q And why is that?

ERRATA SHEET

In the Matter of Drainage Permits 11-81 and 12-142

Deposition of: Timothy L. Kenyon

Reporter: Audrey M. Barbush, RPR

Taken on: January 30, 2015

Indicate changes you want to make below, including page number, line number, the text as shown in the transcript, what you want to change it to, and the reason for the change.

Page	Line	Presently Reads	Should Read	Reason for Change
7	24	sixty-two	sixty-one	my mistake
29	24	$230	$230 in 2014, $235 in 2015	was not sure of 2015 rate
46	16	cell	soil	phonetic spelling
69	19	spacial	spatial	phonetic spelling

I have read my deposition and have noted any changes I wish to make to it above. Signed and dated this 17 day of February, 2015.

Tim Kenyon

Digitally signed by Tim Kenyon
DN: cn=Tim Kenyon, o=LBG, ou=Sioux Falls, mail=timk@bgdlaw.com, c=US
Date: 2015.02.17 12:19:45 -06'00'

Deponent

D

STATE OF SOUTH DAKOTA)
: SS
COUNTY OF MINNEHAHA)

IN CIRCUIT COURT

SECOND JUDICIAL CIRCUIT

IN THE MATTER OF DRAINAGE PERMIT 11-81 and 12-142, JASON MCAREAVEY, APPLICANT,

MARK DESCHEPPER,

Appellant,

vs.

THE BOARD OF COMMISSIONERS, MINNEHAHA COUNTY ,SOUTH DAKOTA,

Respondent,

and

JASON MCAREAVEY and VERNON MCAREAVEY,

Appellees.

CIV. 11-2729
CIV. 12-3742
(Consolidated Cases)

DEFENDANT VERNON MCAREAVEY'S STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON ABATEMENT OF NUISANCE CLAIM AND INJUNCTIVE RELIEF

MARK DESCHEPPER,

Plaintiff,

vs.

VERNON R. MCAREAVEY and THE BOARD OF COMMISSIONERS, MINNEHAHA COUNTY, SOUTH DAKOTA,

Defendants.

Defendant Vernon McAreavey pursuant to SDCL 15-6-56, hereby submits the following

statement of undisputed material facts in support of his Motion for Summary Judgment on Plaintiff Mark DeSchepper's remaining claim for abatement of a nuisance and injunctive relief:

1. On December 5, 2015, the Circuit Court, Judge Mark E. Salter presiding, entered summary judgment in favor of McAreavey on all causes of action alleged by DeSchepper except DeSchepper's claim for injunctive relief couched as an abatement of a nuisance claim. (Affidavit of Justin T. Clarke Ex. B at 12.)[1]

2. A court trial was held on July 26-27, 2016, addressing DeSchepper's administrative appeal of the Minnehaha County Board of County Commissioners' ("County") grant of agricultural drainage permits 11-81 and 12-142. (Clarke Affidavit Ex. C at 2.)

3. After hearing the parties' evidence and receiving the parties' post-hearing briefs, the Court affirmed the County's grant of the drainage permits to McAreavey. (*Id.*)

4. In his Brief in Resistance to (1) Motion to Strike or Exclude Testimony of Tim Kenyon, and (2) Motion in Limine, DeSchepper stated "If the Court determines they have been lawfully approved, in light of the fixed rules and standards (namely, the civil law rule of drainage), then there would be little point – at this juncture and this point in time – in pursuing the remaining relief sought in the complaint against McAreavey." (Clarke Affidavit Ex. A at 16.)

[1] This Court has already determined DeSchepper's "abatement of a nuisance" claim is essentially injunctive relief and the Court does not discern a fundamental difference between his claim for abatement and his separate claim for injunctive relief. (Clarke Affidavit Ex. B at 12.)

Dated at Sioux Falls, South Dakota, this 19th day of September, 2017.

DAVENPORT, EVANS, HURWITZ & SMITH, L.L.P.

Vince M. Roche
Justin T. Clarke
206 West 14th Street
PO Box 1030
Sioux Falls, SD 57101-1030
Telephone: (605) 336-2880
Facsimile: (605) 335-3639
Attorneys for Defendant Vernon R. McAreavey

CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for Defendant, hereby certifies that a true and correct copy of the foregoing "Defendant Vernon McAreavey's Statement of Undisputed Material Facts on Abatement of Nuisance Claim and Injunctive Relief" was served by Odyssey file & serve upon:

A.J. Swanson
Arvid J. Swanson P.C.
27452 482nd Avenue
Canton, SD 57013
Attorney for Plaintiff Mark DeSchepper

Dennis McFarland
McFarland Law Office
505 West 9th Street #101
Sioux Falls, SD 57104
Attorney for Jason McAreavey and Vernon McAreavey

James E. Moore, Esq.
Woods, Fuller, Schultz, & Smith, P.C.
PO Box 5027
Sioux Falls, SD 57117-5027
Attorneys for Minnehaha County

on this 19th day of September, 2017.

E

STATE OF SOUTH DAKOTA) :SS COUNTY OF MINNEHAHA)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
IN THE MATTER OF DRAINAGE PERMIT 11-81, JASON MCAREAVEY, APPLICANT, and IN THE MATTER OF DRAINAGE PERMIT 12-142, VERNON MCAREAVEY, APPLICANT. MARK DESCHEPPER, *Appellant,* vs. THE BOARD OF COMMISSIONERS, MINNEHAHA COUNTY, SOUTH DAKOTA, *Respondent,* and JASON MCAREAVEY and VERNON MCAREAVEY, *Appellee.* MARK DESCHEPPER, *Plaintiff,* vs. VERNON R. MCAREAVEY and MINNEHAHA COUNTY, SOUTH DAKOTA, *Defendants.*	49CIV11-002729 (CIV. 12-3742-Consolidated Cases) PLAINTIFF'S RESPONSE TO DEFENDANT'S STATEMENT OF UNDISPUTED MATERIAL FACTS AND PLAINTIFF'S STATEMENT OF MATERIAL FACTS

Comes now MARK DESCHEPPER, as Appellant and Plaintiff (and sometimes referenced as "DeSchepper"), in the above-referenced consolidated cases, by and through his counsel, and provides the following Response to Defendant Vernon McAreavey's Statement of Undisputed Material Facts (numbered paragraphs, following, correspond to the paragraph

numbers in the Statement of Facts, as filed herein on 9/19/2017 1:28:26 PM CST).

1. Admit.

2. Admit.

3. Admit.

4. Admit that, while indeed the quoted text was contained in a brief written by DeSchepper's counsel in 2015, the statement is more an observation on a question of law, about which the writer (over the course of 45 years and 4 months of practice) often has been proven wrong, and this, the writer further submits, would be one of those times. An accompanying response, written by DeSchepper's counsel, has more to say about why this is so.

DESCHEPPER'S STATEMENT OF MATERIAL FACTS

A. For a number of years, Minnehaha County, the location of the respective properties of the parties, has regulated the drainage activities of dominant landowners. (Stipulation of Counsel, October 25, 2011, with annexed Ordinance MC38-10, and others, Clerk's file)

B. Drainage regulation in the county was in the form of a drainage plan and ordinance, under which drainage permits were required. (*Id.*)

C. DeSchepper's Farm (SW4 of 17-103-52), acquired by him in 1997 and serving as his residence since 2009, is adjacent to Twin Lake (sometimes, Twin Lakes), a non-meandered body of water that originally had two distinct bodies (North Body and South Body), which more recently have merged into one body of water. (Affidavit Mark DeSchepper, ¶ 2)

D. During the past twenty years, whether weekly or daily, DeSchepper has closely observed the seasonal fluctuations in the water levels of Twin Lake, with particular regard to the lake water coming onto the DeSchepper Farm, with the known size of a culvert under his

driveway being a means of measurement. (*Id.*, ¶¶ 5, 9)

E. The State of South Dakota purchased Twin Lake in or about 1956, an approximate 255-acre purchase in the E2 of 17-103-52; since then, Twin Lake has expanded to occupy about 350 acres, including inundation of some forty acres of DeSchepper's Farm. (*Id.*, ¶ 23)

F. Twin Lake is a prairie pothole, left behind by the retreating glaciers of the Wisconsin Age, the watershed being an approximate circle of around 980 acres, with DeSchepper's farm and Twin Lake being at the bottom of the "cup." (*See* Exhibits 40, 41, annexed to Affidavit A.J. Swanson)

G. When surface water enters Twin Lake, it leaves only by evapotranspiration (described by experts as a combination of plant uptake and the evaporative drying effect of wind, temperature and atmospheric conditions), lacking a regular natural outlet, even as the soils within the watershed basin are impenetrable, inhibiting absorption and lateral travel within the soil profile. (Affidavit Mark DeSchepper, ¶¶ 5, 24)

H. Defendant's farms, as relevant, are in two sections – the NW4 of 17-103-52 ("North Farm"), sitting immediately north of DeSchepper's Farm, and the N2 of 20-103-52 ("South Farm"), which also adjoins DeSchepper's farm on the south, as well as the South Body of Twin Lake. (First Amended Complaint, October 11, 2011, ¶ 5)

I. In 2008, ostensibly as a result of drainage permits issued by Minnehaha County ("2008 Permits"), Defendant installed six-inch perforated drain tile at a depth of about 3 feet on both of the described farms, with the South Farm now served by 3 tile outlets pointing in the direction of Twin Lake, while the North Farm has one outlet (installed in 2009), pointed towards Twin Lake but emitting drain water near the north property line of DeSchepper's Farm. (*Id.*, ¶

23)

J. Shortly after the tile lines were installed in 2008 and 2009, Twin Lake water levels rose high enough to bury *all* of the tile outlets below the water surface, a condition that remained so at the time of trial in 2016. (Affidavit Mark DeSchepper, ¶ 6)

K. Although the tile lines are not equipped with flow meters, Defendant avers the tile lines are all working. (*See* Affidavit of Mark DeSchepper, June 1, 2015, incorporated by reference into current Affidavit of Mark DeSchepper, the former, at 5-6, extensively quoting from deposition testimony of Vernon McAreavey and Jason McAreavey, both taken June 11, 2013)

L. Much of DeSchepper's Farm now has the appearance of being an extension of Twin Lake. (Affidavit Mark DeSchepper, ¶ 23)

M. For a several month period of time in 2011, Twin Lake rose high enough to begin outletting at the northwest corner (at an elevation of 1,735.5 feet NGVD), along an ancient outlet path towards the West Branch of Skunk Creek. (*Id.*, ¶ 7)

N. Following severe drought conditions in 2011, Twin Lake fell by several feet and ceased to outlet. (*Id.*, ¶ 8)

O. DeSchepper's Farm has been adversely affected by the ever-increasing water level in Twin Lake, having lost about fifty (50) acres of crop production and trees to the effects of the water in the past 20 years. (*Id.*, ¶ 23)

P. Between 2009 and 2011, at the urging of DeSchepper and Minnehaha County's own Administrative Official, the Drainage Board of Minnehaha County several times considered Defendant's tile installations, entering determinations unfavorable to McAreavey, including a directive that certain tile installed beyond the scope of the 2008 Permits be removed. (*See*, for

example, Exhibits C and D to First Amended Complaint)

Q. The 2008 Drainage Permits, moreoever, were issued by the Administrative Official without notice to Deschepper, actions contrary to the requirements of Minnehaha County's Drainage Ordinance; these permits were then replaced by one consolidated permit, authorized and approved under ADP 12-142; meanwhile, the drain tile contemplated by ADP 11-81 has yet to be installed by Defendant McAreavey. (The Court's recitation of facts, at 3 of memorandum opinion, entered December 13, 2016, incorrectly states otherwise – ADP 12-142 actually purports to belatedly replace the earlier permits issued without notice to DeSchepper; meanwhile DeSchepper has always actively contested ADP 11-81, for which hearing was timely held and is a proposed expansion of drains installed under prior permits, which remains uninstalled at this writing, to our best knowledge.)

R. Twin Lake is not named or listed as a so-called "blue-line stream" in the Drainage Ordinance, for which the Administrative Official may have had discretion to issue drainage permits without notice to other landowners. (Ordinance MC38-10, annexed to Stipulation of Counsel, October 25, 2011, at p. 4, § 1.06)

S. Following the Court's memorandum opinion of December 13, 2016 (upholding the issuance of drainage permits to McAreavey), Minnehaha County elected to leave the business of regulating drainage under the provisions of SDCL Chapter 46A-10A, having repealed both its Drainage Plan and Drainage Ordinance effective May 31, 2017. (Stipulation of Counsel, with Order filed August 11, 2017, with annexed Ordinance MC49-17)

T. Drain tile, such as that used or installed on the McAreavy's North Farm and South Farm, consists of high-density polyethylene plastic pipe (HDPE), with regular or frequent perforations (slots) or drilled holes to admit water from the surrounding soil profile. This same

material is produced in solid tubes, without perforations or drilled holes, and is used to transport water underground that has been captured from the surface, through inlets or risers. (Affidavit Mark DeSchepper, ¶¶ 15, 16)

U. On the tile installations on the McAreavy Farm, only the leading edge of the tile line installed (buried) on the North Farm has an "elevated inlet riser" (and that is a single, above-ground inlet, orange in color, installed just north of the boundary between DeSchepper's Farm and the North Farm), capable of directly admitting *surface water* to the buried tile; to Plaintiff's knowledge, *other than this single exception*, the tiles on both the North Farm and the South Farm otherwise function, *and in their entirety*, by means of many thousands of small, perforated openings along the tile's exterior, working around the clock, day-in and day-out, throughout the year, to admit *subsurface water* into the tile's interior, where, promptly following collection, the water is transported by gravity, and transported down grade to the tile's outlet. (*Id.*, ¶¶ 13, 14, 15)

V. DeSchepper readily agrees the civil law drainage rule, as recognized in South Dakota, places on him the burden of accepting the drainage of *surface water*, under certain conditions, but does not oblige him to accept also, without distinction or compensation, the dominant landowner's drainage of *subsurface waters* under the facts herein recounted as to Twin Lake's watershed and hydrology. (*Id.*, ¶ 20)

ARVID J. SWANSON P.C.

Dated: November 8, 2017

/s/ A.J. Swanson

A.J. Swanson
27452 482nd Avenue
Canton, SD 57013
(605) 743-2070
E-mail: aj@ajswanson.com

Attorney for
MARK DESCHEPPER
Appellant & Plaintiff

F

STATE OF SOUTH DAKOTA :SS COUNTY OF MINNEHAHA	)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
IN THE MATTER OF DRAINAGE PERMIT 11-81 AND 12-142, JASON MCAREAVEY, APPLICANT. MARK DESCHEPPER, Appellant, vs. THE BOARD OF COMMISSIONERS, MINNEHAHA COUNTY, SOUTH DAKOTA, Respondent, and JASON MCAREAVEY AND VERNON MCAREAVEY, Appellees.	)	Court Trial CIV 11-2729 CIV 12-3742 (Consolidated Cases)
MARK DESCHEPPER, Plaintiff, vs. VERNON MCAREAVEY and THE BOARD OF COMMISSIONERS, MINNEHAHA COUNTY, SOUTH DAKOTA, Defendants.	)	

BEFORE: Honorable Mark Salter,
Circuit Court Judge

PROCEEDINGS: The above-entitled proceeding commenced at 9:00 a.m. on the 26th day of July, 2016, in Courtroom 6D at the Minnehaha County Courthouse, Sioux Falls, South Dakota.

APPEARANCES

Mr. A.J. Swanson
Arvid J. Swanson P.C.
27452 482nd Avenue
Canton, South Dakota 57013

For the Appellant/Plaintiff;

Mr. Vince Roche
Mr. Justin Clarke
Davenport, Evans, Hurwitz & Smith
PO Box 1030
Sioux Falls, South Dakota 57101

For the McAreaveys;

Mr. James Power
Woods, Fuller, Shultz & Smith
300 South Phillips Avenue
Sioux Falls, South Dakota 57104

For the Board of Commissioners.

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THE COURT: Is it? A pasture? So something green. So is that where it's outletting?

THE WITNESS: Yes. To the northwest.

THE COURT: Got it. Now I know what you're talking about.

Q **(BY MR. SWANSON)** Mark, directing your attention to Exhibit 9. Is this a copy of the same photos that are in Exhibit 8?

A Yes, sir.

Q Has -- have black lines been added to show the approximate outline of your quarter section?

A Yes, sir.

Q And again the orientation would be the same and you're still flying the plane in these photos?

A Correct.

Q This photo, I think you said, was taken in April of 2011?

A I believe so, yes.

Q To your knowledge, would this have been the time that Twin Lake would have reached its maximum elevation for water level?

A Yes, sir.

Q When did it go back down?

A I think about August of 2011 the high rain cycle stopped and we actually went into a drought and that lasted through 2012. So from late 2011 through 2012 it receded quite a bit.

Q All right.
A Not all the way.
Q Has it receded from the end of 2012 further or is it about the same as it was, if you know?
A Same as it was.
Q At the end of 2012?
A Mm-hmm.
Q You should answer yes or no.
A Yes, sir.
Q How does that compare with the maximum elevation of the water in 2011 to where it is today? How much has it fallen, if you know?
A Between three and a half and four feet.
MR. SWANSON: I don't think I've done this, Judge, but I offer 8 and 9.
THE COURT: I don't think you have either.
Any objection?
MR. POWER: No.
MR. ROCHE: No.
THE COURT: They're both received, 8 and 9.
(Plaintiff's Exhibit Nos. 8 and 9 were admitted into evidence.)
Q **(BY MR. SWANSON)** Mark, directing your attention to Exhibit 10. Do you have that?
A Yes, sir.

A Correct.
Q And you received notice before that hearing?
A Correct.
Q And you appeared at it; right?
A Correct.
Q And you urged the commissioners to deny that permit because you believed the drain tile was contributing to the increase in the level of Twin Lake; right?
A Correct.
Q And throughout this whole history, you don't have any personal issues with the McAreaveys; right?
A No.
Q So you've always indicated to the commissioners that your sole objection to the drain tile was your belief the tile was contributing to the increase of the level of Twin Lake; right?
A Correct.
Q And you understood that the McAreaveys' position throughout this process has been that the drain tile does not increase the level of Twin Lakes; right?
A Correct.
Q You mentioned the drainage task force that was formed in 2010, do you remember that?
A Yes.
MR. POWER: I've got to dig out something real quick.

A Yes.
Q And your attorney got to speak some too; correct?
A Correct.
Q And you had the opportunity to submit photographs or maps to the commissioners?
A At that hearing?
Q Yes.
A I had the opportunity? I don't know if we did at that point.
Q Have you had that opportunity at other hearings?
A In the original hearings, yes. In '09.
Q Switching gears on you, is it fair to say that you have no personal knowledge -- you yourself have no personal knowledge of any facts that any of the commissioners granted Permits 11-81 or 12-142 for personal financial gain or some other improper purpose?
A I don't have that knowledge, no.
Q Is it fair to say that your testimony indicates Twin Lakes steadily grew between 1956 and 2008?
A It did but not gradually. I mean it was --
Q Bits and pieces?
A Right.
Q You mentioned that once the lake covers a certain area there's subirrigation that happens from the lake. Do you know how far that subirrigation goes out from the lake?

period; correct?

A That's correct. Other than Mr. DeSchepper's observation, there's no numerical data that I'm aware of.

Q Right. And this observation did not quantify an amount; correct?

A That's correct.

Q And you don't have data quantifying the amount of water omitted from the McAreavey drain tile for any time period; correct?

A Correct.

Q And there isn't any data measuring the amount of evapotranspiration for Twin Lake or the surrounding land for any time period; is that correct?

A That's correct.

Q And you don't have any data for the amount of crop production on the McAreaveys' drain tile land for any time period; correct?

A Correct. I think that data probably exists. I don't have it. I'm sure the McAreaveys know.

Q So for all those reasons, do you agree that you can't quantify the impact that McAreaveys' drain tiles had on level of Twin Lakes since it was installed; correct?

A Correct. That data would be necessary to make that quantification.

Q So to the extent the lake's level has increased since the

drain tile was installed, you can't say one way or the other whether the drain tile was a substantial factor in that increase; right?

A Can't quantify it. I wish we could.

Q I'm going to ask you to look at the Hay letter which is 104. I'm going to give a copy of that to the judge.

THE COURT: This is the deposition transcript?

MR. POWER: This is one of the stipulated exhibits. It's the Christopher Hay letter.

Q **(BY MR. POWER)** Now, Mr. Kenyon, have you ever seen that letter dated August 4, 2011, from Christopher Hay?

A Yes. I believe I referenced it in my report.

Q Right. You reviewed the letter and commented on it in your report; correct?

A Yes.

Q And you and Dr. Hay appear to agree that it's difficult to measure how much, if any, that drain tiling increases the water yield from a particular piece of land; is that true?

A I wouldn't agree that it's unmeasurable. It may be difficult to do but not undoable. Certainly could be done.

Q Right. So you agree it's difficult to measure?

A Yeah.

Q You also seem to agree that there's no data available concerning the amount of water yield from the McAreavey's land from either before or after they installed the drain

THE COURT: That's all the state land?

MR. POWER: That is, I think, the water.

THE WITNESS: I would have to refer to my report.

MR. SWANSON: It's actually from the Sands report, Counsel. It's 341.

THE COURT: Okay. I'm just trying to clarify. Forgive me for interrupting.

Q **(BY MR. POWER)** You talked a little bit about what evapotranspiration is affected by and you mentioned temperature and wind, is it also affected by relative humidity?

A Certainly.

Q So if the amount of evapotranspiration in the Twin Lake watershed decreased due to changing weather conditions, like a cooler year, then Twin Lake's level could rise even if the amount of water going into the lake remained constant; right?

A Yes. Less loss due to ET, constant input, the lake would come up.

MR. POWER: Okay. That's all the questions I have.

THE COURT: Mr. Clarke?

CROSS-EXAMINATION

Q **(BY MR. CLARKE)** Mr, Kenyon, you're a geologist; correct?

A Yes, sir.

Q You're not a registered or a professional engineer; right?

A No, sir. I have a BS in engineering and a lot of years ago I decided not to be a PE.
Q So your highest level of education is bachelor's degree; is that correct?
A Yes, sir.
Q You're not a PhD like Mr. Hay, excuse me, Dr. Hay or Dr. Sands?
A No, sir.
Q Now, you'd agree that in your practice as a geologist you haven't addressed the installation of agricultural drain tile very often, have you?
A Correct.
Q And you've never been involved in any field studies regarding the effects of drain tile; is that right?
A Correct.
Q You haven't written any publications regarding drain tile and its effect on agricultural drainage; correct?
A Correct.
Q Now, we've talked about your report some and your opinions. There are no field-based scientific studies with regard to drain tile to support your opinions in this case; is that correct?
A That I'm aware of. They've not been done in a geologic environment like we have in Minnehaha County.
Q So there's no field-based studies on which you rely;

correct?

A Not that I'm aware of, no.

Q And no field-based studies cited to support your conclusion that drain tile increases the water yield into Twin Lake; correct?

A That's -- yes, that's correct. I wish there were.

Q And there's no hydrological data in your report with regard to the effects of the drain tile; correct?

A Correct.

Q And I believe you've gone over this, but the effect is immeasurable; is that correct?

A No.

Q In its current state?

A No. It's not immeasurable. It hasn't been measured. Two hugely different things.

Q And you'd agree that that has not occurred; correct?

A It has not been measured. I wish it were. It would be a very fun study to do.

Q And you don't have experience studying whether drain tile allows crops to use more water while they grow, do you?

A I'm not an Ag guy.

Q No effect on production? No knowledge on that?

A I'm not an Ag guy.

Q And you've heard that the lake has been rising since 1997 according to Mr. DeSchepper; is that right?

A Yes.
Q The McAreaveys weren't tiling then, were they?
A Not to my knowledge, no.
Q And you also know that Twin Lake has receded in size since its high water mark in 2011; correct?
A Yes.
Q And I believe during your deposition you testified you had been to Twin Lake and you had seen that it had receded about 5 or 6 feet. Does that sound right?
A Yes. That's what it looked like when I was there. I didn't measure it so that might be off by a considerable factor.
Q You talked a lot about the soil types and geology today. Would you agree that the type of soil at Twin Lake is composed predominantly of clay and organic material and has a low rate of infiltration?
A I would agree with the first part. Second part, not necessarily.
Q You wouldn't necessarily agree with that?
A The first part that it's composed of clay and organic materials.
Q You'd disagree that it has a pretty low rate of infiltration? That water tends to run off it pretty easily?
A Well, according to the soil map, which is the definitive

source, the infiltration rate is up to, I believe the map said, .57 inches per hour. Which is -- that's a pretty considerable infiltration rate. So I would not characterize it as low.

Q Do you remember when we took your deposition on January 30, 2015?

A I do, yeah.

Q You do?

MR. CLARKE: Your Honor, may I approach?

THE COURT: You may.

Q **(BY MR. CLARKE)** During your deposition, Mr. Kenyon, you told the truth; correct?

A I tried.

Q Okay. I'm going to show you what I have highlighted here on Page 74 regarding a question about low infiltration rates. If you want to start here and tell me what your answer was regarding the type of soil at Twin Lake, what it was composed predominantly of and its infiltration rate?

A "Statement is inaccurate in that it's grossly generalized. The type of soil we have at Twin Lake is composed predominately of clay with organic material and has a pretty low rate of infiltration. Water tends to runoff it pretty easily." You got me.

Q So that's different than what you told us earlier today when you said that this had a decent infiltration rate and

that we didn't have much surface runoff; correct?

A Correct. And can I tell you the reason why?

Q No. No question pending.

A Okay.

Q And I think we've been over this. You can't quantify the overland flow rate into Twin Lake before the installation of the drain tile by the McAreaveys in comparison to the overland flow rate after drain tiles were installed; correct?

A It has not been measured. That's correct.

Q So we don't have any data at all to support the theory that more water is getting into Twin Lake; correct?

A Or less water. That's correct.

MR. CLARKE: Nothing further Your Honor.

THE COURT: Redirect?

REDIRECT EXAMINATION

Q **(BY MR. SWANSON)** Mr. Kenyon, you were asked by Counsel Power about the Exhibit 104, the Hay letter. Do you recall that?

A Yes.

Q Did we discuss that on your examination before, earlier today?

A I don't believe so.

Q Is the Hay letter subject of three paragraphs in your report at Page 5, the document marked as 37 that the Court

A I have it.
Q Are you familiar with Dr. Hay?
A I know Dr. Hay, yes.
Q Is he considered a competent guy? You'd respect his opinion?
A I do.

MR. POWER: Nothing further.

THE COURT: Do you have questions, Mr. Clarke?

MR. CLARKE: A few, Your Honor.

THE COURT: Go ahead.

CROSS-EXAMINATION

Q **(BY MR. CLARKE)** Dr. Sands, based upon what you've testified to here today and along with the questions asked and answered here for Mr. Power, based upon the studies that you have researched and been a part of, can you say to a reasonable degree of scientific probability that the drain tile in this case, which the McAreaveys have installed, does not increase the water yield into Twin Lake?
A I feel pretty confident in saying that.
Q Now, you've read Mr. Kenyon's report; correct?
A I have.
Q And you had the opportunity to hear him testify here today too; correct?
A Yes, I did.
Q After you read his report and heard his testimony, does his

THE COURT: So -- and hang on. I'm going to talk with you for just a second. So to narrow the issues for my consideration and I think we mentioned this earlier, too. This case isn't about -- I'm not challenging you. There's going to be a question mark at the end of this. The case really isn't about a commissioner acting fraudulently or having some sort of improper motive or nefarious motive other than maybe they weren't careful in the application of the law.

MR. SWANSON: Not careful and to the extent that they characterized this as natural drainage. We believe that is false evidence, yes.

THE COURT: So that would fall under the objectively false?

MR. SWANSON: That part of it would, yes.

THE COURT: And I -- that was one of the reasons why I ruled the way I ruled because I thought you would make that argument on the merits.

Mr. Power?

MR. POWER: Yeah. We're not characterizing this as natural drainage. It's an artificial drainage system that carries water in the direction water naturally flows, but we acknowledge drain tile constitutes artificial drainage. So our argument does not in any way depend on that.

MR. SWANSON: All you have to do is read -- and I don't mean to jump in without being invited here -- all you have

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 28525

IN THE MATTER OF DRAINAGE PERMIT 11-81, JASON MCAREAVEY, APPLICANT
and
IN THE MATTER OF DRAINAGE PERMIT 12-142, VERNON MCAREAVEY, APPLICANT.

MARK DESCHEPPER,
Appellant,

vs.

THE BOARD OF COMMISSIONERS, MINNEHAHA COUNTY, SOUTH DAKOTA,
Respondent-Appellee

JASON MCAREAVEY and **VERNON MCAREAVEY,**
Appellees.

MARK DESCHEPPER,
Plaintiff-Appellant,

vs.

VERNON R. MCAREAVEY and **MINNEHAHA COUNTY, SOUTH DAKOTA,**
Defendants-Appellees

Appeal from the Circuit Court, Second Judicial Circuit
Minnehaha County, South Dakota
The Honorable Mark E. Salter, Presiding

MINNEHAHA COUNTY'S APPELLEE'S BRIEF

A.J. Swanson
Arvid J. Swanson, P.C.
27452 482nd Avenue
Canton, SD 57013

Attorneys for Mark Deschepper, Appellant & Plaintiff-Appellant

James A. Power
James E. Moore
Woods, Fuller, Shultz & Smith P.C.
300 S. Phillips Avenue
P.O. Box 5027
Sioux Falls, SD 57117-5027

Attorneys for Board of Commissioners, Minnehaha County, Defendant-Appellee

Vince M. Roche
Justin T. Clarke
Davenport Evans Hurwitz & Smith, LLP
P.O. Box 1030
Sioux Falls, SD 57101-2880

Attorneys for Jason McAreavey and Vernon McAreavey, Appellees and Defendant-Appellee

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Notice of Appeal filed February 12, 2018

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JURISDICTIONAL STATEMENT

The County has no objection to DeSchepper's jurisdictional statement.

STATEMENT OF THE ISSUES

1. The circuit court found that McAreavey's drain tile, which uses perforated tubes, does not add any water to Twin Lake and so causes no injury to DeSchepper. In these circumstances, does the use of perforated tubes make the tile unlawful?

The circuit court held that South Dakota's civil law rule of drainage does not make drain tile using perforated tubes per se unlawful.

Thompson v. Andrews, 39 S.D. 477, 165 N.W. 9 (1917)
Anderson v. Drake, 24 S.D. 216, 123 N.W. 673 (1909)
Winterton v. Elverson, 389 N.W.2d 633 (S.D. 1986)
Rumpza v. Zubke, 2017 S.D. 49, 900 N.W.2d 601

2. The circuit court found that McAreavey's drain tile, which discharges into Twin Lake, which is located within a basin, does not add any water to Twin Lake and so causes no injury to DeSchepper. In these circumstances, is drain tile that discharges water into a lake within a basin per se unlawful?

The circuit court held that, in these circumstances, South Dakota's civil law rule of drainage does not make drain tile discharging into a lake within a basin per se unlawful.

Thompson v. Andrews, 39 S.D. 477, 165 N.W. 9 (1917)
First Lady, LLC v. JMF Properties, LLC, 2004 S.D. 69, 681 N.W.2d 94
Magner v. Brinkman, 2016 S.D. 50, 993 N.W.2d 74
SDCL § 46A-10A-20
SDCL § 46A-10A-70

3. DeSchepper did not present evidence of bias during the trial de novo. May DeSchepper raise a bias issue on appeal, or, alternatively, did DeSchepper overcome the presumption of objectivity during the trial de novo?

The circuit court held that DeSchepper had abandoned the issue of bias during the trial de novo.

Armstrong v. Turner County Bd. of Adjustment, 2009 S.D. 81, 772 N.W.2d 643

4. With regard to DeSchepper's civil tort claims, he did not present competent expert testimony at summary judgment that McAreavey's drain tile was causing Twin Lake's level to increase. Was DeSchepper's lay opinion concerning the drain tile's effect competent to create a jury question whether the drain tile had caused the lake's level to increase?

The circuit court held that the cause of Twin Lake's increase in level was a complex question requiring expert testimony, and thus DeSchepper's lay opinion could not create a jury question on the issue of causation.

Wells v. Howe Heating & Plumbing, Inc., 2004 S.D. 37, 677 N.W.2d 586
Burley v. Kytec Innovative Sports Equip., Inc., 2007 S.D. 82, 737 N.W.2d 397
Magner v. Brinkman, 2016 S.D. 50, 883 N.W.2d 74
Garr v. City of Ottumwa, 846 N.W.2d 865 (Iowa 2014)
Davis v. City of Mebane, 512 S.E.2d 450 (N.C. App. 1999)

STATEMENT OF THE CASE

DeSchepper challenges the County's approval of two drainage permit applications by McAreavey (this brief refers to Vernon and Jason McAreavey collectively as "McAreavey" unless it is necessary to distinguish between the two, in which case their first names will be used). The first is Agricultural Drainage Permit ("ADP") 11-81, which the County granted after notice to DeSchepper and a hearing on August 9, 2011. The second permit is ADP 12-142. This application included existing drain tile that had been installed pursuant to past permits issued without proper notice to DeSchepper. McAreavey applied for ADP 12-142 to correct the lack of notice concerning past permits. The County approved the permit following a hearing on September 25, 2012. DeSchepper appealed the grant of both permits to circuit court.

DeSchepper's appeals of the two drainage permits were consolidated. (SR1-248 to SR1-251.) The circuit court held a trial de novo on July 26, 2016, and affirmed the County's approval of the permits after hearing testimony, finding facts, and issuing an initial, and then an amended, written decision. (*See* Appellant's App. C-001 to C-017.)

DeSchepper is now appealing the circuit court's affirmance of ADP 11-81 and ADP 12-142.

DeSchepper also asserted two civil claims against the County. Count One of his Amended Complaint sought a declaratory judgment to void the drainage permits issued without notice to him. (SR1-103 to SR1-104.) The circuit court held that Count One was mooted when the McAreaveys applied for a new permit (ADP 12-142) covering the drain tile at issue and provided proper notice to DeSchepper. (App. A-005 to A-007.) Count Six was an inverse condemnation claim seeking damages. (SR1-107 to SR1-109.) The circuit court granted summary judgment as to the inverse condemnation claim based on DeSchepper's inability to prove that water discharged pursuant to the permits was a legal cause of any increase in the level of Twin Lake. (App. A-007 to A-012.) DeSchepper appealed from the grant of summary judgment to the County on these two civil claims, but his brief does not challenge summary judgment dismissing Count One of the Amended Complaint.

STATEMENT OF FACTS

The facts found by the circuit court and established at summary judgment are integral to the arguments on appeal, so the County will address the relevant facts within the Argument.

STANDARD OF REVIEW

The County agrees with DeSchepper's statement of the applicable standards of review.

ARGUMENT

The most significant thing about DeSchepper's brief is what he does not say. DeSchepper does not challenge the finding, based on testimony from the County's expert

and from Jason McAreavey, that the drain tile at issue adds ***no additional*** water to Twin Lake: "the water drained by the tiles is no more than the amount that would be drained by natural drainage over the land in the Twin Lake watershed during periods of precipitation and runoff." (Appellant's App. at C-012.) That factual finding establishes that McAreavey's drain tile causes no injury to DeSchepper's land because the sole alleged mechanism of injury is that McAreavey's drain tile causes the level of Twin Lake to rise and flood DeSchepper's property by adding water to the lake. (*See* SR1-1365.) Accordingly, in the circumstances of this case, the circuit court's unchallenged factual finding that McAreavey's drain tile does not add any water to Twin Lake necessarily means that the tile causes no injury to DeSchepper.

Consequently, DeSchepper must rely on arguments that McAreavey's drain tile is unlawful even though it causes no injury. He argues that all tiles using perforated drain tubes should be per se unlawful because water entering such a perforated tube three feet underground is no longer surface water. He also argues that all drainage efforts into a lake within a basin should be unlawful. Both arguments are incorrect under the civil law rule of drainage. Perforated drain tile tubes have been widely used for decades without any suggestion that they impermissibly drain subsurface water. Rather, this Court has always determined the lawfulness of a particular drain tile project by examining its impact on other property. Similarly, multiple decisions indicate drainage within a basin is permissible unless it causes unreasonable harm to others. In short, no principle of South Dakota drainage law establishes that McAreavey's drain tile is unlawful regardless of its impact on DeSchepper, and thus the finding that the drain tile causes no injury to

DeSchepper means the circuit court correctly affirmed the County's grant of drainage permits to McAreavey and correctly granted summary judgment against DeSchepper.

1. The circuit court correctly recognized that DeSchepper bore the burden of proof at the trial de novo and with regard to his civil claims.

At summary judgment and during the trial de novo, the key issue was whether McAreavey's drain tile increased Twin Lake's level. At the trial de novo, the circuit court affirmatively found that McAreavey's drain tile does not add any water to Twin Lake, and at summary judgment on DeSchepper's civil claims, it concluded that DeSchepper had no competent evidence the drain tile increased Twin Lake's level. (*See* Appellant's App. at A-010, C-012, and D-002.) Sprinkled into DeSchepper's other arguments, he asserts that it should not be his burden to prove that McAreavey's drain tile increased the level of Twin Lake.

DeSchepper does not cite any evidence on appeal, and did not argue or present any evidence during the trial de novo, that the Commissioners improperly imposed a burden of proof on DeSchepper at the hearings for either drainage permit under appeal. Instead, DeSchepper's burden-of-proof argument asserts that the circuit court erred by placing the burden of proof on DeSchepper during the circuit court proceedings. (*See* Appellant's Brief at 19.) But as the party appealing the County's decision, DeSchepper bore the burden of proof to show that the Commissioners' decision should be overturned. *South Dakota Dep't of Game, Fish and Parks v. Troy Township*, 2017 S.D. 50, ¶ 24, 900 N.W.2d 840, 850-51 (party asserting that township board acted arbitrarily had burden of proof). That is why he was given the opportunity to present evidence first and to offer rebuttal at the trial de novo. (*See* SR1-1296.) The circuit court did not err by imposing the burden of proof on DeSchepper at the trial de novo.

Similarly, as a plaintiff asserting civil claims against McAreavey and the County based on the theory that the County's drainage permits and/or McAreavey's drain tile caused Twin Lake's level to rise, DeSchepper bore the burden of proving causation. *Bridge v. Karl's, Inc.*, 538 N.W.2d 521, 525 (S.D. 1995) ("As the plaintiff, Mike had the burden of proof on causation and the extent of his injuries, if any."); *see also Midzak v. Midzak,* 2005 S.D. 58, ¶ 18, 697 N.W.2d 733, 738 ("The plaintiff in a civil proceeding bears the burden of proving every material allegation in his or her complaint."). The circuit court did not err in assigning DeSchepper with the burden to prove causation concerning his civil claims.

2. DeSchepper does not challenge the circuit court's factual finding that McAreavey's drain tile has no impact on the volume of water flowing from McAreavey's land into Twin Lake.

This Court "will accept the circuit court's factual findings unless they are clearly erroneous." *Rumpza v. Zubke*, 2017 S.D. 49, ¶ 7, 900 N.W.2d 601, 604. DeSchepper makes no attempt in his brief to demonstrate that any of the circuit court's factual findings at the trial de novo were clearly erroneous, and thus this Court must accept those findings. *Id.; see also Ray v. Downes*, 1998 S.D. 40, ¶ 8, 576 N.W.2d 896, 898 (issues not briefed by appellant need not be considered).

The relevant facts established by the circuit court are that DeSchepper and McAreavey both own farms adjoining Twin Lake. (Appellant's App. C-003.) Their land is rural. (*Id.* C-010.) Water from the portions of McAreavey's land at issue naturally drains toward Twin Lake. (*Id.* C-012.) Twin Lake lies in a basin. (*Id.* C-003.) DeSchepper acknowledges that his land is servient to McAreavey's land for drainage purposes. (Appellant's Brief at 8.) Because any rise in Twin Lake affects McAreavey's

land as well as DeSchepper's land, Jason McAreavey testified that he would not intentionally act to increase Twin Lake's level. (Appellant's App. at C-006.)

In 2008-09, McAreavey installed four six-inch main drainage tiles with outlets on his property draining into or toward Twin Lake. (*Id.* C-003 to C-004.) The tiles "are essentially perforated tubes which are buried approximately three feet below the ground's surface." (*Id.* C-003.)

When the trial de novo occurred, Twin Lake covered approximately 341 acres. (Appellant's App. C-003.) Twin Lake experienced increases in its size well before McAreavey installed drain tile in 2008-09. (*Id.* C-004.) For example, DeSchepper testified that the north body of the lake did not have any water in it during the 1970's (SR1-1307), and the lake grew "in bits and pieces" from 1956 through 2008, when drain tile was first installed. (SR1-1369.) Twin Lake continued to rise after the drain tiled was installed, reaching its high point during a period of heavy precipitation in 2011, at which time Twin Lake outletted at a spill point on McAreavey's land and water from the lake flowed through a slough and into Skunk Creek. (Appellant's App. at C-004; *see also* SR1-1314 to 1315.) "However, after this wet period, the level of Twin Lake has stabilized and receded significantly, despite the presence and operation of the McAreavey's drain tiles." (Appellant's App. at C-004.)

The County's expert, Dr. Sands, is an agricultural engineer at the University of Minnesota who focuses on the hydrology and effects of drainage on crops. (*Id.* at C-005.) Sands testified that drain tile decreases surface runoff by transferring some of that water to the subsurface tubes. (*Id.*) Also, tiling "generally increases crop production with a corresponding increase in evaporation and plant transpiration, commonly known at

ET." (*Id.*) These principles are consistent with Jason McAreavey's testimony that, after tiling, surface erosion improved on his land—indicating surface runoff had decreased--and he was able to "farm about 5-7 acres more on the north side of Twin Lake and 15-20 additional acres on the south edge of the Lake." (*Id.* at C-006.) Sands concluded that McAreavey's drain tile was likely decreasing the total amount of water draining into Twin Lake "because of increased ET." (*Id.* at C-011.) The circuit court found "Sand's opinions to be sound and well-reasoned and accept[ed] them in its analysis." (*Id.*)

In sum, the circuit court found "that the water drained by the tiles is no more than the amount that would be drained by natural drainage over the land in the Twin Lake watershed during periods of precipitation and runoff." (*Id.* at C-012.) The factual finding means there is no basis to overturn the County's grant of ADP 11-81 and ADP 12-142 unless DeSchepper can show that South Dakota drainage law precludes a county from approving drain tile flowing into a lake that will not increase the volume of water in the lake *at all* and thus will cause *no* injury to DeSchepper.

3. Surface water drawn into a perforated drain tile tube three feet below ground remains surface water that may permissibly be drained subject to the civil law rule of drainage.

DeSchepper's first argument that McAreavey's tile should be unlawful even if it causes no injury is that the civil law rule of drainage prohibits all drain tile with subsurface inlets. For example, it is undisputed that, except for one above-surface intake, the tile in this case uses perforated tubes located approximately three feet below ground. (Appellant's App. C-003.) DeSchepper contends that, because water is three feet below ground when it enters these perforations, the drain tile is impermissibly collecting

subsurface water. The circuit court correctly rejected this argument, which would radically alter agricultural practices used across South Dakota for decades.

DeSchepper's argument would make buried perforated drain tile illegal wherever it is located. This would be a sweeping change because the use of this type of drain tiling "in the Midwest region dates back to the late 1800s when western Minnesota saw a massive increase in large-scale drainage," and "[t]echnological advancements have created a recent boom in tile drainage in South Dakota." Katie Dahlseng, SOUTH DAKOTA'S SOLUTIONS TO SOPP SOIL: CHANGES TO WATER MANAGEMENT, 58 S.D.L. Rev. 347, 350 (2013). Given the prevalence of drain tiles using perforated tubes, if the civil rule of drainage prohibited that practice, surely some South Dakota decision or statute would have said so expressly by now. But DeSchepper cites no such authority, and this Court should not adopt such a sweeping change in a case where the tile in question is causing no injury to other property.

One reason DeSchepper's argument should be rejected is that it is contrary to the fundamental principle that drainage is permissible if it can be accomplished "without injustice to another." *Thompson v. Andrews*, 39 S.D. 477, 165 N.W. 9, 13 (1917). That principle has been a building block of South Dakota's civil law rule of drainage for over a century. In 1917, this Court stated:

> Certainly every person who acquires lands normally fitted for cultivation should have the right to render them permanently fitted therefore if he can do so without injustice to another; therefore one who acquires lands, over which a water course passes through which upper lands normally dry can be drained in accordance with "the general course of natural drainage," should be held to have aquired same knowing that good neighborliness and the common welfare required him to permit of the drainage of such upper lands through such water course *conditioned only that such drainage be accomplished without* ***unreasonable*** *injury to his land.*

Id. (emphasis added). The first quoted sentence recognizes that if a property owner can improve his land without causing harm to others, he should be allowed to make that improvement. The last quoted clause recognizes the converse: that a servient owner must allow that drainage unless he can show it causes unreasonable injury to the servient land.

DeSchepper's argument that buried perforated tiles are per se unlawful is contrary to that fundamental principle because it would prohibit a common method of improving property whether or not that method causes any injustice to others. For example, here the circuit court found that McAreavey's drain tile has no effect on Twin Lake, and thus it causes no injury to DeSchepper. Accepting DeSchepper's argument that perforated drain tubes are per se unlawful would force McAreavey—and likely many other farmers--to destroy drain tile that has improved their properties without causing any harm to neighbors.

In 1985, when the Legislature revised South Dakota's drainage statutes, it had a perfect opportunity to prohibit perforated drain tile if it believed that practice was per se unlawful, and it did not do so. SDCL Ch. 46A-10A does not define surface water. The chapter's definitions, however, define "closed drain" and "blind drain" to include "a man-made drain or drainage scheme utilizing pipes, tiles, or other materials and constructed in such a way that the flow of water is not visible." SDCL § 46A-10A-1(2). The definition of closed or blind drains thus encompasses tiles that use perforated tubes, and Chapter 46A-10A clearly contemplates the use of such closed or blind drains. *See, e.g.*, SDCL § 46-10A-85. The chapter contains no language requiring closed or blind drains that use buried tile to have in-take risers located only above ground level, nor does it say that the

closed or blind drains may not use perforated underground tubes. Chapter 46A-10A contains nothing that can reasonably be construed as a prohibition on the use of perforated drain tile buried three feet underground. Given the prevalence of perforated drain tile, if the Legislature intended to prohibit its use, that prohibition would have been made clear by now.

Nor do any of the decisions cited by DeSchepper hold that perforated tile is per se impermissible. The decision in *Anderson v. Drake*, 24 S.D. 216, 123 N.W. 673 (1909), actually supports the conclusion that surface water does not lose its character as surface water merely because it enters a perforated drain tile three feet below ground. In *Anderson*, the defendant had a well fed by a subsurface spring. *Id.* at 673-74. After the well filled with subsurface water, the defendant dug a ditch allowing the well water to flow through the ditch and onto the plaintiff's property. *Id.* at 674. This Court held that cutting a ditch to allow well water to flow across the surface of the ground did not convert the water from subsurface to surface water: "certainly no person can have a right to convert water, which was not surface water, into surface water, and then, as against their parties, claim the right to handle such water as though it had originally been surface water." *Id.*

Anderson's principle that transferring water with a sub-surface origin through a man-made ditch on the surface of the ground did not change the sub-surface nature of the water cuts against DeSchepper. The purpose of drain tile is the opposite of a well. Farmers who use perforated tile do not want to draw sub-surface water up to low spots; rather, they use perforated tile to help surface water drain more quickly so that the surface and ground just below the surface is dry enough for crop production. (*See* SR1-1478 to

SR1-1479.) Here, the circuit court rejected the opinion of DeSchepper's expert that McAreavey's drain tile was collecting water from fissures below the surface. (Appellant's App. C-011.) Conversely, it accepted Jason McAreavey's testimony that erosion improved after he installed the tile and that the areas where he could grow crops increased, demonstrating that the tile was draining surface water. (*Id.* C-006.) *Anderson's* principle that the surface or sub-surface nature of water is determined by the water's source rather than the location of the artificial device it is flowing through therefore indicates that surface water does not lose its character as surface water when it enters and flows through perforated tubes located three feet below the ground's surface.

Although this Court has never expressly addressed this issue, its drain tile cases have implicitly recognized the *Anderson* principle by judging the lawfulness of drain tile projects based on the impact they have on neighboring property rather than relying on whether water enters the tile system above or below the ground's surface. For example, in *Winterton v. Elverson*, 389 N.W.2d 633 (S.D. 1986), this Court characterized a tile drainage system as draining "only surface water" without specifying whether the tile system used perforated tubes or used only above-ground intakes and solid tubes. *Id.* at 634. DeSchepper argues this means the drainage system in *Winterton* must have used only above-ground intake and solid tubes. But that is wishful thinking on his part. The reality is that *Winterton's* silence suggests the opposite. If, as DeSchepper assumes, a drain tile system using above-ground intakes and solid tubes is permissible, but systems using perforated buried tubes are per se unlawful, it would be important to specify that the drain tile at issue was the permissible type. On the other hand, if either type of drain tile system is permissible (assuming the tile does not cause unreasonable harm to others),

there would be no need for this Court to specify which type of drain tile system was involved. The Court would need only to examine whether the drain tile system caused unreasonable harm, which is precisely how *Winterton* approached the issue. The circuit court thus correctly concluded that *Winterton* indicates farmers are not limited to drain tile systems using above-ground intakes and solid tubes because the key issue is not how the water enters the system, but rather the system's impact on other property. (*See* Appellant's App. C-014.)

The circuit court's view of *Winterton* was confirmed by the recent decision in *Rumpza.* In *Rumpza*, the circuit court's memorandum decision and its findings of fact specified that the "Defendants installed perforated tile on their property." (Appellee County's App. 002; *see also id.* at 010 ¶ 14.) Yet, when discussing *Winterton*, this Court's opinion in *Rumpza* characterized the water discharged from the tile systems in both cases as surface water: "*As in the present case,* the owner of the dominant estate in *Winterton* installed a drain-tile system that 'discharged [surface water] into the natural drainage waterway.'" *Rumpza*, 2017 S.D. 49, ¶ 14, 900 N.W.2d at 606-07 (quoting *Winterton*, 389 N.W.2d at 634) (emphasis added). If DeSchepper's view were correct, the mere fact that perforated drain was used in *Rumpza* would have been sufficient to rule against the defendants, and this Court would not have needed to analyze the drain tile's effect. Consequently, this Court's extensive analysis of the effect of the perforated drain tile system in *Rumpza* shows that perforated drain tile tubes are not per se unlawful; rather the critical question is their impact on other property. *See id.* ¶¶ 11-15, 900 N.W.2d at 605-607.

The other decisions cited by DeSchepper are immaterial because they did not involve a drain tile system. *See, e.g., Gross v. Connecticut Mutual Life Insurance Co.*, 361 N.W.2d 259, 263 (S.D. 1985) (issue was flooding caused by an intentional release of water from a feed lot's irrigation pond). Adopting DeSchepper's view that it is unlawful to use perforated drain tile regardless of its impact on other land would nullify decades of South Dakota agricultural practices and unnecessarily limit the ability of farmers to improve their land's productivity. Here, the circuit court found that McAreavey's perforated drain tile is not harming DeSchepper's land because the tile has no impact on the level of Twin Lake. The circuit court's decision is not only consistent with, but supported by, the civil law rule of drainage, and it did not err in affirming the County's issuance of drainage permits to McAreavey.

4. South Dakota law does not prohibit drainage flowing into a lake located in a basin when it does not cause any injury.

DeSchepper alternatively argues that South Dakota law does not permit a county to approve *any* drainage into a lake located within a basin. In so doing, DeSchepper again fails to recognize that critical issue in determining the lawfulness of a drain tile system is whether it has a negative impact on other property, not whether it is located in a basin or whether it has perforated tubes. The circuit court's decision should be affirmed because the civil law of drainage permits drainage within a basin so long as it does not cause unreasonable injury to other land, and the finding that McAreavey's drain tile has *no* impact on Twin Lake's level means the drain tile is not injuring DeSchepper.

DeSchepper's argument that drainage into a lake within a basin should be per se unlawful is contrary to the fundamental principal discussed in the previous section that a property owner has the right to improve his land so long as he does not cause

unreasonable injury to others. *Thompson*, 39 S.D. 477, 165 N.W. at 13. In fact, *Thompson* recognized later in the opinion that drainage is permissible within a basin--assuming it can be done without injury to others--when it summarized the civil law rule of drainage as the right of an owner "lying in the upper portion of a natural drainage course *or* water basin" to use artificial drains to move water in the direction it would naturally flow except that surface water should not "be cast upon the servient estate in unusual or unnatural quantities" and that surface waters may not be artificially transferred from "one natural watershed or basin" to a "different natural drainage course or basin." *Id.* at 14. This Court's foundational opinion on the civil law rule of drainage recognized the right to artificially drain within a single basin subject to the requirement of not causing unreasonable injury.

This Court has continued to recognize the right to drain into basins or onto neighboring property if it can be done without causing unreasonable harm, even in decisions after the 1985 codification of SDCL §§ 46A-10A-20 & -70. For example, in *First Lady, LLC v. JMF Properties, LLC*, 2004 S.D. 69, 681 N.W.2d 94, an uphill property owner made changes to a road that allegedly diverted water and silt onto a motel's property. *Id.* ¶ 3, 681 N.W.2d at 96. The motel obtained a bench verdict for nuisance and an abatement order. With regard to the civil law rule of drainage, this Court said that rule "would initially require determining whether the drainage was onto a natural or established watercourse. The plaintiff would *also be required to show unreasonable harm to its property." Id.* ¶ 10, 681 N.W.2d at 99 (emphasis added). Although the first part of the quoted language could be construed as limiting the discharge point of drainage to watercourses, this Court clarified later in the opinion that

the civil law rule does permit drainage into both watercourses and basins: "South Dakota's surface water drainage under civil law allows property owners to drain into natural or established watercourses *and natural depressions*." *Id.* at 100 (emphasis added). The critical issue is impact, not location.

This Court's recent decision in *Magner v. Brinkman*, 2016 S.D. 50, 993 N.W.2d 74, reaffirms the principles of *First Lady*. *Magner* affirmed a jury verdict for damages based on evidence that the defendants' ditch had diverted a greater-than-normal volume of water onto the plaintiffs' property, thereby causing damage. *Id.* ¶¶ 15-16, 883 N.W.2d at 81-82. But the circuit court had also issued an injunction, which this Court reversed. This Court held that the circuit court should not have enjoined *all* future alterations to the defendants' land that would adversely affect drainage onto the plaintiffs' property. "The circuit court's use of the disjunctive conjunction *or* indicates that Plaintiffs would be protected under the injunction *even from reasonably adverse alterations in drainage.* However, within certain restrictions, the owner of a dominant estate is generally entitled to drain onto a servient estate." *Id.* ¶ 24, 883 N.W.2d at 85 (emphasis added). "There is no requirement that the dominant property refrain from all draining that is adverse to the servient property; rather, drainage must not create '*unreasonable* hardship or injury to the owner of the land receiving the drainage[.]'" *Id.* (emphasis in *Magner*). "Thus, the injunction would leave Plaintiffs in a better position than they are entitled to be under South Dakota's drainage laws." *Id.*

These decisions show that South Dakota's civil law rule of drainage has always permitted artificial drainage, even within a natural depression or basin, so long as it does not cause *unreasonable* injury to other property. The circuit court's unchallenged factual

finding that McAreavey's drain tile does not add any water to Twin Lake precludes DeSchepper from establishing that the circuit court erred by affirming the Commissioners' grant of ADP 11-81 and ADP 12-142. The circuit court correctly concluded that the "insufficient showing in this record that there has been any water added to Twin Lake by virtue of tiles, much less an amount that is unreasonable or 'unusual or unnatural'" means the Commissioners' decision to approve the drainage permits was within their discretion. (Appellant's App. C-016.)

DeSchepper contends the circuit court erred, but cites no authority expressly stating that South Dakota law precludes drainage into a lake within a basin even when the complaining land owner cannot show the drainage has caused *any* impact upon his land. DeSchepper instead is forced to argue that comments in various cases and statutes *imply* such a restriction. The implication DeSchepper attempts to draw should be rejected because it is contrary to statements in *Thompson* and *First Lady* allowing drainage within basins and in *Magner* allowing drainage onto neighboring property, so long as those types of drainage do not have an unreasonable impact on the other land. Those decisions show that DeSchepper is reading the authority he cites too broadly.

For example, DeSchepper cites *Feistner v. Swenson*, 368 N.W.2d 621 (S.D. 1985), but it did not involve a lake in a basin. Instead, the plaintiff Feistner claimed that the defendant Swenson had channeled water directly onto Feistner's land that had previously been dry. *Id.* at 623. In contrast, Swenson contended that he merely "channeled the water into the watercourse which crosses Feistner's land." *Id.* at 622. This Court recognized that, to prevail, Swenson "must first show *as he claimed* that he drained the water into a 'natural watercourse.'" *Id.* (emphasis added). This Court thus

recognized that, in the context of that case, Swenson could not prevail unless the factual dispute whether he was diverting water into a natural watercourse or simply diverting it directly onto Feistner's land was resolved in his favor, which could not be done at summary judgment. Nothing in the context indicates that the statement in *Feistner* establishes a universal requirement that to be legal drainage must discharge directly into a natural watercourse. *Feistner* thus is consistent with *Thompson* and *First Lady's* recognition that drainage may occur within a basin, assuming it does not cause unreasonable harm to other property.

Similarly, *Johnson v. Metropolitan Life Ins. Co.*, 22 N.W.2d 737 (S.D. 1946), did not involve drainage to a lake in a basin. To the contrary, *Johnson* said it was undisputed that the drainage, after leaving the defendant's land, "would flow down such watercourse" located on plaintiff's land. *Id.* at 738. Because this Court relied on the undisputed fact that the water at issue would follow "the natural watercourse across the plaintiff's land which drained the territory," any comment *Johnson* makes about drainage into a lake in a basin would be mere dicta.

Nothing in SDCL §§ 46A-10A-20 or -70 alters this result. As an initial matter, this Court has recognized that these statutes were intended to codify common law principles, so it would be a strange result to find that they prohibited drainage permissible under *Thompson*, *First Lady*, and *Magner*. *See Rumpza v. Zubke*, 2017 S.D. 49, ¶ 10, 900 N.W.2d 601, 605 (recognizing that these statutes codified common law principles). Examination of the statutory language, however, shows that the Commissioners' approval of ADP 11-81 and 12-142 was consistent with the principles contained in SDCL § 46A-10A-20. In fact, the circuit court carefully examined each of the six factors set forth in

that section and concluded that, under the facts it found, McAreavey's drain tile was consistent with each factor. (*See* Appellant's App. C-010 to C-016.)

The only conclusion DeSchepper challenges concerns the fourth factor: whether "[t]he drainage is natural and occurs by means of a natural water course or established water course." SDCL § 46A-10A-20(4). DeSchepper argues that drainage into Twin Lake, which only has an outlet if/when it rises above the level it occupied when McAreavey first installed drain tile, is not consistent with the statutory phrase "by means of a natural water course or established water course." The circuit court correctly rejected this argument based on its conclusion that Subpart (4) does not require the discharge point of drainage to be a natural water course or established water course. Rather, the phrase is describing how water being drained is conveyed, and it requires the drained water to follow a route that constitutes a natural or established water course. (Appellant's App. C-010 to C-016.) McAreavey's drain tile satisfies that requirement because the water flowing through the tile is following the natural path of surface runoff from his land and thus McAreavey's drainage occurs "by means of a natural water course or established water course."

In contrast, DeSchepper's view that Subpart (4) is intended to prohibit drainage unless it discharges into a natural or established water course does not fit the statutory language. The phrase "by means of" most naturally refers to how the drainage occurs rather than where it ends. If the Legislature had intended Subpart (4) to require that drainage water discharge into a natural water course or established water course, it would have said so directly, i.e., "The drainage is natural *and discharges* into a natural water course or established water course." That is not what it chose to say. It said, "The

drainage is natural *and occurs by means of* a natural water course or established water course." SDCL § 46A-10A-20(4) (emphasis added). The purpose of Subpart (4) thus is to ensure that drainage follows a natural or established course.

The circuit court's approach to SDCL § 46A-10A-20 is more consistent with the common law decisions permitting drainage within basins than DeSchepper's view. Moreover, the circuit court's interpretation does not mean that counties could approve any drain tile simply because it follows the path of a natural water course. A rural applicant must satisfy the requirements of the civil law rule of drainage, including not causing unreasonable harm in any manner, which are embodied in the other subparts of SDCL § 46A-10A-20. Indeed, the circuit court specifically noted that Subpart (6) supports the County's grant of drainage permits because there is no other feasible means of draining McAreavey's property that would cause less harm. SDCL § 46A-10A-20(6). The lack of feasible alternatives stems from Twin Lake's location in a basin, which means that discharging drainage from the portions of McAreavey's land at issue anywhere but Twin Lake would impermissibly move that water to a different watershed. *See Thompson*, 39 S.D. 477, 165 N.W. at 14. This does not mean McAreavey could add unnatural quantities of water to Twin Lake. But because his tile is not adding any water to Twin Lake and thus is not harming DeSchepper, the circuit court's finding that there is no other feasible method to drain McAreavey's land means that Subpart (6) supports the circuit court's conclusion that the drainage at issue here is consistent with SDCL § 46A-10A-20 as a whole.

An additional problem with DeSchepper's view is that it incorrectly assumes SDCL §§ 46A-10A-20 and -70 are swords for servient land owners, when they are

actually shields for dominant land owners. For example, DeSchepper's view assumes that SDCL § 46A-10A-20 was intended to restrict a county's authority so that it can approve only drainage that satisfies all the terms of subparts (1) to (6), and thus that a servient land owner like DeSchepper can use the statute as a sword to prevent any drainage that does not satisfy the terms of every subpart, even when it has been established that the drainage has no impact on the servient land.

DeSchepper's view is contrary to the opening paragraph of SDCL § 46A-10A-20, which shows that it was not intended to restrict a county's power to *approve new* projects, but rather it was intended to restrict a county's power to *prohibit existing* drainage that satisfies the six subparts:

> Official controls instituted by a board ***may*** include specific ordinances, resolutions, orders, regulations or other such legal controls pertaining to other elements incorporated in a drainage plan, project, or area or establishing standards and procedures to be employed toward drainage management. Any such ordinances, resolutions, regulations or controls ***shall*** embody the basic principle that any rural land which drains onto other rural land ***has a right to continue such drainage if:***

SDCL § 46A-10A-20 (emphasis added). The first sentence authorizes counties to regulate drainage. The second sentence, however, uses the mandatory term "shall" to require those regulations to recognize that dominant land owners have a legal right to *continue* (not construct) drainage that satisfies the terms of subparts (1) to (6). The statute is a shield that protects dominant land owners by denying counties the power to adopt regulations prohibiting existing drainage that satisfies all the subparts, and thus it is not surprising that its subparts reflect a strict construction of the civil law rule of drainage.

Nothing in the introductory paragraph of SDCL § 46A-10A-20, however, prohibits a county from approving new projects that do not strictly comply with all of the subparts. Indeed, the section does not purport to be a list of conditions new drainage projects must satisfy; rather, it merely identifies a category of existing drainage that counties must allow to continue. Counties therefore have the ability—subject to the civil law rule of drainage for rural properties—to exercise discretion in approving or rejecting new projects that do not strictly comply with every subpart of SDCL § 46A-10A-20. This freedom is consistent with SDCL § 46A-10A-17, which states that the purposes of authorizing counties to regulate drainage include "encouraging land utilization that will facilitate economical and adequate productivity of all types of land."

SDCL § 46A-10A-70 is similarly permissive.

> Subject to any official controls pursuant to this chapter and chapter 46A-11, owners of land ***may*** drain the land in the general course of natural drainage by constructing open or covered drains and discharging water into any natural watercourse, into any established watercourse or into any natural depression whereby the water will be carried into a natural watercourse, into an established watercourse or into a drain on a public highway, conditioned on consent of the board having supervision of the highway. If such drainage is wholly upon an owner's land, he is not liable in damages to any person. Nothing in this section affects the rights or liabilities of landowners in respect to running water or streams.

SDCL § 46A-10A-70 (emphasis added). Section 46A-10A-70 thus does not attempt to describe when drainage is prohibited. It merely identifies a category of drainage that is expressly authorized and immune from damages.

Another problem with DeSchepper's view is that it creates an unnecessary conflict between SDCL §§ 46A-10A-20 and 46A-10A-70. The two statutes use different criteria to describe the drainage they each address. For example, the conditions in Section 46A-10A-20 include that there be no unreasonable harm to the servient land, and

that there be no alternative drainage system that would cause less harm without substantially greater cost. In contrast, Section 46A-10A-70 does not mention either of these factors. But conversely, Section 46A-10A-70 addresses subjects not addressed by SDCL § 46A-10A-70, including specifying where the permitted drainage may discharge:

> discharging water into any natural watercourse, into any established watercourse or into any natural depression whereby the water will be carried into a natural watercourse, into an established watercourse or into a drain on a public highway, conditioned on consent of the board having supervision of the highway.

SDCL § 46A-10A-70.

One potential reconciliation for these differences would be to require any proposed drainage to satisfy all the terms of both statutes. But the language of SDCL § 46A-10A-20 forecloses that option. It requires counties to allow drainage to continue that meets *its* terms. Requiring drainage to satisfy additional language from SDCL § 46A-10A-70 would be contrary to SDCL § 46A-10A-20's second sentence requiring counties to recognize the right to continue drainage that satisfies the six subparts of SDCL § 46A-10A-20. In contrast, the County's position that the statutes are shields that each protect a specific category of drainage prevents any tension between the two statutes. In sum, DeSchepper cannot show that any statute or decision prohibits a county from approving drainage discharging into a lake in a basin when that drainage does not add any additional water to the lake.

5. DeSchepper either abandoned the issue of bias by not arguing it before the circuit court issued its decision or, alternatively, failed to overcome the presumption of objectivity.

In Issue Four, DeSchepper contends that the circuit court erred in affirming ADP 12-142 because the Commissioners had a "bias, self-interest or inherent conflicts of

interest." The alleged bias stems from the improper issuance of prior permits by County staff to McAreavey without notice to DeSchepper. DeSchepper argues the Commissioners' actual motive for approving ADP 12-142 was their desire to eliminate the procedural impropriety related to those past permits rather than a genuine belief that ADP 12-142 should be granted on its merits. This argument fails because DeSchepper presented no evidence or argument during the trial de novo asserting improper motives such as "bias, self-interest or inherent conflicts of interest," and thus the circuit court correctly concluded this issue had been abandoned. (Appellant's App. B-007 n.2.) Alternatively, the circuit court can be affirmed because DeSchepper failed to present any evidence to overcome the presumption that the Commissioners' decision was based on the merits. *See Am. Family Ins. Group v. Robnik*, 2010 S.D. 69, ¶ 22, 787 N.W.2d 768, 776 ("we affirm summary judgment if the circuit court was correct for any reason").

As an initial matter, DeSchepper is incorrect to say that his notice of appeal to circuit court concerning ADP 12-142 "clearly" challenged that permit based on "bias, self-interest or inherent conflicts of interest." That phrase does not appear in the notice of appeal. (*See* SR2-1 to SR2-6.) Rather, the notice of appeal's operative paragraph focused on the alleged legal errors involved in granting the permit ("contrary to governing state law, the civil rule of drainage, and the 2010 Drainage Ordinances") and the factual allegation that the drain tile was "contributing to additional, prolonged flooding of the DeSchepper Farm." (SR2-5 ¶ 13.)

But, regardless whether DeSchepper's notice of appeal mentioned bias, self-interest, or inherent conflicts, the record clearly shows that he did not present evidence concerning those issues at the trial de novo. To the contrary, DeSchepper admitted

during his testimony that he did not have any personal knowledge that any of the Commissioners acted with an improper purpose:

> Q. Switching gears on you, it is it fair to say that you have no personal knowledge—you yourself have no personal knowledge of any facts that any of the commissioners granted Permits 11-81 or 12-142 for personal financial gain or some other improper purpose?
>
> A. I don't have that knowledge, no.

(SR1-1369.) DeSchepper further testified that the only objection he raised before the commissioners was his belief that the drain tile was contributing to the rise of Twin Lake:

> Q. So you've always indicated to the commissioners that your sole objection to the drain tile was your belief the tile was contributing to the increase of the level of Twin Lake; right?
>
> A. Correct.

(SR1-1365.) DeSchepper presented no evidence of bias, including predisposition or inherent conflict, through any other witness. He did not even call the Commissioners as witnesses. (*See* SR1-1296.) Because DeSchepper had not presented any bias evidence, the County elected not to have the Commissioners testify, and instead focused—as DeSchepper had--on the factual issue of the drain tile's effect.

In addition, during closing arguments, the circuit court asked DeSchepper's counsel directly whether he agreed that the case was not about improper motive:

> The Court: So—and hang on. I'm going to talk with you for just a second. So to narrow the issues for my consideration and I think we mentioned this earlier, too. This case isn't about—I'm not challenging you. There's going to be a question mark at the end of this. The case really isn't about a commissioner acting fraudulently or having some sort of improper motive or nefarious motive other than maybe they weren't careful in the application of the law.
>
> Mr. Swanson: Not careful and to the extent that they characterized this as natural drainage. We believe that is false evidence, yes.

(SR1-1536.) The circuit court thus gave DeSchepper the opportunity to clarify whether he was arguing an improper motive such as bias or predisposition, but the final quoted word "yes" shows that DeSchepper agreed his challenge went to the decision's merits rather than the Commissioners' motives. Counsel for the Defendants thereafter assumed that any issue as to bias had been abandoned. (*E.g.*, SR1-1540 (Mr. Roche: "I think it's now been abandoned that there was some sort of fraud or 'money under the table' thing that went on here.")

This assumption was confirmed by DeSchepper's post-trial brief. Despite being 39 pages long, DeSchepper did not ask for the Commissioners' decision to be reversed based on bias, self-interest, or inherent conflicts. (*See* SR1-801 to SR1-802 (outlining the "main points of Appellants' case").) DeSchepper thus is wrong to say that the circuit court "passed over" the issue of bias. In reality, DeSchepper presented no evidence or argument on this point. Moreover, the circuit court expressly noted this in its first decision: "Deschepper acknowledged at the hearing that he was not alleging the members of the Commission had acted with selfish or fraudulent motives." (App. B-007 n.2.)

After the circuit court had issued its initial decision, DeSchepper contended in his proposed conclusions of law that the Commissioners approved ADP 12-142 based on bias and conflicts of interest. (SR1-1030 ¶ 29; SR1-1031 ¶ 34.) But, at that point, the Defendants had already presented their witnesses and made their post-trial arguments relying on the absence of any contention from DeSchepper concerning bias. It was too late for the County to present testimony from the Commissioners explaining their motives. This is why new theories cannot be presented for the first time in a post-trial

motion or on appeal. *See Rogen v. Monson*, 2000 S.D. 51, ¶ 15, 609 N.W.2d 456, 460 ("We generally do not reverse trial courts for reasons not argued before them."); *Fortier v. City of Spearfish*, 433 N.W.2d 228, 231 (S.D. 1988) (issue not framed in pleadings or included in summary judgment materials was not properly before trial court or Supreme Court); *Wheeldon v. Madison*, 374 N.W.2d 367, 373 (S.D. 1985) ("This court has held that the theory on which a case is tried below must be adhered to on appeal."). This Court should not consider DeSchepper's bias theory when it was not presented during the trial de novo.

Alternatively, this Court should reject DeSchepper's bias theory on the merits. "Decision makers 'are presumed to be objective and capable of judging controversies fairly on the basis of their own circumstances.'" *Armstrong v. Turner County Bd. of Adjustment*, 2009 S.D. 81, ¶ 23, 772 N.W.2d 643, 651 (quoting *Northwestern Bell Tel. Co. v. Stofferahn*, 461 N.W.2d 129, 133 (S.D. 1990)). It was DeSchepper's burden to rebut this presumption at the trial de novo with competent evidence of bias. But, as discussed above, DeSchepper did not introduce any evidence of a personal or financial interest sufficient to overcome that presumption. DeSchepper's bias argument depends entirely on his assumption that the County staff's error in issuing past permits without notice, and his litigation pointing out that error, precluded the Commissioners from being able to fairly judge the merits of ADP 12-142.

But that is pure speculation. DeSchepper made no effort to obtain, and did not obtain, any testimony that the Commissioners viewed granting the drainage application as more beneficial to themselves or the County than denying it would have been. Nor is there any reason to simply assume that they harbored such a belief. Once McAreavey

reapplied for a permit and the County provided DeSchepper with notice and an opportunity to object to ADP 12-142, the lack of notice concerning past permits was moot regardless of how the Commissioners ruled. (*See* SR1-545.) With regard to the merits of ADP 12-142, the County's options were both unpalatable. There is no reason to assume that granting the drainage permit and stoking DeSchepper's wrath represented an easier path for the Commissioners politically or legally than denying the application and earning McAreavey's wrath. In fact, DeSchepper's counsel argued at the hearing that approving ADP 12-142 would worsen the County's position in this litigation: "Mr. Swanson also spoke on the lawsuit filed against the McAreavey's and the County filed by Mr. DeSchepper and told the Commission to not make their legal position worse than it is." (SR1-953.) In these circumstances, DeSchepper's speculation—unsupported by any competent evidence--that the Commissioners believed granting the permit offered more benefit to themselves or the County than a denial would have is insufficient to overcome the presumption of objectivity. This provides an alternative basis to affirm the circuit court.

6. The circuit court correctly granted summary judgment to the County on DeSchepper's inverse condemnation claim.

In DeSchepper's fifth issue, he contends that the circuit court erred when it granted summary judgment concerning DeSchepper's civil claims based in part on the conclusion that DeSchepper could not rely on his own lay opinion to establish that McAreavey's drain tile was a legal cause of Twin Lake's rise. DeSchepper has not challenged the circuit court's conclusion that count one of the amended complaint became moot when DeSchepper was granted notice and an opportunity to object to ADP 12-142, so the only claim against the County affected by this issue is DeSchepper's

inverse condemnation claim. Summary judgment on that claim should be affirmed. Because Twin Lake expanded for decades before McAreavey installed drain tile, the circuit correctly held that whether the drain tile caused the lake to rise more than it would have naturally is a complex question requiring expert testimony.

"[T]his Court has repeatedly affirmed that '[e]xpert testimony is required when the subject matter at issue does not fall within the common experience and capability of a lay person to judge.'" *Wells v. Howe Heating & Plumbing, Inc.*, 2004 S.D. 37, ¶ 18, 677 N.W.2d 586, 592 (quoting *Goebel v. Warner Transp.*, 2000 S.D. 79, ¶ 18, 612 N.W.2d 18, 26). Examples of cases where causation required expert testimony include an electrocution incident and a failure to warn claim concerning an athletic training device. *Id.* ¶ 18, 677 N.W.2d at 592 (Because "no source of the electrical current that injured [the employee] was apparent or identified, expert testimony was necessary."); *Burley v. Kytec Innovative Sports Equip., Inc.*, 2007 S.D. 82, ¶ 39, 737 N.W.2d 397, 411 ("As with her previous claims, causation for failure to warn requires expert testimony.")

As the circuit court recognized, determining whether McAreavey's drain tile has affected the level of Twin Lake involves multiple issues beyond the common experience or knowledge of lay people, including: (1) estimating the amount of water that drained from McAreavey's land into Twin Lake before drain tile was installed; (2) estimating the amount of water that drained from McAreavey's land, including the drain tile, after the tile was installed; and (3) comparing the first and second estimates to determine whether the drain tile increased the volume of water draining into the lake from McAreavey's land (this comparison is particularly complex because it would involve adjusting for other factors affecting that volume such as annual rain fall), and, if so, whether any increase in

the volume of drainage caused by the tile was sufficient to affect the level of a lake covering 340 acres that has been increasing in size for decades.

In addition, DeSchepper's admissions establish that he did not have sufficient personal knowledge or experience to offer a lay opinion concerning these issues. DeSchepper admitted that, "like many lakes in eastern South Dakota, Twin Lake has been rising since approximately 1984 or 1985." (SR1-489 to SR1-490.) McAreavey's drain tile, however, was not installed until 2008-09. (SR1-401 ¶ 14.) DeSchepper further admitted that, since 2011, the lake has receded. (Appellant's Brief at 9.) These admissions show that factors other than McAreavey's drain tile make the lake's level increase or decrease, and thus DeSchepper's visual observation that the level increased between 2008 and 2011 is not competent evidence that McAreavey's drain tile was a legal cause of that increase. In this case, expert analysis is required.

DeSchepper further admitted, however, that neither his expert nor any other witness (which would include himself) had gathered sufficient data to conduct the required analysis:

> [McAreavey SUMF] 13. Kenyon [DeSchepper's expert] admitted he could not quantify the overland flow rate into Twin Lakes before the installation of drain tile by McAreavey and compare it to the overland flow rate after the drain tile was installed.
>
> [Deschepper's Response:] Admit, with the proviso that neither can any other witness "quantify the overland flow rate before the installation of drain tile by McAreavey and compare it to the overland flow rate after the drain tile was installed." As stated by Kenyon, the "data does not exist to do that."

(SR1-490.) When McAreavey later made a renewed motion for summary judgment as to DeSchepper's nuisance claim, DeSchepper admitted: "I can't prove to what extent the subsurface water collection and drainage has added to Twin Lake for purposes of

flooding my farm." (SR1-1127 ¶ 26.) This admission alone is fatal to DeSchepper's argument that his lay testimony would be competent evidence of causation.

The circuit court's conclusion that, under these circumstances, DeSchepper's lay observations were not competent evidence as to causation is supported by decisions from other jurisdictions concerning flooding involving complex causation. *See Garr v. City of Ottumwa,* 846 N.W.2d 865, 872 (Iowa 2014) ("Courts have found that establishing a causal link between the topographical changes and flooding requires expert testimony."); *Davis v. City of Mebane*, 512 S.E.2d 450, 505 (N.C. App. 1999) ("Accordingly, we find that '[c]ausation of flooding is a complex issue which must be addressed by experts.'") (quoting *Hendricks v. United States,* 14 Cl. Ct. 143, 149 (1987).

The circuit court's finding that causation in this case required expert testimony is consistent with *Magner v. Brinkman*, 2016 S.D. 50, 883 N.W.2d 74. *Magner* involved a much simpler causation issue. In *Magner*, on two separate occasions, heavy rainfall caused water to pool on the defendants' property. *Id.* ¶¶ 3-4, 883 N.W.2d at 77. On each occasion, the defendants drained their property by digging a trench to divert the pooled water onto the plaintiffs' property. *E.g., id.* ¶ 4, 883 N.W.2d at 77. At trial, the plaintiffs were allowed to testify that the defendants' new trenches flooded plaintiffs' property on both occasions:

> Plaintiffs explained that their property had no standing water after the June 2008 event, that their property initially had no standing water after the June 2009 event, that they witnessed water flowing down a trench running from Defendants' corrals toward Plaintiff' property after the June 2009 event, and that their property subsequently flooded.

Id. ¶ 15, 883 N.W.2d at 81.

Because the *Magner* plaintiffs' land went from having no standing water to being flooded after construction of the new trenches, the flooding's cause was visually observable to the average lay person. *See id.* In contrast, here is it undisputed that Twin Lake was rising for years before the drain tile was installed and that DeSchepper cannot quantify whether the drain tile increased, decreased, or did not affect the volume of water entering Twin Lake from McAreavey's land. In these circumstances, even if Twin Lake continued to rise after the drain tile was installed, neither DeSchepper nor any other lay person can identify simply by looking at the lake to what extent, if any, the drain tile contributed to the increase. (SR1-1127 ¶ 26.)

Magner merely shows that, in some instances, a lay person may be able to observe and testify to the cause of flooding. In the circumstances of this case, however, the circuit court correctly concluded that "the question of whether the McAreavey drain tile caused Twin Lake to flood DeSchepper's land requires expert knowledge in hydrological principles, hydrologic effects of subsurface tile drainage, and the role of precipitation and soil characteristics on hydrology." (App. A-009 to A-010.) Summary judgment to the County on the inverse condemnation claim should be affirmed.

CONCLUSION

South Dakota's drainage law permits property owners to improve the productivity of their land so long as it can be done without causing unreasonable injury to others. The circuit court's unchallenged finding that McAreavey's drain tile does not cause any injury to DeSchepper therefore precludes DeSchepper from showing that McAreavey's tile is unlawful. The circuit court correctly determined that the County acted within its discretion by granting drainage permits to McAreavey, and so the County respectfully requests that this Court affirm all decisions in the County's favor.

Dated this 29th day of May, 2018.

WOODS, FULLER, SHULTZ & SMITH P.C.

By_____

James A. Power
James E. Moore
P.O. Box 5027
300 South Phillips Avenue, Suite 300
Sioux Falls, SD 57117-5027
Phone (605) 336-3890
Fax (605) 339-3357
Email Jim.Power@woodsfuller.com
James.Moore@woodsfuller.com
Attorneys for Respondent and Defendant/Appellee Board of Commissioners, Minnehaha County

CERTIFICATE OF COMPLIANCE

In accordance with SDCL § 15-26A-66(b)(4), I certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word 2010, Times New Roman (12 point) and contains 9,263 words, excluding the table of contents, table of authorities, jurisdictional statement, statement of legal issues and certificate of counsel. I have relied on the word and character count of the word-processing program to prepare this certificate.

Dated this 29th day of May, 2018.

WOODS, FULLER, SHULTZ & SMITH P.C.

By_____

James A. Power
James E. Moore
P.O. Box 5027
300 South Phillips Avenue, Suite 300
Sioux Falls, SD 57117-5027
Phone (605) 336-3890
Fax (605) 339-3357
Email Jim.Power@woodsfuller.com
James.Moore@woodsfuller.com
Attorneys for Respondent and Defendant/Appellee Board of Commissioners, Minnehaha County

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of May, 2018, I electronically served via e-mail, a true and correct copy of the foregoing Minnehaha County Appellee's Brief to the following:

A.J. Swanson
Arvid J. Swanson P.C.
27452 482nd Avenue
Canton, SD 57013
Attorney for Appellant and Plaintiff Mark DeSchepper

Vince M. Roche
Davenport, Evans, Hurwitz & Smith
P.O. Box 1030
Sioux Falls, SD 57101-1030
Attorney for Jason McAreavey and Vernon McAreavey

One of the Attorneys for Respondent and Defendant/Appellee Board of Commissioners, Minnehaha County

APPENDIX

APPENDIX

2016 WL 9560205 (S.D.Cir.) (Trial Order)
Circuit Court of South Dakota.
Fifth Judicial Court
Day County

Robert RUMPZA, et al.,
v.
David ZUBKE, et al.

No. 18CIV13-000067.
September 16, 2016.

Memorandum Decision

Jon S. Flemmer, Judge.

*1 The above-entitled matter is currently pending before the Court following a trial on December 14, 2015. The trial was conducted in the courtroom of the Day County Courthouse. At that time, Plaintiffs Robert Rumpza and Duane Zubke appeared personally and with counsel, Reed Rasmussen. Defendants David Zubke and Marilyn Zubke also appeared personally and with counsel, Jack Hieb. The Court heard testimony from four witnesses and received 53 exhibits into evidence. All exhibits were pre-marked by counsel and admitted through stipulation. Upon the trial's conclusion, the parties agreed to submit post trial briefs. The Court then received Plaintiffs' Post Trial Brief dated January 25, 2016; Defendant's Post Trial Brief dated February 18, 2016 and Plaintiffs Post Trial Reply Brief dated February 29, 2016. The Court has now had an opportunity to review, with care, counsel's written argument, the exhibits and testimony presented at trial, and the trial transcript. This Memorandum Decision constitutes the Court's decision in this case.

BACKGROUND

This lawsuit involves drainage issues between adjoining land owners. Plaintiffs Robert and Nancy Rumpza, hereinafter referred to as Rumpzas, are the owners of the Northeast Quarter of Section 14, Township 120 North, Range 54 West, in Day County, South Dakota, as shown on Exhibit 1. Rumpzas' property lies to the east of property owned by Plaintiff Zubke Brothers, LLC, hereinafter referred to as Zubke Brothers. Zubke Brothers are the owners of the Northwest Quarter of Section 14, Township 120 North, Range 54 West, in Day County, South Dakota, as shown on Exhibit 1. Rumpzas' property also lies to the west of property owned by Defendants David and Marilyn Zubke, hereinafter referred to as Defendants. Defendants own the Northwest Quarter of Section 13, Township 120 North, Range 54 West in Day County, South Dakota, as also shown on Exhibit 1.

There are two areas on Defendants' land from which water drains to the west. One of these areas is designated as Drainage Area 1 on Exhibit B. There is no dispute that drainage in this area generally travels to the west and that drainage from Drainage Area 1 naturally drains through a culvert which runs under Day County Road 1 from Defendants' land onto Rumpzas' land and then onto Zubke Brothers' land. The other drainage area on Defendants' property is in the northwest corner of that property and is designated as Drainage Area 2 on Exhibit B. The water from that area naturally drains to the west into a slough on the Rumpza property which is a closed basin.

The testimony established that the southwest corner of Defendants' property is a low lying area. Testimony indicated that this area was anywhere from 15 to 24 inches lower than the placement of the culvert under the county road.

Testimony established that the height of the county culvert is the primary reason water collects in the southwest corner of Defendants' property. While the witnesses disagreed as to how much water would normally collect in the southwest corner of Defendants' property, there was no disagreement that Defendant had not been able to farm this area prior to 2013 because it was usually too wet. After Defendants completed the tiling project, crops have been grown in the southwest corner of their property.

*2 In 2012 Defendants constructed a dam and used a portable pump to drain the southwest corner of their property. Defendant then dug a 10 foot pit on the east side of the dam. In September, 2012, Defendants installed perforated tile on their property. According to the testimony of Mike Gutenkauf, a civil engineer from Clark Engineering who was hired by Defendants to review the drainage in Sections 13 and 14 and provide testimony, there were two tiling areas developed. Those are Tile Area 1, on the southern portion of Defendants' property and Tile Area 2, in the northern portion of Defendants' property. See Exhibit C.

Tile Area 1 was designed to drain into the pit or pump station on the east side of the dam in the southwest corner of Defendants' property. The pit or pump station collects drainage until a float switch is triggered which starts the pump and the water is then pumped over the dam and into the natural surface drainage area which takes it through the culvert under the county highway. Tile Area 2 takes the water which would naturally drain to the west and redirects it to the south to the drainage way instead of through its natural route to the west. Tile Area 2 discharges into the natural drainage way in Drainage Area 1, just upstream of the culvert under the county highway.

Rumpzas and Zubke Brothers allege that Defendants' tiling activities have increased the amount of water on their property, extended the time that water is in the natural waterway and have adversely affected their ability to farm their land. They are seeking a Court Order requiring Defendants to cease operating the pump in Tile Area 1 and to also cease using the tiling in Tile Area 2. Additionally, Rumpzas and Zubke Brothers seek an award of damages for crop loss.

ANALYSIS

For rural surface water drainage, South Dakota follows the civil law rule. *Knodel v. Kassel Township*, 1998 S.D. 73. This rule "burdens lower agricultural property with an easement under which the dominant, or upper property owner, may reasonably discharge surface water over the servient estate through natural water courses." *Id.* This rule permits the discharge of surface water [over] but not [onto] the land of another. *Id.*

The civil law rules regarding rural surface water drainage have been codified in SDCL 46A-10A-20.
[A]ny rural land, which drains onto other rural land, has a right to continue such drainage if: ...

(2) The land being drained is used in a reasonable manner;

(3) The drainage creates no unreasonable hardship or injury to the owner of the land receiving the drainage;

(4) The drainage is natural and occurs by means of a natural water course or established water course;

(5) The owner of the land being drained does not substantially alter on a permanent basis the course of flow, the amount of flow or the time of flow from that which would occur;...

"[I]t is impermissible for a dominant land owner to collect surface waters, and then cast them upon the servient estate in 'unusual or unnatural quantities.'" *Winterton v. Elverson*, 389 N.W.2d 633 at 635 (S.D. 1986)(citing Thompson v. Andrews, 165 N.W.9, 14) (S.D. 1917). In *Winterton, Id.*, it was determined by the South Dakota Supreme Court that the plaintiff was entitled to relief "even though no more water was collected than would have naturally flowed upon

the property in a diffused condition." *Id.* at 636. In *Bruha v. Bochek*, 74 N.W.2d 313 (S.D. 1955), it was held that the servient land owner was entitled to relief even though the amount of the additional water reaching his land could not be ascertained.

TILE AREA 1

Tile Area 1 carries surface water from the southern part of Defendants' property draining into the 10 foot pit lying east of the dam in the southwest corner of Defendants' property. "Surface waters comprehend waters from rains, springs, or melting snows which lie or flow on the surface of the earth but which do not form part of a water course or lake." *Sullivan v. Hoffman*, 296 N.W.2d 707 (Neb. 1980). The main tile lines installed in Tile Area 1 run under a channel that directs surface water in Tile Area 1 to the southwest corner where the pit is located. After water flows into the pit and the float triggers the switch on the pump, the water is then pumped over the dam and into an area adjacent to the east side of the culvert under the county highway.

*3 There is no question that Defendants' property is dominant and that Rumpzas' and Zubke Brothers' property is servient as the natural drainage in the area flows from east to west. However, under SDCL 46A-10A-20(4), the drainage must be *natural* and occur by means of a natural water course or established water course. In this case, the drainage in Tile Area 1 appears to be occurring by means of a natural water course, after the water is pumped over the dam. However, the pit, pump and dam installed by Defendants are anything but natural. By use of the equipment installed by Defendants, Defendants are able to collect surface waters in the pit and then force or cast them onto the servient estate. The whole purpose in having the dam installed is to keep water from backing up onto Defendants' property. This forces the water pumped onto the west side of the dam to enter the culvert under the county highway and continue down the drainage way.

Duane Zubke testified that before the pump was installed by Defendants in the fall of 2012, he had never seen the southwest corner of Section 13 farmed, although hay may have been put up on the property in a few years. Prior to the installation of the pump, the natural water course on his property used to be wet in the spring and would then dry out as the year progressed. Now, the pump causes a continuous flow onto his property and prevents the use of land that could normally be farmed.

Robert Rumpza also testified about the effect the drain and pump have had on his land. He testified that before the pump was installed, Defendants' land had water in the southwest corner about 90% of the time and he had never seen a crop grown there. Before installation of the pump in 2012, he farmed the entire waterway on his property. In 2013, after the pump began running, he could not plant a crop in the waterway.

Testimony at trial indicated that the drain tile installed on the main branch of tiling that empties into the pit enters the pit below ground level. When the 10 foot pit has five foot of water in it, the float triggers the pump and the water in the pit is then pumped over the dam. Clearly, this is not a natural drainage system. While the surface water being pumped ends up in a natural water course on the west side of the dam, it clearly did not get there by natural means. By installing the dam, pump and pit, Defendants have permanently altered the amount and time of flow that would occur in the natural water course in Tile Area 1.

Although damages will be discussed later, it is clear from the testimony that an injury has been caused to the owners of the land receiving the drainage. Both Rumpzas and Zubke Brothers provided testimony as to their inability to use their land in the same manner as they did before the pump was installed in the fall of 2012. Prior to the pump, it appears there were times when the drainage area was wet in the spring, but could then be farmed later in the year and produce a crop. After the pump was installed, Rumpzas and Zubke Brothers received water on their land throughout the growing season which prevented them from planting, spraying or harvesting crops.

In their complaint, Rumpzas and Zubke Brothers are seeking a permanent injunction prohibiting Defendants from continuing to alter the natural drainage of water upon Rumpzas' and Zubke Brothers' property and requiring that Defendants immediately and permanently remove any drain tile, pumps, dams or other alterations which have been installed upon Defendants' property and which cause water to flow out and accumulate on Rumpzas' and Zubke Brothers' property. Under SDCL 21-8-14, a permanent injunction may be granted to prevent the breach of an existing obligation:
(1) Where pecuniary compensation would not afford adequate relief;

(2) Where it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief;

(3) Where the restraint is necessary to prevent a multiplicity of judicial proceedings; or

*4 (4) Where the obligation arises from a trust.

In *Maryhouse, Inc. v. Hamilton*, 473 N.W.2d 472 (S.D. 1991), the South Dakota Supreme Court discussed the four basic factors guiding courts in ruling on requests for injunctions. Those four factors are:
1) Did the party to be enjoined cause the damage?

2) Would irreparable harm result without the injunction because of lack of an adequate and complete remedy at law?

3) Is the party to be enjoined acting in bad faith or is the injury causing behavior an "innocent mistake"?

4) In balancing the equities, is the "hardship to be suffered by the [enjoined] party disproportionate to the... benefit to be gained by the injured party?

Each factor will be discussed below.

FACTOR ONE: DAMAGE

The damage claimed by Rumpzas and Zubke Brothers is that water being pumped onto their property by the pump installed by Defendants results in additional amounts of water in the natural drainage way during unusual times of the year when the pump is running. This water clearly comes from the pump system installed by Defendants on their land and additional tiling done on their land. While Defendants argue that it is impossible to know whether or not the water on the land of Rumpzas' and Zubke Brothers comes from pumping or the natural waterway, testimony indicated that the discharge pipe of the pump is clearly visible from the county highway and it is easy to determine when the pump is running and when water is on the Rumpzas' and Zubke Brothers' land. Defendants admit that they installed the pit, tiling, dam and pump. Therefore, they have clearly caused the damage.

FACTOR TWO: IRREPARABLE HARM

If an injunction is not granted, the pump will continue to force water onto the property of Rumpzas' and Zubke Brothers at any time of the year the pump runs. This water is the cause of the damage discussed in Factor One. While Rumpzas and Zubke Brothers could bring a lawsuit each time their property was flooded to recover any damages they incur, this is clearly not an adequate and complete remedy at law. The Rumpzas and Zubke Brothers have clearly suffered an unreasonable hardship and injury because Defendants have chosen to drain excess water from their land. If an injunction is not granted, this unreasonable hardship and injury will continue in the future, leaving Rumpzas and Zubke Brothers

with an irreparable harm and no adequate and complete remedy at law. Rumpzas and Zubke Brothers have provided sufficient evidence to establish Factor Two.

FACTOR THREE: INNOCENT MISTAKE

There is no question that Defendants' actions are not an innocent mistake. While their installation of the equipment to establish the pumping station is the injury causing behavior in this case, there is no question that the equipment was not installed by accident. While Defendants may not have acted with the intent to cause damage to their neighbors' property, the actions they took have resulted in that damage. It should certainly be expected when tile is installed to drain surface water into a pit and then pumped over a dam that injury could result downstream. Rumpzas and Zubke Brothers have established that the injury causing behavior was not an innocent mistake.

FACTOR FOUR: BALANCING HARDSHIP AND BENEFIT

*5 The hardship suffered by Defendants if the injunction is granted is that they will return to farming acres that they had farmed in the past and will most likely not be able to farm the area in the southwest corner of their property that previously contained water and was not usually farmed before 2012. Defendants will have access to no fewer acres to farm than they did before the pumping equipment was installed.

If an injunction is granted, the Rumpzas and Zubke Brothers will gain back acres that they previously farmed but have not been able to farm since the pump was installed. Although Defendants have incurred expense to install the equipment that would no longer be used, there was no evidence presented that this expense would be disproportionate to the benefit gained by Rumpzas and Zubke Brothers again being able to farm land they previously had access to before the installation of the pumping equipment. Rumpzas and Zubke Brothers have established that the benefit they will receive from the injunction is not disproportionate to the hardship suffered by Defendants.

A review of the above factors indicates that Rumpzas and Zubke Brothers have presented sufficient evidence to establish by a greater convincing weight of the evidence that injunctive relief should be granted prohibiting Defendants from operating the pump installed in Tile Area 1. While the tile installed in Tile Area 1 may not be functional without the pump pursuant to the testimony of David Zubke, Plaintiffs no longer appear to seek removal of that tiling and the Court's injunction does not require removal of the tiling, dam or pit in Tile Area 1.

There was testimony at trial about Defendants' assertions that there were blockages in the natural waterway as it traveled across Rumpzas' land. Mike Gutenkauf attributed one of those blockages to the fact that the culvert under the county road was higher than the bottom of the depression on the southwest corner of Defendants' land. Plaintiffs did not install or locate that culvert and have no control over that culvert or its height. There was also testimony about an additional blockage further downstream that Mike Gutenkauf attributed to possible silting that may have occurred over time. While Defendants at one time had a claim addressing that blockage, they did not pursue that claim. Additionally, David Zubke testified that whether that blockage was cleared out or not he was not going to voluntarily remove his pump. It certainly appears to the Court that without an injunction being granted, there would continue to be litigation between the parties over the drainage and damage to crops that would not be dispositive of the issue. Plaintiffs are hereby awarded the injunctive relief sought in Tile Area One.

TILE AREA 2

The tile in Tile Area 2 drains the low lying areas in Drainage Area 2, collecting this water that eventually ends up in one tile that travels south and discharges into the natural drainage way in Tile Area 1 just upstream of the culvert under the

county road. The water flows to this terminal point by gravity. This results in the surface water in Tile Area 2 draining to the south, rather than through its natural route to the west. See Exhibit C, Figure 3A.

As indicated, the normal drainage for Tile Area 2 is to the west where it drains into a closed basin along County Road 1. The testimony of Duane Zubke established that there is a culvert under County Road 1 that previously drained water from Tile Area 2 into a closed basin on Rumpzas' property if the water was not drained to the south by the current tile in Tile Area 2 that discharges into the natural water course in Tile Area 1.

*6 Plaintiffs are again seeking injunctive relief to enjoin Defendants from draining the surface water in Tile Area 2 into the natural water course in Tile Area 1. In reviewing the factors set forth in *Maryhouse, supra.*, it appears that the tiling system set up in Tile Area 1 increases the water flowing across Rumpzas' and Zubkes Brothers' land because this is water that would naturally flow west rather than south into the waterway. Any damage this caused was created by the tiling installed by Defendants. Unless an injunction is granted, this tile system would continue to operate and discharge water into the waterway in Tile Area 1. There is no question that installation of the tiling was not an "innocent mistake" by Defendants. Again, in balancing the equities, the hardship suffered by Defendants would simply be a return to the status quo inasmuch as their tillable acres may be reduced by land that no longer drains south. Plaintiffs would be benefited by having less water flow through the natural waterway in Tile Area 1.

There is no question that Defendants have permanently altered the course of the drainage in Tile Area 2 by installing the tiling system to get the water to run south when it used to drain west. While there is no way to know for certain how much water is being added to the natural waterway by the tiling in Tile Area 2, it is clear that this water would not naturally flow to the south. It is clear, that but for the manner in which the tiling was done in Tile Area 2, the water from that area would not flow into the natural water course in Tile Area 1 and would stay to the north.

After reviewing all of the evidence, the Court is convinced that the greater weight of the evidence at trial has established that Defendants used artificial means to drain the accumulation of water on their property in Tile Area 2 to the south into the natural water course in Tile Area 1. This results in the course of flow being substantially altered on a permanent basis from the west to the south. Again, this was done so that Defendants could farm more of their land and has resulted in Plaintiffs being able to farm less of their land. While there is no way for the Court to determine how much the water from Tile Area 2 has increased the amount of flow through the natural water course, there is no question that it has permanently altered the amount of flow in the natural water course in Tile Area 1 and the course of the flow in Tile Area 2. Plaintiffs are hereby awarded the injunctive relief sought in Tile Area 2. Defendants are required to remove the tile redirecting the flow of water to the south from Tile Area 2.

DAMAGES

Both Plaintiffs are seeking an award of damages for crop loss. Rumpzas seek the sum of $4,675.00 for 2013; $2,850.00 for 2014 and $2,975.00 for 2015. Zubke Brothers seek the amount of $4,000.00 for 2013; the amount of $7,000.00 for 2014 and the amount of $2,700.00 for 2015.

Defendants argue that Plaintiffs are not entitled to any damages because any crop loss they suffered was within the confines of the natural water course. They further argue that if there are no damages, there can be no injunction. However, in *Bruha v. Bochek, supra.*, the South Dakota Supreme Court eliminated monetary damages that had been awarded by the trial court but affirmed the granting of injunctive relief.

Defendants further argue that Plaintiffs are not entitled to damages and even if they are entitled to damages their claims are excessive because they attribute all of the lost acres to Defendants' actions rather than accounting for natural drainage that may have also occurred. Duane Zubke testified that in 2012, before the pump was operational, he planted every inch of his quarter. In 2013, he could not farm a portion of the quarter because the water course was too wet Based on

the cost for farming the remainder of the quarter, he determined that his net profit on the acres that he was not able to farm, would have been $7,000.00. The rest of the quarter yielded 70 bushel wheat that year. He also testified that he received a $3,000.00 payment for preventative planting thus reducing his loss to $4,000.00. In 2014, he again calculated a loss of $7,000.00. While testifying, he referred to some records that he had in order to make his calculations, but they were not introduced into evidence. Although he had again applied for preventative planting payments in 2014, he did not qualify because the acres totaled less than the 20 acre minimum required for the program. In 2015, he testified that he planted all of his acres, but then 8½ to nine acres were lost when the water course flooded before harvest. Therefore, he calculated a loss of $2,700.00.

*7 The Court had an opportunity to observe Mr. Zubke while he testified under oath. While there is certainly no way to determine exactly how much of the water in the waterway crossing Zubke Brothers' land was only due to Defendants' tiling and pumping, certainly there is no question that Defendants' actions affected the ability of Zubke Brothers to farm their land. Based upon the testimony provided, the Court determines that Zubke Brothers is entitled to a judgment against Defendants for crop loss for the year 2013 in the amount of $4,000.00; in the year 2014 in the amount of $7,000.00 and in the year 2015 the amount of $2,700.00 for a total award of $13,700.00. Judgment is hereby entered in favor of Zubke Brothers and against Defendants for that amount.

Robert Rumpza testified that he also suffered crop losses due to the water pumped and tiled into the natural water course from Defendants' land. He indicated that he used his combine yield monitor to determine the difference in acres and used the average bushels on the rest of the field to determine his loss. In following that procedure, he calculated a loss for 2013 in the amount of $4,675.00, for 2014 in the amount $2,850.00 and in 2015 in the amount of $2,975.00. While Defendants established on cross-examination that all of Rumpzas' losses came from acres within the natural water course, he also testified that there have been many years where he has been able to harvest a crop from his whole field including the natural drainage way. Again, there is no question that the tiling and pumping done by Defendants increased water flowing through the natural drainage course across Rumpzas' land. The exact amount of this water cannot be determined by the Court, but Defendants risked damaging their neighbor's property when they forced water into the natural waterway by artificial means. Therefore, it is clear to the Court that Rumpzas have established by a greater convincing weight of the evidence that they are entitled to damages for crop loss from Defendants in the amount of $4,675.00 for 2013; the amount of $2,850.00 for 2014 and the amount of $2,975.00 for 2015 for a total of $10,500.00. Judgment is hereby entered in favor of Rumpzas and against Defendants for that amount.

CONCLUSION

Plaintiffs have established by the greater convincing weight of the evidence that Defendants have accumulated water on their property and then deposited it onto Plaintiffs' property through artificial means in unusual or unnatural quantities. The tiling, pump, pit and dam in Tile Area 1 clearly are not natural drainage and alter on a permanent basis the amount and time of flow that occurs. The tiling done in Tile Area 2 to discharge water into the established water course in Tile Area 1 also results in drainage that is not natural and substantially alters the course of flow on a permanent basis. Therefore, as set forth above, Plaintiffs are entitled to the injunctive relief they are seeking requiring Defendants to cease operating the pump installed in Tile Area 1 and to remove the tile in Tile Area 2 redirecting the flow of water into the established water course in Tile Area 1. Additionally, Plaintiffs are entitled to judgments as set forth above against Defendants and judgment should be entered accordingly.

Counsel for Plaintiffs is hereby directed to draft an appropriate Order for Injunction and Judgment incorporating this Memorandum Decision by reference and unless waived by Defendants to also prepare Findings of Fact and Conclusions of Law also incorporating this Memorandum Decision by reference.

Dated this 16th day of September, 2016.

BY THE COURT:

<<signature>>

Circuit Judge

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2016 WL 9560206 (S.D.Cir.) (Trial Order)
Circuit Court of South Dakota.
Fifth Judicial Circuit
Day County

Robert RUMPZA, et al.,
v.
David ZUBKE, et al.

No. 18CIV13-000067.
October 20, 2016.

Findings of Fact and Conclusions of Law

Jon S. Flemmer, Judge.

*1 This matter came before the Court for a trial on December 14, 2015, at the Day County Courthouse in Webster, South Dakota. Plaintiff Robert Rumpza appeared personally. Plaintiff Zubke Brothers, LLC, appeared through Duane Zubke. Plaintiffs were represented by Reed Rasmussen. Defendant David Zubke appeared personally. Defendants were represented by Jack Hieb.

Based upon the evidence presented and the Post-Trial Briefs submitted by the parties, the Court hereby enters the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Plaintiffs Robert and Nancy Rumpza are the owners of the following described property in Day County: Northeast Quarter of Section 14, Township 120 North, Range 54 West.

2. Plaintiff Zubke Brothers, LLC, is the owner of the following described property in Day County: Northwest Quarter of Section 14, Township 120 North, Range 54 West.

3. Defendants David and Marilyn Zubke are the owners of the following described property in Day County: Northwest Quarter of Section 13, Township 120 North, Range 54 West.

4. Rumpzas' property is located directly west of Defendants' property. Zubke Brothers' property is located directly west of Rumpzas' property. (*See* Exhibit 1).

5. Rumpzas' and Defendants' property is separated by Day County Road 1.

6. Two areas on Defendants' land drain to the west onto Rumpzas' property. Those areas are designated as Drainage Areas 1 and 2. (*See* Exhibit B).

7. Drainage Area 1 drains through a culvert under County Road 1 onto Rumpzas' property and then onto Zubke Brothers' property.

8. Drainage Area 2, located in the northwest corner of Defendants' property, drains through another culvert under County Road 1 into a closed basin slough on Rumpzas' property.

9. There is a low lying area in the southwest corner of Defendants' property which is 15 to 24 inches lower than the south culvert running under County Road 1 through which water from Drainage Area 1 runs. Prior to 2013, this caused water to collect in the southwest corner of Defendants' property.

10. Prior to 2013, Defendants were unable to farm the southwest corner of their property because it was generally too wet.

11. In 2012 and 2013, Defendants undertook a project which would allow them to drain the southwest corner of their property as well as other low lying areas.

12. Defendants constructed a dam on their property and then pumped water over the dam. The dam prevented the water from running back into the low lying area in the southwest corner of the property. The water to the north and the west of the dam would then run through the culvert under County Road 1 onto Plaintiffs' property.

13. The construction of the dam allowed Defendants to begin farming the southwest corner of their property in 2013.

14. Defendants also installed perforated tile on their property so as to allow other low lying areas to be drained.

15. Two tile areas were developed on Defendants' property. The southerly network was described as Tile Area 1. The northerly network was described as Tile Area 2.

*2 16. On the south and east side of the dam, Defendants dug a 10 foot pit or pump station in which was placed an electric pump. The water from Tile Area 1 drains into this pit. When the water in the pit reaches a certain level, a float switch is triggered causing the water to be pumped over the dam.

17. Tile Area 2 redirected the water in the northwest corner of Defendants' property, which naturally flows to the west, to the south where it joined with the water from Tile Area 1 to the north and the west of the dam. The water collects at that point and then flows through the south culvert under County Road 1 onto Plaintiffs' property.

18. Although Defendants' property is dominant over Plaintiffs' property for purposes of drainage, Defendants' dam, pit, pump and tiling have caused unusual and unnatural quantities of water to be deposited on Plaintiffs' property.

19. Prior to the installation of the pump, the natural waterway running through Plaintiffs' property would typically be wet in the spring and then dry out as the year progressed. This usually allowed Plaintiffs to farm the entire waterway. Since the installation of the pump, Plaintiffs have been unable to farm these areas because they are continually wet.

20. Duane Zubke estimated the installation of the pump caused Zubke Brothers to lose 10 to 17 acres of land they previously farmed.

21. Both David Zubke and Defendants' expert, engineer Mike Gutenkauf, acknowledged the Defendants' drainage system caused additional water to flow onto Plaintiffs' property. Defendants' expert further acknowledged that the drainage system changed the timing of how water was deposited on Plaintiffs' property.

22. Defendants' drainage system has substantially altered the amount of flow and the time of flow from that which would naturally occur.

23. Defendants' drainage system has resulted in an unreasonable hardship and injury to Plaintiffs.

24. Defendants' drainage system has caused damage to Plaintiffs.

25. If Defendants' drainage system continues to operate, Plaintiffs will suffer irreparable harm for which they have no adequate and complete remedy at law.

26. The damages suffered by Plaintiffs have not resulted from an innocent mistake on the part of Defendants.

27. The hardship Defendants will suffer from discontinuing the use of their drainage system is not disproportionate to the benefit to be gained by Plaintiffs.

28. Robert Rumpza's testimony established that Rumpzas were unable to farm certain areas of their property in 2013, 2014 and 2015 due to Defendants' drainage system. This resulted in the loss of income of $4,675 in 2013, $2,850 in 2014 and $2,975 in 2015, for a total of $10,500.

29. Duane Zubke's testimony established that Zubke Brothers were unable to farm certain areas of their property in 2013, 2014 and 2015 due to Defendants' drainage system. This resulted in the loss of income of $4,000 in 2013, $7,000 in 2014 and $2,700 in 2015, for a total of $13,700.

30. The Court incorporates herein all Findings of Fact set forth in its Memorandum Decision filed September 16, 2016.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over this matter.

2. SDCL 46A-10A-20 is a codification of the civil law rules regarding surface water drainage.

3. SDCL 46A-10A-20 provides that rural land which drains onto other rural land has a right to continue such drainage subject to certain conditions.

*3 4. SDCL 46A-10A-20(2) requires that the land being drained must be used in a reasonable manner. The drainage system installed by Defendants has caused there to be an unreasonable use of Defendants' property.

5. SDCL 46A-10A-20(3) requires that the drainage cause no unreasonable hardship or injury to the owner of the land receiving the drainage. Defendants' drainage system has caused unreasonable hardship and injury to Plaintiffs.

6. SDCL 46A-10A-20(4) requires that the drainage must be natural and occur by means of a natural or established water course. Defendants' drainage system has caused unnatural drainage upon Plaintiffs' property.

7. SDCL 46A-10A-20(5) requires that the owner of the land being drained does not substantially alter on a permanent basis the course, amount or time of flow from that which would occur. Defendants' drainage system has substantially altered the amount and time of flow upon Plaintiffs' property.

8. Defendants' drainage system has caused irreparable damage to Plaintiffs entitling them to injunctive relief pursuant to *Maryhouse, Inc. v. Hamilton*, 473 N.W.2d 472, 475 (S.D. 1991).

9. Defendants will be prohibited from operating the pump installed in Tile Area 1.

10. Defendants will be required to remove the drain tile in Tile Area 2, which redirects the flow of water to the south.

11. Defendants Robert and Nancy Rumpza are entitled to an award of damages in the sum of $4,675 for 2013, $2,850 for 2014 and $2,975 for 2015, for a total of $10,500, plus prejudgment interest.

12. Defendant Zubke Brothers, LLC are entitled to an award of damages in the sum of $4,000 for 2013, $7,000 for 2014 and $2,700 for 2015, for a total of $13,700, plus prejudgment interest.

13. The Court incorporates herein all Conclusions of Law set forth in its Memorandum Decision filed September 16, 2016.

BY THE COURT:

<<signature>>

Circuit Court Judge

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

Appeal No. 28525

IN THE MATTER OF DRAINAGE PERMIT 11-81, JASON MCAREAVEY, APPLICANT,
and
IN THE MATTER OF DRAINAGE PERMIT 12-142,VERNON MCAREAVEY, APPLICANT.

MARK DESCHEPPER,
Appellant,

vs.

THE BOARD OF COMMISSIONERS, MINNEHAHA COUNTY, SOUTH DAKOTA,
Respondent-Appellee

JASON MCAREAVEY and **VERNON MCAREAVEY**,
Appellees.

MARK DESCHEPPER,
Plaintiff-Appellant,

vs.

VERNON R. MCAREAVEY and **MINNEHAHA COUNTY, SOUTH DAKOTA**,
Defendants-Appellees

Appeal from the Circuit Court, Second Judicial Circuit
Minnehaha County, South Dakota
The Honorable Mark E. Salter, Presiding

APELLANT'S REPLY BRIEF

NOTICE OF APPEAL FILED FEBRUARY 12, 2018

A.J. Swanson
ARVID J. SWANSON, P.C.
27452 482nd Ave.
Canton, SD 57013
(605) 743-2070
E-mail: aj@ajswanson.com

Attorney for
MARK DESCHEPPER
Appellant & Plaintiff-Appellant

James E. Moore & James A. Power
WOODS FULLER SHULTZ & SMITH
P.O. Box 5027
Sioux Falls, SD 57117-5027
(605) 336-3890

Attorneys for
BOARD OF COMMISSIONERS,
MINNEHAHA COUNTY
Respondent & Defendant-Appellee

Vince M. Roche & Justin T. Clarke
DAVENPORT EVANS
HURWITZ & SMITH, LLP
P.O. Box 1030
Sioux Falls, SD 57101-1030
(605) 336-2880

Attorneys for
JASON MCAREAVEY and
VERNON MCAREAVEY
Appellees, and Defendant-Appellee

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PRELIMINARY STATEMENT

Both County and McAreavey have filed briefs, with appendices. This brief addresses two issues in reply.

ISSUES FOR REPLY

1. **As Minnehaha County asserts on brief, did DeSchepper previously abandon his claim as presently posed in Issue 4 of Appellant's Brief, namely, "Whether the County's determination in the matter of ADP 12-142, as the complaint in Civ. 11-2729 was pending, acting without leave of the circuit court, and exercising adjudicatory powers under the drainage ordinance in favor of McAreavey, is infirm due to bias, self-interest or inherent conflicts of interest."**

   Hanig v. City of Wagner, 2005 S.D. 10, 692 N.W.2d 202

2. **If the County's drainage ordinance expresses the intent to regulate both surface and subsurface drainage activities, does the civil law rule trump the drainage ordinance, or does the latter control, whether in circumstances addressed by the rule or extending beyond the scope of the rule.**

   Gross v. Connecticut Mut. Life Ins. Co., 361 N.W.2d 259, 267 (S.D. 1985)

ARGUMENT OF ISSUES FOR REPLY

1. DeSchepper did not abandon Issue 4.

County's brief, at 23, argues this issue (Issue 4, Appellant's Brief) was abandoned due to the lack of argument to the circuit court, or in the alternative, DeSchepper has failed to overcome the presumption of objectivity. County argues, at 25, "DeSchepper presented no evidence of bias, including predisposition or inherent conflict, through any other witness." A statement from McAreavey's counsel, Mr. Roche, during trial de novo (July 2016), SR 1540, is cited: "I think it's now been abandoned that there was some sort of fraud or 'money under the table' thing that went on here."

Appellant's pleadings never alleged, suggested or maintained that the County Board members engaged in fraud, or accepted bribes for a drainage permit. (That said, the argument that the County Board has been improvidently advised in the circumstances remains, although this is not an easy argument given the outcomes, all starkly favorable to County. Beyond that, the County Board members, as such, are men and women of good repute.) But, DeSchepper's appeal of ADP 12-142 (filed as Civ. 12-3742) did allege, in ¶ 13:

> The Board's action approving Drainage Permit 12-142 is contrary to governing state law, the civil rule of drainage and the 2010 Drainage Ordinance. While authorizing the drains already installed by virtue of an in excess of the 2008 Permits may assure the proprietors and operators of the McAreavey Farm a distinct benefit, while seeking to deflect from the County the obligation to seek judicial remedies against Vernon McAreavey, the presently installed devices on the McAreavey Farm – unless this Court directs otherwise, as a consequence of this action or that now pending in Civ. 11-2729 – will continue to drain into Twin Lake, contributing to additional, prolonged flooding of the DeSchepper Farm, as drained waters come to rest on the DeSchepper Farm, all to the permanent injury of Appellant's property interests and associated rights inherent in title. SR2 6.

The Board's hearing on ADP 12-142 followed the circuit court's ruling (Judge Stuart Tiede) in July 2012 (SR 194), one that apparently startled both the County and McAreavey, leaving, for County, a Hobson's choice, of sorts: That of forcing or compelling McAreavey to remove a rather extensive system of drain tile (*see* Ex. 111, reproduced in App. E, *infra*), having initially permitted that installation, *or* affording DeSchepper a belated hearing opportunity for the tile systems already installed. (Note on Ex. 111 – blue and yellow lines, ADP 137 and 149, drain into a location other than Twin Lake. But, the balance – with the exception of ADP 11-81, not yet installed – all drain into Twin Lake, and embraced by ADP 12-142.) Final rulings from the circuit court

should have been awaited. The path taken in September 2012, is by a tribunal, hoping to avoid the more painful choice, having an interest in the outcome.

County's minutes for ADP 12-142 (Ex. 107, SR 952), provide a glimpse into the September 25, 2012 hearing – recalling the complaint in Civ. 11-2729 had just been answered. (Ex. 109, a DVD of the proceedings affords an even clearer, more complete view.) According to Jason McAreavey (with corrections noted in brackets):

> . . . [t]he tile is installed at a 3' depth and follows the natural ditches and water ways into Twin Lakes. The tile itself is small, 6' [Appellant suspects the minutes are in error, intended to read as 6"] mains and 4" laterals. A.J. Swanson, Attorney representing Mark DeSchepper, stated that 4 years ago an administrative official granted the McAreavey's drainage permits in error. [It should be noted that County has never quarreled with this assertion.] Mr. Swanson stated he assumed that the McAreavey's knew that action was wrong and proceeded to do the work and it appears they greatly exceeded the scope of the permit. Mr. Swanson stated that Drainage Permit # 11-81, that is under appeal, ties in with the tile lines of the permits being considered today. The drainage permits that they are challenging all exit and drain water into Twin Lake. Mr. Swanson spoke on the unique geological feature of Twin Lakes, which has a clay liner that holds water very well. Mr. Swanson also spoke on the lawsuit filed against the McAreavey's and the County filed by Mr. DeSchepper and told the Commission to not make their legal position worse than it is. Mr. Swanson stated that the Commission had not upheld Section 7.03 of the Drainage Ordinance that states one of their purposes is to prevent inordinate adverse impacts on servient properties. Mr. Swanson stated that his client had lost a lot of acres and it is not the County Commission's job to pick winners and losers . . . . Ex. 107, at SR 953.

The Chief Civil Deputy State's Attorney then interjects:

> Gordy Swanson [now Circuit Judge Gordon Swanson] . . . explained that the Planning Department had brought the permits back to the Drainage Board on his advice to [give] the downstream landowner's the opportunity to oppose the permits and allow the Drainage Board to review the permits on their merits. If the permits are approved, the initial permits will become void. Mr. Gordy Swanson stated that Mr. A.J. Swanson's barrage of history on the mistakes by the county makes it clear that the opponents want to be in court. Gordy Swanson said he had hoped this hearing would be on the merits of the tiling applications, instead A.J. [Swanson] offered nothing substantive on why the permits should be denied. Commissioner

> Barth asked A.J. Swanson and Mr. DeSchepper if there was anything that could make this more palatable. *Mr. DeSchepper stated that there would not be a problem if the water had a place to go other than to accumulate on the downstream properties.* [Emphasis supplied.] He said there is no active outlet on this lake. Any water he gets is detrimental to him. He has lost 10 acres in the last wet period. A.J. [Swanson] stated that he would prefer there not be a fight but he has been given no choice. He stated that Section 7.03 of the Drainage Ordinance has never been applied. *Id.*

The minutes conclude with comments, conclusions and motion of the Board:

> Commissioner Heiberger stated that she went out to visit with Mark [DeSchepper] and is sympathetic to his situation. However, she has to look at the merits of the tiling being installed. She believes that the McAreavey's installed the tile in good faith. Commissioner Heiberger stated she does not think the tile lines caused the loss of 10 acres for Mr. [DeSchepper]. The problems with this lake are huge and there needs to be an outlet established. MOTION by Heiberger, seconded by Pekas to approve Drainage Permit #12-127 [not relevant to this matter] and Drainage Permit # 12-142. Commissioner Pekas [now Circuit Judge John Pekas] stated that unfortunately the Board is playing cleanup and that both parties in the case have a valid concern. Pekas further stated that we are trying to move forward by having notice and hearing, which is what we are doing today. VOTE on motion, 5 ayes. *Id.*

Starting with ADPs issued in 2008, without hearing, to a curative ADP being denied in 2009, the demand certain tile be removed, followed in 2011 by the Board's adopted resolution to take no legal action, and then arriving at Circuit Judge Tiede's memorandum decision in July 2012 (SR 194) – all of these events, collectively, are a study in the tribunal's power and decision-making prior to the County following the advice of counsel on ADP 12-142. This approach deflected DeSchepper's problematic litigation, but begs the question of whether the County Board acted *appropriately* in these circumstances. What County did is readily apparent from the pleadings.

During the course of the one-day trial de novo, many exhibits were marked and received by the circuit court, foundation having been agreed (SR 1520). These are all part of the record to be considered now. The minutes of the November 3, 2009 meeting are in

the record (Ex. 16, SR 916), and reflect the County Board and officers wrestling with McAreavey over a proposed drainage permit (ADP 09-149), intended to give legitimacy to the tiling work installed beyond the scope of the permits issued the year before. DeSchepper was present, along with Game Fish & Parks (owner of Twin Lake), and another property owner abutting the lake. This exchange follows (Ex. 16, SR 916, 918):

> Due to the extensive drainage that appears to have been installed, Commissioner Hajek asked how many permits have been applied for by the McAreaveys and how many times they have done tiling. Mr. Kappen recalled 3 applications and could not say how many times that they have performed drainage work. *If those applications were done according to ordinance, the neighboring landowners would have had to sign off before the permit could be issued.* Gordy Swanson, Deputy State's Attorney, could not immediately advise on how the County would go about revoking a mistakenly granted permit. To allow for legal review, MOTION by Barth, seconded by Hajek to defer consideration for 1 week. 5 ayes. (Emphasis supplied.)

Note, the permit could *not* be issued unless neighboring landowners had signed off. The neighboring landowners (including DeSchepper) had no hearing, and did not sign off on the permit. The following week (November 10, 2009), the County would deny the additional permit to McAreavey (Ex. 17, SR 919) on a vote of 3 to 2. Three years later the County Board would wholly reverse course with ADP 12-142.

The Drainage Ordinance didn't change during that time, nor did this Court's expression of the civil law rule. What changed? Before coming to full fruition in ADP 12-142, the Board considered McAreavey's ADP 11-81 in August 2011:

> MOTION by Barth to defer action. Motion dies for lack of a second. Commissioner Kelly stated that part of this problem exists because of actions by a former employee and that the McAreavey's did what they thought was correct; therefore he was in favor of supporting their request. Commissioner Heiberger stated that she had spoken with Brian Top from the NRCS and he stated that by installing tile Mr. McAreavey is preventing erosion into Twin Lakes which is a good conservation practice. Mr. [Dustin] Powers further explained a second permit application was

> submitted in November 2008 for additional tiling. This permit was challenged by the U.S. Fish and Wildlife Service and brought before the County Commission where it was approved. In November of 2009 that permit was brought back to the Commission because the applicant had exceeded what was indicated on the permit, where it was denied. In March of 2011 this permit was brought back again and the Commission decided to take no enforcement action to remove the additional tile. MOTION by Kelly, seconded by Heiberger to approve permit #11-81 as this is good conservation practice and part of the Twin Lakes watershed. Commissioner Barth stated he believes it would be better to not take action at this time due to litigation and environmental issues associated with this permit application. Chairman Pekas stated he wishes that at the time the original application was made they would have let the Commission know they had envisioned the extra drain lines coming in and he would not support the motion. Vote on motion, 4 ayes, Pekas, nay. Motion carries. Ex. 101, SR 958-9.

Clearly, by 2011, litigation over the permits and tiling work at Twin Lake had become a concern; the view stated in 2009 (no permit may be issued without consent of neighboring landowners) had been pitched overboard in favor of other notions, such as "good conservation practices." The civil law rule held no sway for these deliberations in 2011.

The Board's activities as adjudicator are quasi-judicial, subject to due process constraints, much like a local zoning board dealing with a conditional use permit, *Schafer v. Deuel County Bd. of Comm'rs*, 2006 S.D. 106, ¶ 26, 725 N.W.2d 241, at 246. There is a constitutional right to due process, to include fair and impartial consideration by the local board. *Hanig v. City of Wagner*, 2005 S.D. 10, ¶ 10, 692 N.W.2d 202, 205. Quoting *Strain v. Rapid City School Board*, 447 N.W.2d 332, at 336 (S.D. 1989), *Hanig* held:

> A fair trial in a fair tribunal is a basic requirement of due process. This applies to administrative agencies which adjudicate as well [as] to courts. Not only is a biased decision maker constitutionally unacceptable, but our system of law has always endeavored to prevent even the probability of unfairness. *Id.*, ¶ 10, 692 N.W.2d at 205-06.

A certain County employee made a procedural mistake in 2008, administratively issuing permits to McAreavey, without notice to others. McAreavey then installed tile beyond what was described in these administrative permits. But, this is no mere *procedural mistake* – in November 2009, this same County employee (Kappen) describes the ordinance as not allowing the installation of any tile *unless* neighboring landowners had consented. (This is about as close as the County has come for a correct view of the civil law rule, in the context of Twin Lake; more on this later.)

Later, the County's focus is on "good conservation practice," and concerns about litigation, not the civil law rule. In August 2011 (ADP 11-81), litigation, indeed, was looming on the horizon, and by September 2012 (ADP 12-142), it was underway, with Circuit Judge Tiede's ruling in July 2012, largely adverse to County (under Appellant's interpretation).

Appellant's claim, in Issue 4 of opening brief, has no more been waived than his further claim that, first, the Drainage Ordinance (as then existing) describes, and, secondly, the County Board's actions taken over the course of time have endorsed, the permitting of drainage tile that is well beyond the scope of the civil law rule. When inferior tribunals are allowed to continue to adjudicate the vested property rights of parties, even as those matters – *including the prior actions of the tribunal itself* - are being litigated within a higher tribunal (circuit court), does not the question inherently arise on the continued suitability of that tribunal to act, within the context of *Hanig* and others? Many tribunals, when called into question, would wish to have for themselves similar self-help remedies. "Error? There – we've fixed it."

The circuit court's Amended Findings of Fact, Conclusions of Law and Memorandum Opinion and Order Re: Administrative Appeal (App. C to Appellant's main brief) took great care to find, in light of *Department of Game, Fish and Parks v. Troy Township*, 2017 S.D. 50, 900 N.W.2d 840, the County's power were quasi-judicial in nature (as exercised on both August 9, 2011 and September 12, 2012, C-003). Appellant agrees. Whether those powers were constitutionally appropriate for further exercise, in taking up and approving ADP 12-142 in September 2012, even while the legal challenge remained in Civ. 11-2729, garnered no judicial curiosity.

Is the County Board properly functioning in a quasi-judicial role, "playing cleanup," as one member candidly observes, while another member bemoans a lake with "huge problems" in need of an outlet, all preceding a unanimous vote to issue ADP 12-142? Ex. 107, at SR 953. Appellant's proposed findings of fact and conclusions of law concerning the inferior tribunal's conduct, requested by the circuit court about one year before the amended findings, conclusions and order were then entered (App. C), remain apt and alive for review at this time. (See, generally, SR 1011, findings of fact # 42-49, conclusions of law, # 40, 43, 44, 48, and 50, among others.) That the County Board actually did what Appellant's brief says is apparent from the pleadings and exhibits.

2. Neither the former ordinance nor the civil law rule accommodates these drainage permits.

A. Surface Water – What is it?

Several writers – the briefs of County and McAreavey, and the Amended Findings of Fact, Conclusions of Law and Memorandum Opinion and Order Re: Administrative Appeal – note the 1985 drainage law, Chapter 46A-10A, SDCL, fails to define "surface water." Perhaps the legislature was purposeful (if not neglectful) in this

regard, or simply accepted that the term, being factually intensive, is sufficiently defined by case law. What are "surface waters for purposes of drainage" is in each case a question of fact to be determined from the evidence, according to *Thompson v. Andrews*, 39 S.D. 477, at 488, 165 N.W. 9, at 13 (1917).

As considered in *Gross v. Connecticut Mut. Life Ins. Co.*, 361 N.W.2d 259, 267 (S.D. 1985), cited in Appellant's brief, at 15, drainage protected by the rule must, first, be "drained into a water course or into any natural depression whereby the water will be carried into some natural watercourse." Consistently with *Thompson*, and *Johnson v. Metropolitan Life Ins. Co.*, 71 S.D. 155, 22 N.W.2d 737 (1946), *Gross* asserts the rule allows the discharge of surface waters "over" and not "on" the land of another. 361 N.W.2d at 266. The water discharged in *Gross* came from an irrigation pond. The trial court determined this was not surface water, having lost the characteristics of "surface water by being contained and stored in the irrigation pond." *Id.*, 266-7. Not all water on the surface of the earth (the irrigation pond) is surface water; yet, there is no known case law description of water, not on the surface of the land but yet deemed to be surface water, even if Dr. Sands were imbued of such an opinion. It seems obvious to Appellant that water, upon entering a perforated tile 3 feet below the surface of land, might be described as percolating water, and perhaps subsurface water, but not as surface water.

Knodel v. Kassel Township, 1998 S.D. 73, 581 N.W.2d 504, concerned a long-plugged culvert under a township road. In footnote 2, the Court relied on *Gross*, 361 N.W.2d at 266, for a definition of surface water:

> "Surface waters comprehend waters from rains, springs, or melting snows which lie or flow on the surface of the earth but which do not form part of a watercourse or lake." *Sullivan v. Hoffman*, 207 Neb. 166, 170, 296 N.W.2d 707, 710 (1980); *Lahman v. Comm'r of Highways*, 282 N.W.2d

> 573 (Minn. 1979); Restatement (Second) of Torts, § 846 (1979). The term does not comprehend waters impounded in artificial ponds, tanks, or water mains. *Thomson v. Pub. Serv. Comm'n*, 241 Wis. 243, 5 N.W.2d 769 (1942). "The chief characteristic of surface water is its inability to maintain its identity and existence as a water body." III Farnham, Waters and Water Rights § 878, at 2557 (1904).

The waters flowing into – and through - the four tile mains in question (before exiting into Twin Lake or directly onto DeSchepper's farm, in the case of ADP 08-71, proposed to be superseded by ADP 12-142, *see* Ex. 111, App. E, *infra*), are *not* surface water. The water is gathered below ground, by means of perforated drain tile (plus the one intake riser, actually capable of gathering surface water as is placed at the leading edge of the tile in ADP 08-71, discussed at 21 of Appellant's main brief – oddly, a feature never mentioned by McAreavey). Is not the determination of surface versus subsurface water controlled by location – whether on the surface or within subsurface environs - at the exact moment of capture by the drain? Surface water, captured by means of inlet risers, *and transport of that water by a blind or closed tile below grade to an exit*, does not forfeit that status. But the facts of this case are otherwise!

The circuit court tacitly agreed, recognizing the intake of drainage water occurs 3 feet below grade (App. C, C-003), while holding out the premise the drainage tile system referenced in *Winterton v. Elverson*, 389 N.W.2d 633, at 634 (S.D. 1986) *could* be of the type used by McAreavey, while draining "only surface water," in the words of *Winterton*. The phrase "only surface water" reflects the intent of *Winterton* to draw a clear distinction between *that* kind of water and some other kind of water – and "subsurface water" is the only other kind that comes to the mind of this writer. McAreavey's extensive tile system (Ex. 111, App. E) drains *subsurface water*, there being no surface ponds. In a certain sense, the water drained is converted back into surface water (at least,

in the loose sense of the irrigation pond considered in *Gross*), by emitting onto the *surface of the ground* at the exit end, but for the highly inconvenient fact that the exit end is already well covered by Twin Lake, in a highly engorged, flooded state.

Appellees both reference another trial court's underlying findings in *Rumpza v. Zubke*, 2017 S.D. 49, 900 N.W.2d 601; the trial court referenced "perforated tile," and on appeal, the use of a drainage tile system that drained "only surface water," as mentioned in *Winterton*, is then quickly equated, by these briefing parties, to the *perforated tile* as considered by the *Rumpza* trial court. This is an interesting point – other than the *Winterton* tile system is nowhere described as such, recognizing that in *Rumpza*, the defendant's use of the a pump to drain the pit, receiving the water drained by the tile system, was enjoined. Likewise, the "only surface water" system at stake in *Winterton*.

B. Subsurface Water – Something other than Surface Water.

If the tile system in question drains subsurface water, such is beyond the scope of the civil law rule of drainage. Given the law's reference to "blind drains" or "closed drains," some confusion may exist. SDCL 46A-10A-1(2) – a drain utilizing pipes, tiles, etc., constructed in such a way that flow of water is not visible. When it comes to modern-day tiling, the question is not the tile's physical location - *all of it is in the ground, below grade.* No farmer engaged in tillage practices could farm around a system of pipes or tiles lying on top of the ground. It simply isn't possible or practical.

Thus, *all* drain tiles (as contrasted with an open ditch, for example) are in the nature of a blind or closed drain – the flow of water is not visible, at least from the usual viewing perspective of humans. The question is – what kind of water does it collect and move? Does it collect water that is subsurface water (via a perforated tile designed for

subterranean function), or only water that is surface water (solid tile, with water being admitted via inlet risers)? As Appellant has placed in the record and referenced in the opening brief, at 21, one of the four main lines installed by McAreavey involves a single inlet riser, but is also a perforated tile, able to gather and thus would emit both surface and subsurface waters. That a blind drain is statutorily recognized does not mean such device is handling subsurface water, or there is now a *subsurface drainage rule* hidden in Chapter 46A-10A, SDCL, on an equal footing with the civil law rule.

This discussion is relevant as the Drainage Ordinance purports to cover the drainage of *both* surface and subsurface waters, Section 6.01.30, defining "drain" as a means of "draining either surface or subsurface water." Ex. 112, SR 968, at 981. Should DeSchepper prevail, Appellees claim that a disaster awaits modern farming in this state.

C. "The Sky is Falling" (Chicken Little).

DeSchepper is asking this Court to "declare all drain tile illegal because drain tile drains something other than surface water." McAreavey brief, at 26. County asserts this will "nullify decades of South Dakota agricultural practices" (at 14), while McAreavey (at 26) states that "farmers all over eastern South Dakota will be required to remove their drain tile resulting in catastrophic damage to our agricultural economy." DeSchepper, however, merely proposes the civil law rule should continue, in line with SDCL 46A-10A-70, and the expressed concerns of Commissioner Heiberger. Ex. 107, SR 953.

At the peak inundation of Twin Lake in 2011, exactly 50 acres of this quarter-section farm was under water or affected by high water table. Ex. 36, *see* App. F, *infra*. Appellees each maintain DeSchepper's farm is *not* adversely affected by drainage. These assertions ignore the evidence of both DeSchepper and McAreavey – shortly after the

tiles were inserted into the ground, Twin Lake soon rose high enough to bury all of the exits under water, and remaining so at the time of trial (2016). SR 1381, 1466-7.

Coincidence? No one knows, as the crucial data within this 950-acre watershed – rainfall, run-off rates, tile line discharge volumes, etc. – does not exist. No one has gathered or kept such records, not even McAreavey. There is only an opinion of Dr. Sands, based not on his empirical study of *this* watershed, but on a published study of others working on one project on an ancient seabed in North Dakota. The opinion is interesting – but the reality is this: the lake level rose quickly once the tile lines were installed. The inherent difficulties (and cost) in gathering and presenting this type of evidence may be one of the reasons behind the civil law rule itself.

Appellees assert that Dr. Sands described the water captured and flowing into the subsurface tile lines as surface water. That testimony does not seem to appear in the record, other than that Dr. Sands was unfamiliar with the civil law rule. Appellant's brief, at 10. Do the waters being drained – *prior to being caught up in the very mechanism that accomplishes the drain* - lie or flow on the surface of the earth, as referenced in *Gross*, 361 N.W.2d at 266? There is no case holding "surface water" is so expansive and flexible that water suspended (due to heavy clay content, lateral movement is nil, according to witness Kenyon) in the soil some three feet below the surface is likewise embraced.

D. Regimes Other Than the Civil Law Rule

The recent case of *Zwart v. Penning*, 2018 S.D. 40, 2018 WL 2247501, reflects the background of county-issued (Moody County) drainage permits, under which the upstream landowner (Zwart) connected a drain-tile system to the downstream owner's previously-installed tile system, exiting into Bachelor Creek, a "blue-line" waterway, that

"an upstream landowner can drain water into without needing to acquire a waiver from downstream owners." *Id.,* at ¶ 2. *Zwart* references drainage permits; "perforated tile" is not mentioned, but "surface runoff," and "surface inlet" are, suggesting (to us) the tile systems handled surface waters, to some extent. The case was deemed a contractual dispute with waivers and agreements, rather than governed by the civil law rule.

Minnehaha County's ordinance also recognized a number of "blue-line" streams, listed in Section 1.06(1) (Ex. 112). Twin Lake is not listed. Projects that outlet elsewhere – as referenced in subsections (2) and (3) – may proceed if *all* downstream landowners within one-half mile have signed a waiver. These conditions are not met in this case; as noted in Section 1.06, the "drainage permit applications shall be addressed by the Board." This begs these questions: (a) if the Board addresses the permit, is that "address" ungoverned by the civil law rule, and (b) what rights for draining subsurface water (into a lake without an outlet), adverse to a servient owner may be conferred by this "address"?

A drainage regime for subsurface waters seems to be suggested by *Zwart* - the use of waivers, access to "blue-line" streams (with sufficient capacity), and easements and contracts. Mutual "good neighborliness," suggested by a century of civil law rule cases, seems essential, too. The impetuous, the imperious will find difficulties with such a regime, recalling this Twin Lake dispute is now a decade old.

E. Whence this Drainage Right by Permit?

The challenge is to establish where and how – exactly – under the Drainage Ordinance, in defining the County Board's jurisdiction, does it claim the right to address and "permit" McAreavey's private drain of water (of any description – surface or subsurface) onto DeSchepper? Board's counsel considers Section 2.02 controlling (*see*

Ex. 31, SR 928, in particular, email annexed thereto; the reference to Section 2.10 cannot be explained, no such section is in Appellant's copy of the Drainage Ordinance). If controlling, Section 2.02 lists factors – of which # 8 and subparts (a) through (e) seem relevant (Ex. 112, at p. 7). Subpart (a) focuses on "[u]ncontrolled drainage into receiving watercourse which do not have sufficient capacity to handle the additional flow and quantity of water shall be an adverse effect" on downstream landowners. This test completely fails; there is *no* receiving watercourse.

Having divorced the essence of the civil rule, in SDCL 46A-10A-70, from the structure of 46A-10A-20, the circuit court approves of these permits. Appellees persist in reading *First Lady* (2004 S.D. 69, 681 N.W.2d 94) in the same, attenuated fashion as the circuit court (*see* C-016, and discussion Appellant's brief, at 24) – drained water dumped into a natural depression is the end of inquiry! County, at 16, grabs the same quotation of *First Lady*, from ¶ 13, as did the circuit court; but, the full passage begins "[a]s previously indicated" –a clear reference back to the extended quotation of the entire statute, 46A-10A-70, *First Lady*, ¶ 6. This much is omitted; *First Lady* is not good authority for simply dumping any kind of drainage into a natural depression.

What lacks Twin Lake? Commissioner Heiberger answered on September 25, 2012 - "an outlet." Ex. 107, SR 953. An apt observation, and, one hastens to note, a feature also required by SDCL 46A-10A-70.

CONCLUSION

Given the weighty, lengthy briefs of Appellees – and the circuit court's rulings below – one may forget this case's origins. *It was a mistake!* Ex. 16, SR 918; see County's brief, at 2, admitting to a procedural mistake. The ensuing, long history of this

case is presented and defended as a just and proper result under the civil law rule. It is not. Simply trying to cure the 2008 procedural mistake (by means of a 2012 hearing) does not fix the substantive law problem.

Respectfully submitted:
MARK DESCHEPPER, Appellant

June 8, 2018 /s/ A.J. Swanson
A.J. Swanson, Attorney for Appellant

ARVID J. SWANSON, P.C.
27452 482nd Ave.
Canton, SD 57013
(605) 743-2070
aj@ajswanson.com

CERTIFICATE OF COMPLIANCE

In accordance with SDCL 15-26A-66(b)(4), I certify Appellant's Reply Brief complies with the requirements of South Dakota Codified Laws; this brief was prepared using Microsoft Word 2010, Times New Roman (12 point), contains 4,990 words, 25,067 characters, exclusive of title page, table of contents, table of authorities, jurisdictional statement, statement of legal issues and authorities and certificates of counsel. The word and character count of the word processing program were relied on in preparing this certificate.

June 8, 2018 /s/ A.J. Swanson

CERTIFICATE OF SERVICE

The undersigned hereby certifies that Appellant's Reply Brief in the above referenced case were served upon each of the following persons, as counsel for Respondent, Defendants and Appellees herein, via electronic mail, as stated below:

James E. Moore james.moore@woodsfuller.com
James Power jim.power@woodsfuller.com
WOODS FULLER SHULTZ & SMITH P.C.
P.O. Box 5027
Sioux Falls, SD 57117-5027
Attorneys for Board of Commissioners & Minnehaha County

Vince M. Roche vroche@dehs.com
Justin T. Clarke jclarke@dehs.com
DAVENPORT EVANS HURWITZ & SMITH, LLP
P.O. Box 1030
Sioux Falls, SD 57101-1030
Attorneys for Vernon McAreavey & Jason McAreavey

Further, the original and two (2) copies of Appellant's Reply Brief were transmitted via U.S. Mail, at a facility of the U.S. Postal Service at Canton, Harrisburg or Sioux Falls, SD, addressed to the South Dakota Supreme Court, 500 E. Capitol, Pierre, SD 57501, as well as filing by electronic service in Word format (appendices in portable document format) to the Clerk of the South Dakota Supreme Court at: SCClerkBriefs@ujs.state.sd.us. All service accomplished the date entered below:

Date: June 8, 2018

/s/ A.J. Swanson
A.J. Swanson
ARVID J. SWANSON, P.C.
27452 482nd Ave.
Canton, SD 57013
(605) 743-2070
aj@ajswanson.com
Attorney for Appellant