MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Town of Clayton,
Appellant-Defendant,

v.

Michael Swanson and Evi Swanson,
Appellees-Plaintiffs

April 14, 2023

Court of Appeals Case No. 22A-CT-1061

Appeal from the Hendricks Superior Court

The Honorable Robert W. Freese, Judge

Trial Court Cause No. 32D01-2005-CT-85

Memorandum Decision by Judge Mathias
Judges Bradford and Kenworthy concur.

Mathias, Judge.

[1] Town of Clayton ("the Town") appeals the trial court's judgment for Michael Swanson and Evi Swanson (collectively, "the Swansons") on their claim

alleging inverse condemnation of real property. The Town raises three issues for our review, which we restate as:

I. Whether the trial court erred when it denied the Town's motion for partial summary judgment on the issue of the scope of the Swansons' alleged damages.

II. Whether the trial court erred when it denied the Town's motion for partial summary judgment on the Swansons' claim based on vicarious liability for a contractor's alleged negligence.

III. Whether the trial court erred when it entered judgment for the Swansons on their inverse condemnation claim.

[2] We affirm in part and reverse in part.

Facts and Procedural History

[3] In 2005, the Swansons bought approximately five acres of real property in Clayton, Indiana. The property is transected by a recorded public drainage easement that is sixty-feet wide and runs from east to west ("the easement"). The easement continues across the property to the west of the Swansons' property. The Town is the dominant estate holder of the easement. The Swansons built a residence on the north side of the easement, abutting the street. The area to the south of the easement has been in a natural state since the Swansons bought the property, and Michael mows the weeds on the south side a few times per year. In fact, the plat indicates that the entire portion of the property from the north edge of the easement to the south property boundary "is not buildable for residence." Ex. 1. Prior to 2019, a narrow ditch ran along

the easement, and the Swansons could cross the ditch by stepping over it. In order to allow a lawnmower access to the south side of the property, however, Michael had to build a small temporary bridge over the ditch.[1]

[4] Over the years, the Swansons and neighboring property owners experienced issues with intermittent flooding. In particular, during some storms, the Swansons' property would experience excess surface water flowing from the northwest corner of the property, down the driveway next to the house, into the ditch, and over the edges of the ditch onto properties to the south. In response to those issues, in 2018, the Town planned a remediation project focused on clearing out "trees and brush and other impediments" from the ditch running along the easement. Tr. p. 184. Dan Slattery, Clayton Town Manager, spearheaded the planning and execution of the project. Slattery met with Michael at the Swanson property to discuss the project, along with a few contractors. At no time were the Swansons informed that the project would include making the ditch significantly wider or deeper.

[5] The Town hired Murrain Excavating, Inc. ("Murrain") to complete the project, and Murrain began work on February 26, 2019. About two or three days into the project, Michael grew concerned that the scope of the work being done to the ditch exceeded what had been represented to him. Michael expressed his concerns to Slattery, but he received no satisfactory resolution. Accordingly,

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[1] The Swansons are prohibited from building or maintaining permanent structures in the easement.

Michael stopped the work on the project[2] and contacted the Indiana Department of Environmental Management ("IDEM").

[6] On May 3, Douglas Wolf, a Storm Water Specialist with IDEM, inspected the project site and prepared a report that found violations of rules governing "Construction Site Management for Erosion and Sediment Control" requiring "corrective action[.]" Ex. Vol. 4, p. 49. Wolf noted that the Town was required to get a permit from IDEM for the project, but the Town had failed to get one. Wolf stated that approximately 500 linear feet of the ditch had unstable, "straight up and down" banks. *Id.* Wolf instructed the Town to take steps to stabilize the banks of the ditch by regrading them and implementing erosion control measures. In particular, Wolf recommended that the Town "obtain appropriate professional design guidance for this stabilization implementation." *Id.* at 50.

[7] In response to Wolf's report, the Town hired an engineering firm, GRW, to design and implement a plan to comply with IDEM's recommendations. The Swansons' neighbor to the west, Ryan Rash, allowed GRW to do the remediation work to the ditch on his property, but the Swansons refused. Instead, the Swansons hired V3, an engineering firm, to assess the problems in the ditch on their property and to design a remediation plan.

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[2] Michael denied Murrain permission to access the easement via his property, and the work stopped.

[8] On May 29, the Swansons met with Gregory Wolterstorff, an engineer with V3, at their property. Wolterstorff found that, as a result of the work done by Murrain, the Swansons could not access the southern portion of their property; there was evidence of "soil disposal and equipment tracking" across the southern portion of the Swansons' property indicating that Murrain's work had exceeded the boundaries of the drainage easement; there was no temporary or permanent erosion control in place in the ditch; the banks were "dug too steep," which led to "significant erosion . . . occurring throughout the property"; and there was "significant sedimentation . . . gathering at the down stream end of the property because the newly constructed channel has significantly larger conveyance capacity than the downstream ditch." Tr. pp. 117-19. In other words, there is now a "bottle neck effect at the eastern end" of the ditch on the Swansons' property. *Id.* at 122. Wolterstorff concluded that, due to storm water being unable to flow out of the ditch from the Swansons' property, the Town had "turned the Swanson property into a storm water detention basin for the benefit of the surrounding properties." *Id.* at 120-21.

[9] Since February 2019, flooding events have created sinkholes on the Swansons' property. And storm water coming from the north of the Swansons' property that used to flow into the ditch and off the property now gets backed up and spills over the ditch's banks towards the Swansons' home.

[10] On May 26, 2020, the Swansons filed a complaint for damages against the Town and Murrain alleging negligence, including vicarious liability and inverse condemnation against the Town. In November, the Swansons filed an amended

complaint adding a claim for breach of contract against the Town. In December 2021, the Town filed a motion for partial summary judgment seeking a declaration that the Swansons could not recover for alleged damages for items within the drainage easement; alleging that the Swansons could not prevail on their vicarious liability claims; and alleging that the Town was entitled to summary judgment on the Swansons' claim for inverse condemnation. The trial court denied that motion.

[11] Following a takings hearing[3] on the Swansons' claim for inverse condemnation, the trial court found in relevant part:

> 55. The flooding on the Swanson land is (1) inevitable, reoccurring and consistent; (2) was foreseeable; and (3) unique to the Property. The flooding now occurs any time there is significant rain to cause stormwater runoff. The flooding was foreseeable in that it was the Town's stated goal to have the ditch catch all the stormwater in the area. By increasing the conveyance capacity of the ditch without making any arrangements for the downstream release, it was entirely foreseeable that the Swanson Property would retain the stormwater and flooding would occur. This burden is unique to the Swanson Property in that the Swanson Property is the only Property now so suffering. In fact, the adjacent properties have all benefitted from having the stormwater diverted to the Swanson[s'] land.

[3] As we explain below, there are two stages in an inverse condemnation action, the first being a hearing to determine whether a compensable taking has occurred. *Center Townhouse Corp. v. City of Mishawaka*, 882 N.E.2d 762, 770 (Ind. Ct. App. 2008), *trans. denied*.

> 56. By design, the Swanson Property is now acting as the stormwater detention basin for the Town. This has resulted in an "involuntary servitude" of the Property. This is a change in function and use of the drainage ditch which was imposed by the Town of Clayton on the Property, and it represents a compensable taking.
> 57. What was originally an area where water would flow through the Swanson[s'] Property that a person could step over with ease is now a significant ditch/creek that [is more] than several feet deep and cannot be easily crossed, if crossed at all.
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> 58. Water is now retained in the ditch and had not been retained prior to the work performed by the Town.
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> 59. The work has caused a back-flow of water onto the Swanson[s'] Real Estate.
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> 62. The Swansons have presented two independent arguments in support of their takings' theory. First, the Swansons argue that access to the southern portion of their Property was completely eliminated by the degree and manner of excavation to Ditch within the Drainage Easement by Murrain Excavating (the "Ditch Work"). Second, the Swansons argue that the Ditch Work has caused new flooding on their Property northeast of the Ditch. . . .

Appellant's App. Vol. 2, pp. 23-25. The trial court found that the Swansons had proven both grounds to show a taking. Accordingly, the court concluded that "a taking has occurred." *Id.* at 26. This appeal ensued.

Discussion and Decision

Issue One: Damages

[12] The Town first contends that the trial court erred when it denied its motion for partial summary judgment seeking a declaration that the Swansons are not entitled to damages alleged to have occurred within the drainage easement. Our standard of review is well settled.

> We review summary judgment de novo, applying the same standard as the trial court: "Drawing all reasonable inferences in favor of . . . the non-moving parties, summary judgment is appropriate 'if the designated evidentiary matter shows 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.'" *Williams v. Tharp*, 914 N.E.2d 756, 761 (Ind. 2009) (quoting T.R. 56(C)). "A fact is 'material' if its resolution would affect the outcome of the case, and an issue is 'genuine' if a trier of fact is required to resolve the parties' differing accounts of the truth, or if the undisputed material facts support conflicting reasonable inferences." *Id.* (internal citations omitted).
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> The initial burden is on the summary-judgment movant to "demonstrate [ ] the absence of any genuine issue of fact as to a determinative issue," at which point the burden shifts to the non-movant to "come forward with contrary evidence" showing an issue for the trier of fact. *Id.* at 761-62 (internal quotation marks and substitution omitted).

Hughley v. State, 15 N.E.3d 1000, 1003 (Ind. 2014) (alterations original to *Hughley*).

[13] In its brief on appeal, the Town argues that it is entitled to partial summary judgment because, as the dominant estate holder of the easement, "it cannot be liable to the Swansons for damages within the Drainage Easement as a matter of law." Appellant's Br. at 57. In support, the Town cites *Panhandle Eastern Pipe Line Co. v. Tishner*, 699 N.E.2d 731, 739 (Ind. Ct. App. 1998). In that case, the Tishners bought property with a natural gas pipeline easement running through it. The easement was "open" and of "undefined width," and it provided, in relevant part, "that Panhandle has the right to lay, maintain, operate, repair, replace, change the size of, and remove a pipeline"; that the Tishners "are entitled to fully use and enjoy the premises except for the purpose granted to Panhandle"; "that the pipe be buried so as not to interfere with the cultivation of the land"; and that "the easement holder must pay for damages to crops and fences caused by the exercise of easement rights." *Id.* at 734, 738.

[14] During the 1960s, the Tishners installed "a swimming pool, a patio, a brick pool wall, a pool house, a stone wall entry into the pool area, and a brick entry wall." *Id.* at 734. Most of those improvements were installed "within thirty-three feet of" the pipeline. *Id.* The Tishners enjoyed their property without incident until 1988, when Panhandle had to replace some of the pipeline on their property. In the course of that project, Panhandle removed "the brick entry wall, several trees and shrubs, [and] the stone entry wall to the pool area," and it had "to tear up the asphalt on the Tishners' driveway." *Id.* at 735.

[15] In the course of litigation,[4] the trial court "ordered Panhandle to pay damages to the Tishners for their pool wall, benches, patio, curb, driveway, front yard, and playground[.]" *Id.* On appeal, we disagreed, in part, and held as follows:

> Panhandle's rights and duties within and without the easement must be distinguished. The owner of an easement (the dominant estate) possesses all rights necessarily incident to the enjoyment of the easement. *Litzelswope v. Mitchell*, 451 N.E.2d 366, 369 (Ind. Ct. App. 1983). He may make repairs, improvements, or alterations that are *reasonably necessary* to make the grant of the easement effectual. *Id.* The owner of the servient estate may use his property in any manner and for any purpose consistent with the enjoyment of the easement, and the dominant estate cannot interfere with the use. *Holding v. Indiana & Michigan Elec. Co.*, 400 N.E.2d 1154, 1157 (Ind. Ct. App. 1980). All rights necessarily incident to the enjoyment of the easement are possessed by the owner of the dominant estate, and it is the duty of the servient owner to permit the dominant owner to enjoy his easement without interference. *Id.* The owner of the servient estate may not so use his land as to obstruct the easement or interfere with the enjoyment thereof by the owner of the dominant estate. *Id.* Thus, within the easement, Panhandle has the right to enter upon the easement and to make repairs and replacements to its pipeline, including any necessary excavation, without regard to structures erected upon the easement, and the Tishners erected such structures at their peril. *By the express terms of the easement grant, Panhandle is liable only for damages to crops and fences within its easement* caused by its repair or replacement of its pipeline.

Id. at 739 (emphases added).

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[4] Panhandle sought an injunction against the Tishners, and they filed a counterclaim seeking damages.

[16] In sum, in *Tishner*, we held that the express terms of the easement grant controlled on the issue of damages. Here, the Town does not direct us to any designated evidence to show the terms of the drainage easement.[5] In any event, to the extent the Town reads *Tishner* as precluding all damages within an easement, the Town is incorrect. Indeed, as we noted in *Tishner*, the Town is only entitled to make "repairs, improvements, or alterations that are *reasonably necessary* to make the grant of the easement effectual," and the Swansons are entitled to "use [their] property in any manner and for any purpose consistent with the enjoyment of the easement, and the [Town] cannot interfere with the use." *See id.* (emphasis added). Without designated evidence to show what rights each party has with respect to use of the drainage easement, the Town has not sustained its burden on summary judgment to show that it is entitled to a declaration that the Swansons are not entitled to damages within the drainage easement as a matter of law.

Issue Two: Vicarious Liability

[17] The Town next contends that the trial court erred when it denied its motion for partial summary judgment on the issue of its alleged vicarious liability for Murrain's negligence. The Town maintains that those claims are "barred as a

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[5] At the takings hearing, the Plat was submitted into evidence. The Plat states that the drainage easement is "RESERVED FOR SURFACE WATER DRAINAGE PURPOSES"; that the Swansons' title is "SUBJECT TO THE RIGHTS OF PUBLIC UTILITIES"; and that "NO PERMANENT OR OTHER STRUCTURES ARE TO BE ERECTED AND MAINTAINED UPON" the drainage easement. Ex. Vol. 3, p. 6. While the Swansons' rights are not expressly delineated in the Plat, neither are the Town's rights.

matter of law under the Indiana Tort Claims Act, the application of which is a question of law for the court to decide." Appellant's Br. at 58. We must agree.

[18] Indiana Code section 34-13-3-3(a)(10) provides that a governmental entity or an employee acting within the scope of the employee's employment is not liable for the alleged negligent act or omission of anyone other than the governmental entity or the governmental entity's employee. In their brief on appeal, the Swansons cite case law relevant to the general rule governing an employer's liability for the negligence of an independent contractor,[6] but the Swansons do not address the statute, which clearly provides immunity here. We hold that the trial court erred when it denied the Town's motion for partial summary judgment on this narrow issue. *See Bartholomew County v. Johnson*, 995 N.E.2d 666, 679 (Ind. Ct. App. 2013) (holding County entitled to summary judgment on issue of vicarious liability for third-party negligence).

Issue Three: Inverse Condemnation

[19] The Town also contends that the trial court erred when it found for the Swansons on their claim for inverse condemnation. Our Supreme Court recently set out the applicable standard of review:

> When, like here, the trial court issues special findings and conclusions under Trial Rule 52, an appellate court applies a two-tiered standard of review—first determining whether the evidence supports the findings and, if so, whether the findings support the

[6] The primary case cited by the Swansons, *Van Keppel v. County of Jasper*, 556 N.E.2d 333 (Ind. Ct. App. 1990), predates Indiana Code section 34-13-3-3(a)(10) and is inapposite here.

> judgment. *Indiana Land Tr. Co. v. XL Inv. Properties, LLC*, 155 N.E.3d 1177, 1182 (Ind. 2020). Without reweighing the evidence or reassessing witness credibility, the appellate court applies a "clearly erroneous" standard, deferring to the trial court's factual findings "as long as they are supported by evidence and any legitimate inferences therefrom." *Id.*
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> A de novo standard of review applies to the trial court's conclusions of law and the parties' constitutional challenges. *In re Adoption of I.B.*, 32 N.E.3d 1164, 1169 (Ind. 2015).

Town of Linden v. Birge, 204 N.E.3d 229, 233-34 (Ind. 2023).

[20] As our Supreme Court explained in *Town of Linden*,

> [w]hen the State exercises its inherent authority to take private property for public use, the United States Constitution requires just compensation for that taking. U.S. Const. amend. V. If the government takes property but fails to initiate eminent-domain proceedings, an affected property owner may recover money damages from the State by suing for inverse condemnation. Ind. Code § 32-24-1-16. An action for inverse condemnation requires the claimant to show (1) a taking or damaging (2) of private property (3) for public use (4) without payment of just compensation (5) by a government entity. *Murray v. City of Lawrenceburg*, 925 N.E.2d 728, 731 (Ind. 2010) (internal quotation marks and citations omitted).

Id. at 234.

[21] Here, again, the trial court found a taking based on the "complete[] eliminat[ion]" of access to the southern portion of their property and new flooding that resulted from the project. Appellant's App. Vol. 2, p. 25. The

Town argues that the trial court erred in both respects. We address each of the two grounds supporting the trial court's judgment in turn.

Access to Southern Portion of Property

[22] It is undisputed that, since the Town's work on the project in February 2019, the Swansons have no way to access the portion of their property that lies to the south of the drainage easement. On appeal, the Town argues that "the plain language of the Drainage Easement controls" and, as the trial court found, the easement does not confer any right to the Swansons to access the southern portion of the property. Appellant's Br. at 38. The Town then cites *Tishner* and asserts that, "as the servient estate holders, the Swansons' right of access across the Drainage Easement is subject to the rights of the Town as dominant estate holder." *Id.* In essence, the Town asserts that its rights to the easement trump the Swansons' rights in every respect.

[23] But in *Tishner*, we reiterated the rule that a dominant estate holder's rights to use an easement are *limited* to "repairs, improvements, or alterations that are *reasonably necessary* to make the grant of the easement effectual." 699 N.E.2d at 739 (emphasis added). Here, the trial court expressly found that the "alterations made [to the ditch] were not reasonable as to the original purpose of the easement." Appellant's App. Vol. 2, p. 26. The evidence supports that finding. And, while the easement did not confer a right to the Swansons to cross the ditch, neither did it confer a right to the Town to cut off access.

[24] Indeed, as the trial court observed, "[t]he owner of the dominant estate cannot subject the servient estate to *extra burdens*, any more than the holder of the servient estate can materially impair or unreasonably interfere with the use of the easement." *Id.* at 22-23 (citing *McCauley v. Harris*, 928 N.E.2d 309, 314 (Ind. Ct. App. 2010), *trans. denied*) (emphasis added). The trial court found that "[t]he entire nature of the Property has been changed and altered by the Town's acts within the easement" and that the Swansons "have been deprived of all economic value of the southern half of their Property." *Id.* at 21-22. The Town's argument on appeal misses the mark. We hold that the evidence supports the trial court's findings, and the findings support the court's conclusion that the elimination of access to the southern portion of the property constituted a taking.

New Flooding

[25] The Town next contends that the trial court erred when it found a taking based on flooding because each of the court's findings "either fails as a matter of law or lacks evidence in the record to support the findings." Appellant's Br. at 44. We cannot agree.

[26] With respect to the allegedly erroneous findings, the Town challenges the court's findings that: water is backing up outside of the easement because of bottlenecking in the ditch; the Town caused flooding coming from the north of the Swansons' property; and the flooding constitutes a "long-term interference" with the Swansons' use of their property. Appellant's App. Vol. 2, p. 26. But the Town merely asks that we reweigh the evidence, which we will not do. Michael

testified that, prior to the Town's work on the project in February 2019, surface water flowing from the north of his property would reach the ditch and "leave the property[.]" Tr. Vol. 2, p. 104. But since the project, the bottleneck that occurs on the east end of the drainage easement causes the water to back up towards his house. Thus, the evidence supports the trial court's finding on that issue. The Town does not direct us to any finding by the trial court that the Town "caused water to flow across the Swansons' Property from the north." Appellant's Br. at 49. And the trial court's finding of "long-term interference" is based on the recurring nature of the flooding issues, which is supported by the evidence.

[27] With respect to the Town's contention that there has been no taking as a matter of law, the Town's argument rests primarily on this Court's since-vacated opinion in *Town of Linden v. Birge*, 187 N.E.3d 918 (Ind. Ct. App. 2022), *vacated*. [7] In that case, the Town of Linden completed a project to overhaul a regulated drain,[8] including work within a drainage easement on the Birges' property. Thereafter, "low-lying portions of the Birges' Property flooded after any heavy rainfall, encumbering the Birges' farming enterprise," and the Birges sued Linden for inverse condemnation. *Town of Linden*, 204 N.E.3d at 232. The trial court found in relevant part that "the flooding has made farming on the

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[7] Our Supreme Court granted transfer in *Town of Linden* after the Town filed its appellant's brief in this case.

[8] A regulated drain means "an open drain, a tiled drain, or a combination of the two." Ind. Code § 36-9-27-2. Here, the parties agree that the drainage easement is not a regulated drain.

Property 'more difficult' than before," and the trial court concluded that, "by using the Property 'as the overflow basin for any heavy rain,' the project amounted to a taking in the form of a 'permanent physical invasion.'" *Id.*

[28] On direct appeal, this Court reversed, holding that "the trial court erred as a matter of law when it found that the frequent but non-permanent flooding of the Property constituted a permanent physical invasion of the property and a per se taking." *Town of Linden*, 187 N.E.3d at 931, *vacated*. Still, we acknowledged that the Birges may have proven a taking by temporary flooding, and we remanded to the trial court to consider factors set out in *Arkansas Game & Fish Commission v. United States*, 568 U.S. 23, 34 (2012).

[29] On transfer, our Supreme Court stated that

> we analyze a flooding-related takings claim as follows: (1) if the flooding is continuous or "intermittent but inevitably recurring," and the invasion is "substantial," then it results in a per se taking; (2) if, on the other hand, the flooding is temporary or of "finite duration," then the *Arkansas Game* factors apply.
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> [u]nlike in *Arkansas Game*, where the "recurrent floodings" were of "finite duration" (lasting from 1993 to 2000), 568 U.S. at 27, 133 S. Ct. 511 (emphasis added), the floodings here are repetitive and of indefinite duration—i.e., they amount to a "permanent condition," *see* [*United States v.*]*Cress*, 243 U.S.[316,] 327 [(1917)]. As the trial court expressly found, and as the record evidence supports, the drain reconstruction project has resulted in "repeated flooding events" on the Birges' Property due to increased pressurization at the Transfer Point during "every

> heavy rainfall." App. Vol. 5, p. 59; see Tr. Vol. 2, p. 56 (expert testifying to the same effect). *In other words, the flooding here amounts to a permanent physical invasion by way of "intermittent but inevitably recurring overflows*." *See Cress*, 243 U.S. at 328, 37 S.Ct. 380 (emphasis added). Indeed, so long as the Property sustains "heavy rainfall" (or unless and until the County takes the necessary corrective measures), the flooding will persist indefinitely. *This type of physical appropriation reflects the "clearest sort of taking," which we assess by "using a simple, per se rule: The government must pay for what it takes*." *See Cedar Point Nursery v. Hassid*, —— U.S. ——, 141 S. Ct. 2063, 2071, 210 L.Ed.2d 369 (2021) (internal quotation marks and citations omitted).
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> Still, a taking occurs only when "the damage is substantial." *Cress*, 243 U.S. at 328, 37 S. Ct. 380 (emphasis added).

Town of Linden, 204 N.E.3d at 235-36 (emphases added).

[30] The Court held that, whether the "evidence shows an interference substantial enough to create a taking was a question of fact for the factfinder," but that "the trial court here found only that the flooding rendered farming on the Property 'more difficult' than before." *Id.* at 236. Thus, the Court remanded to the trial court "for further development of the trial court's factual findings to support its determination whether the flooding amounted to a permanent physical invasion." *Id.*

[31] Here, the trial court found that the water "retention [e]ffect" the Town created on the Swansons' property "will continue to worsen . . . as increased sedimentation . . . will further inhibit water from leaving the Property"; the retention effect "has caused sinkholes to appear . . . throughout the northern

half of the Property"; the new flooding is "recurring and frequent" in that it "occurs any time there is significant rain to cause stormwater runoff"; and the flooding is "inevitable, reoccurring and consistent." Appellant's App. Vol. 2, pp. 20-21, 23. We hold that the evidence shows substantial damage to the Swansons' property and that the trial court's findings are sufficient to support its conclusion that the flooding amounts to a taking. *See Town of Linden*, 204 N.E.3d at 236.

[32] Finally, the Town argues that the trial court erred when it did not "provide any description from which appraisers could assess the fair market value of the property acquired or a jury could award just compensation to the Swansons." Appellant's Br. at 54. The Town also argues that the trial court erred when it did not "specify whether the taking is temporary or in fee simple." *Id.* at 55. However, other than our vacated opinion in *Town of Linden*, the Town does not support these assertions with citation to relevant authority, and the issues are waived.

[33] Waiver notwithstanding, it appears that these issues are not yet ripe for review.

> There are two stages in an inverse condemnation action. *Bussing* [*v. Ind. Dep't of Transp.*, 779 N.E.2d 98,] 111 [(Ind. Ct. App. 2002), *trans. denied*]. The first stage determines whether a compensable taking has occurred. *Id.* At this stage the landowner must show that he has a property interest that has been taken for a public use without having been appropriated pursuant to eminent domain laws. *Id.* If the trial court, acting as finder of fact in the first stage, determines that a taking has occurred, the

> matter proceeds to the second stage, at which the court appoints appraisers, and damages are assessed. *Id.*

Ctr. Townhouse Corp. v. City of Mishawaka, 882 N.E.2d 762, 770 (Ind. Ct. App. 2008), *trans. denied*.

[34] The Town's concerns regarding the scope of the Swansons' alleged damages will be addressed at hearing(s) during the damages phase of this trial. Among the issues for the trial court to decide will be whether and to what extent the Swansons failed to mitigate their damages by stopping the Town's work on the drainage easement and by preventing the Town from implementing any remediation measures responsive to the IDEM report. Finally, the effect of the completed project on the Swansons' claims for damages should be part of the trial court's consideration of the Swansons' alleged damages.

Conclusion

[35] The trial court did not err when it denied the Town's motion for partial summary judgment on the issue of damages within the drainage easement. But the trial court erred when it denied the Town's motion for partial summary judgment on the Swansons' claims alleging vicarious liability for Murrain's negligence. Also, the trial court's findings regarding the Swansons' inverse condemnation claim are supported by the evidence and are sufficient to show a taking.

[36] Affirmed in part and reversed in part.

Bradford, J., and Kenworthy, J., concur.