

FILED
SUPREME COURT
STATE OF WASHINGTON
10/28/2022 1:50 PM
BY ERIN L. LENNON
CLERK

No. 101241-1
(Court of Appeals No. 37747-4 III)

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

BROCK MASLONKA and DIANE MASLONKA, a marital
community,

Plaintiffs/Appellants/Cross-Respondents,

v.

PUBLIC UTILITY DISTRICT NO. 1
OF PEND OREILLE COUNTY,

Defendant/Respondent/Cross-Appellant.

AMICUS BRIEF OF THE WASHINGTON PUBLIC
UTILITY DISTRICTS ASSOCIATION

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I. INTRODUCTION

The “subsequent purchaser rule” is a rule regarding standing that prohibits a purchaser of real property from bringing an inverse condemnation claim related to government action predating their purchase. Public utility districts (“PUDs”), municipalities, and state agencies throughout Washington rely on the subsequent purchaser rule for finality in limiting liability for old infrastructure projects. The Court of Appeals opinion in this case upended the subsequent purchaser rule by stating that the PUD No. 1 of Pend Oreille County (“the PUD”) had the burden of establishing the applicability of the rule with detailed evidence of past damage caused by dam operations dating back to 1955, rather than requiring that plaintiffs establish their own right to sue as a purchaser subsequent to the construction and operation of the dam.

The Court of Appeals opinion threatens to swing open the door to property owners seeking compensation for stale claims on decades old infrastructure projects and placing the

evidentiary burden posed by old claims on public entities. As a result, infrastructure projects will have an infinite tail of liability for takings claims. The costs of those claims will ultimately be borne by the public. The Supreme Court should accept review of the PUD's petition and clarify that: 1) plaintiffs have the burden of establishing standing under the subsequent purchaser rule; and 2) that defendant public entities should not carry the burden of proving past property damage.

II. IDENTITY OF AMICUS

WPUDA is a membership-based nonprofit organization. Its members include 27 of the state's not-for-profit, community owned utilities, which operate energy, water, wastewater, and telecommunications systems serving nearly one-million customers in more than 28 counties. These systems date back as far as 1934, when the first PUD began operations, and have evolved and expanded to best meet the needs of their local communities. PUD systems are designed, permitted, and operated in accordance with federal, state, and local

requirements. As necessary, PUDs address mitigation related to system impacts as systems are developed, modified, or expanded. WPUDA represents the interests of PUDs and is concerned with potential costs and operational impacts to public utilities if this Court does not restore the subsequent purchaser rule as it existed prior to the recent Court of Appeals decision.

III. STATEMENT OF THE CASE

WPUDA incorporates the PUD's statement of the case as though set forth herein.

IV. ARGUMENT

A. The Subsequent Purchaser Rule Holds that a Subsequent Purchaser Lacks Standing to Bring An Inverse Condemnation Claim.

Under the subsequent purchaser rule, a grantee or purchaser of land cannot sue for a taking or injury occurring prior to their acquisition of the property. *Hoover v. Pierce County*, 79 Wn. App. 427, 433, 903 P.2d 464 (1995). However, when new governmental action occurs during the subsequent

purchaser's ownership, and the action causes a measurable decline in market value, the subsequent owner may bring a claim for the new damages. *Wolfe v. Department of Transportation*, 173 Wn. App. 302, 308, 293 P.3d 1244 (2013). The subsequent purchaser rule is a rule concerning whether plaintiffs have standing to bring their claims. *See, e.g., City of Woodinville v. Fowler Partnership*, 189 Wn. App. 1042, *4 n.3 (2015) (*unpublished*) (plaintiff “lacks standing to challenge the taking now, because of the subsequent purchaser rule”).

The fact that the rule is one pertaining to standing is apparent in a review of case law from other jurisdictions. While other jurisdictions may not use the term “subsequent purchaser rule,” the principle regarding standing embodied in Washington's rule is widely followed in other jurisdictions. *See, Russell Real Property Services, LLC v. State*, 200 So.3d 426, 429–30 (Miss. 2016) (grantee lacked standing to assert inverse condemnation claim for actions predating ownership); *Ex parte Simpson*, 36 So.3d 15, 22–25 (Ala. 2009) (plaintiff

“has no standing to bring this cause of action for actions which occurred prior to the conveyance”); *State ex rel. City of Blue Springs v. Nixon*, 250 S.W.3d 365, 370 (Mo. 2008) (“As subsequent grantees, the Stevenses would not have standing to bring a claim for inverse condemnation”); *Johns v. Black Hills Power, Inc.*, 722 N.W.2d 554, 558 (S.D. 2006) (“any cause of action for inverse condemnation belongs to the prior owner and Johns lack standing”); *Allodial Ltd. Partnership v. North Texas Tollway Authority*, 176 S.W.3d 680, 683 (Tex. App. 2005) (plaintiff lacked standing to bring inverse condemnation claim because prior owner did not expressly assign the claim to plaintiff as the buyer).

B. Plaintiffs Carry the Burden of Proving Standing.

“Standing refers to a party’s right to make a legal claim or seek judicial enforcement of a right.” *Forbes v. Pierce County*, 5 Wn.App.2d 423, 433, 427 P.3d 675 (2018), *citing Friends of North Spokane County Parks v. Spokane County*, 184 Wn. App. 105, 115, 336 P.3d 632 (2014). “A litigant

cannot assert the legal rights of another person and must have a real interest before bringing a cause of action.” *Id.*, citing *Dean v. Lehman*, 143 Wn.2d 12, 18-19, 18 P.3d 523 (2001). Regardless of the nature of legal issues presented, “[i]t is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court’s remedial powers.” *Warth v. Seldin*, 422 U.S. 490, 518 (1975). “To have standing, a claimant must establish that injury has occurred to a legally protected right.” *Pacific Marine Ins. Co. v. State ex rel. Department of Revenue*, 181 Wn. App. 730, 740, 329 P.3d 101, 107 (2014) (emphasis added).

The burden of establishing one’s right to judicial relief rests with the plaintiff. Here, the Maslonkas had the burden of establishing that they had standing to bring their claims. With respect to their inverse condemnation claim, that would mean they had the burden of establishing that new governmental action subsequent to their purchase of their property caused

them harm. *Hoover*, 79 Wn. App. at 433; *Wolfe*, 173 Wn. App. at 308. A claim that they were damaged by the ongoing operations of a dam that has been in place for decades prior to their purchase would not satisfy their obligation to establish standing.

C. The Court of Appeals Decision Conflicts with Established Law By Shifting the Burden to the PUD to Disprove Standing.

The Court of Appeals opinion states that “[b]ecause the subsequent purchaser rule is a defense, it was the PUD’s burden before the superior court to prove that it permanently reduced the value of the Maslonkas’ property before the Maslonkas purchased the land in 1993.” *Maslonka v. Public Utility District No. 1 of Pend Oreille County*, 514 P.3d 203, 228 (2022). The Court’s characterization of the subsequent purchaser rule as a defense—rather than a rule regarding standing—leads to the misapplication of the appropriate burden.

As the PUD pointed out in its Petition, several Washington cases exemplify that inverse condemnation claims will be dismissed if the Plaintiff fails to establish a new governmental action during the plaintiff's ownership without requiring the defendant to prove the scope of a taking occurring prior to purchase. *See Wolfe v. Dep't of Trans.*, 173 Wn. App. 302, 293 P.3d 1244 (2013); *Crystal Lotus Enterprises, v. City of Shoreline*, 167 Wn. App. 501, 504–05, 274 P.3d 1054 (2012); *Hoover v. Pierce County*, 79 Wn. App. 427, 433, 903 P.2d 464 (1995). The Court of Appeals opinion here conflicts with these rulings.

Here, the Court of Appeals flipped the burden and did not require Plaintiffs to establish standing by proving a new governmental action caused their alleged injuries. Instead, the Court placed the burden on the PUD to establish the nature and extent of damage caused by the dam's operations prior to the Plaintiffs' purchase nearly 30 years ago. This is wholly inconsistent with prior subsequent purchaser rule cases in

Washington and incompatible with general principles of standing that otherwise appear to be universally enforced.

D. Public Policy Favors Placing the Burden of the Subsequent Purchaser Rule on Plaintiffs.

The subsequent purchaser rule serves to protect PUDs, municipalities, and state agencies from stale claims related to public infrastructure projects. If new property owners are relieved of the obligation to prove standing and new governmental action, and the burden is instead placed on public entities to prove prior damage to property from infrastructure projects that may have occurred decades ago, then all infrastructure projects will become susceptible to continuing litigation regardless of their age.

The Maslonkas are claiming damage from a dam that has been operating continuously since 1955. It requires no stretch of the imagination to see similar new claims made against decades old transmission lines, water/sewer lines, and highway projects following the Court of Appeals ruling in this case. The

costs of the increased litigation, and potential capital projects that follow such litigation, will necessarily be forced upon the public. Furthermore, while the PUD in this case has plenty of evidence in its favor, other municipalities may naturally struggle with a burden to prove damage occurring decades ago—an evidentiary burden they should not have to carry. This Court should uphold the subsequent purchaser rule as a rule regarding standing that will serve to bring finality to potential liability for public infrastructure projects.

V. CONCLUSION

For the reasons set forth above, the Supreme Court should accept review of the PUD's petition and clarify that: 1) plaintiffs have the burden of establishing standing under the subsequent purchaser rule; and 2) and that defendant public entities should not carry the burden of proving past property damage.

Pursuant to RAP 18.17, this document contains 1,579 words,
excluding exempted portions.

Dated this 28th day of October, 2022.

Respectfully submitted,

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October 28, 2022 - 1:50 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 101,241-1
Appellate Court Case Title: Brock Maslonka, et ux. v. Public Utility District No.1 of Pend Oreille City., et al.
Superior Court Case Number: 16-2-00169-2

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