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

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 CURIAE MEMORANDUM OF THE WASHINGTON STATE DEPARTMENT OF TRANSPORTATION IN SUPPORT OF PETITION FOR REVIEW

ROBERT W. FERGUSON
Attorney General

ALBERT H. WANG, WSBA No. 45557
Assistant Attorney General
PO Box 40113
Olympia, WA 98504-0113
360-586-3457
albert.wang@atg.wa.gov
OID No. 91028

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

I. IDENTITY AND INTEREST OF AMICUS

The Washington State Department of Transportation (WSDOT) is a state agency charged by statute with managing all elements of the state's transportation system. RCW 47.01.011. WSDOT's responsibilities include the planning, construction, and maintenance of highways, bridges, culverts, drainage facilities, and other supporting structures throughout the state. RCW 47.01.260. WSDOT has defended against inverse condemnation and tort claims involving property adjacent to government land, and believes this experience will be of assistance to this Court.

The issues presented in this appeal could impact every public agency that takes actions affecting private property in the state. As the agency responsible for the construction and maintenance of transportation infrastructure all throughout the state, WSDOT has a particular interest in ensuring that inverse condemnation claims are not brought by claimants who lack standing. WSDOT also has an interest in avoiding tort claims

that are duplicative of inverse condemnation claims. Such claims are not supported by law and ultimately increase the cost to the public of maintaining the transportation system.

II. STATEMENT OF THE ISSUES

(1) When a claimant alleges that a governmental entity has taken or damaged the claimant's land, does the claimant bear the burden of proving that they had an interest in the land at the time of the taking?

(2) Where the state takes or damages land in its sovereign capacity, does inverse condemnation provide the exclusive remedy, or is a parallel tort claim also available?

III. STATEMENT OF THE CASE

The Maslonkas filed the current lawsuit against the PUD in 2016, seeking injunctive relief and damages under theories of inverse condemnation, trespass, nuisance, and negligence. *Maslonka v. PUD No. 1 of Pend Oreille Cnty.*, __ Wn. App. __, 514 P.3d 203, 214 (2022).

In 2019, the parties cross-moved for summary judgment. The superior court granted the PUD's motion in part, dismissing the inverse condemnation claim based on the subsequent purchaser rule, and dismissing the negligence claim as to one of the Maslonkas' two parcels. *Maslonka*, 514 P.3d at 214.

Division Three of the Court of Appeals reversed the superior court's dismissal of the Maslonkas' claims for inverse condemnation, trespass, and nuisance as to one of the two parcels. *Id.* at 203. For the first time, the Court of Appeals placed the burden on a governmental entity to prove that it permanently reduced the value of the property prior to the plaintiff's acquisition, rather than on the plaintiff to prove that the taking occurred during plaintiff's ownership. *Id.* at 227. The Court of Appeals did not provide any authority or analysis for this new requirement other than stating that "the subsequent purchaser rule is a defense." *Id.* at 228.

The Court of Appeals also held that the Maslonkas' claim for inverse condemnation did not subsume their trespass or nuisance claims, reasoning that a "viable cause of action for inverse condemnation" could moot a parallel trespass or nuisance claim, but that the causes of action were not mutually exclusive. *Maslonka*, at 229.

IV. WHY REVIEW SHOULD BE ACCEPTED

A property owner may only bring an inverse condemnation claim against the government for an alleged taking during that owner's ownership of the property. Prior to this case, no case has held that the government bears the burden of *disproving* that the taking occurred during the claimant's ownership of the property. The Court of Appeals' decision presents a significant conflict justifying review by this Court. *See* RAP 13.4(b)(2).

Also, when a governmental entity takes action for a public purpose that negatively affects private property, the law provides a single cause of action: a claim for inverse

condemnation. Multiple decisions of this Court and the Court of Appeals have affirmed that the state government, as sovereign, is not a trespasser even when it takes actions that would otherwise constitute trespass. The Court of Appeals' decision ignores these principles and should be reviewed by this Court. *See* RAP 13.4(b)(1), (2).

Finally, review is warranted because the Court of Appeals' analysis impairs a substantial public interest in the efficient and economical construction and maintenance of state infrastructure. RAP 13.4(b)(4).

A. The Decision Is Inconsistent with Case Law Holding That a Subsequent Purchaser Lacks Standing to Bring an Inverse Condemnation Claim

Inverse condemnation is a cause of action brought to recover the value of property which has been appropriated by the government in fact, but without the formal exercise of the power of eminent domain. *Dickgieser v. State*, 153 Wn.2d 530, 534–35, 105 P.3d 26 (2005) (citing *Phillips v. King County*, 136 Wn.2d 946, 957, 968 P.2d 871 (1998)). A party alleging

inverse condemnation must establish five elements: "(1) a taking or damaging (2) of private property (3) for public use (4) without just compensation being paid (5) by a governmental entity that has not instituted formal proceedings." *Phillips*, 136 Wn.2d at 957.

At common law, a party that does not have a property interest at the time of the alleged taking lacks standing to sue for inverse condemnation. *See* 29A C.J.S. *Eminent Domain* § 578 (2022). This common-law principle is reflected in established Washington case law. In *Hoover v. Pierce County*, 79 Wn. App. 427, 433, 903 P.2d 464 (1995), the defendant argued that the plaintiffs had no standing to sue for alleged flooding damage because they were subsequent purchasers of the property. The Court of Appeals agreed, holding "the right to damages for an injury to property is a personal right belonging to the property owner" and "does not pass to a subsequent purchaser unless expressly conveyed." *Id.* at 433–34. The decision in *Hoover* was consistent with nearly 70 years of

Washington case law holding that a claim for inverse condemnation is personal to the property owner at the time the alleged taking occurred. *See City of Seattle v. Fender*, 42 Wn.2d 213, 217, 254 P.2d 470 (1953); *State v. Sherrill*, 13 Wn. App. 250, 257 n.1, 534 P.2d 598 (1975) (citing 30 C.J.S. *Eminent Domain* § 390 at 461); *Crystal Lotus Enters., Ltd. v. City of Shoreline*, 167 Wn. App. 501, 505, 274 P.3d 1054 (2012). As the Court of Appeals explained in *Crystal Lotus*, the reason that the right to damages does not pass to subsequent purchasers is because "the price of property is deemed to reflect its condition at the time of the sale, including any injury because of government interference." *Id.* at 505 (citing *Hoover*, 79 Wn. App. at 433–34).

Here, the Court of Appeals held that the PUD had the burden of proving that the Maslonkas were subsequent purchasers. *Maslonka*, 514 P.3d at 228. The Maslonkas argue that it was proper to allocate this burden to the PUD because the subsequent purchaser rule is not a matter of standing, but an

affirmative defense. Answer to Petition for Review at 13–14 (citing Black's Law Dictionary, Abridged 7th Ed., (2000)). Other than a general dictionary entry, neither the Court of Appeals nor the Maslonkas have cited any authority suggesting that the subsequent purchaser rule is an affirmative defense. Nor could WSDOT identify any. To the contrary, *Hoover* specifically cast the subsequent purchaser rule in terms of standing. 79 Wn. App. at 433. Furthermore, the Court of Appeals' decision in *Crystal Lotus* makes clear that the subsequent purchaser rule does not excuse the government from an otherwise valid inverse condemnation claim, but reflects the fact that there is no basis for the claim in the first place. 167 Wn. App. at 505. Treating the subsequent purchaser rule as a mere defense, rather than an integral part of the claimant's prima facie case, was error.

When the subsequent purchaser rule is properly analyzed as a standing doctrine, it is clear that the burden falls on the claimant, not the government. Standing is generally the burden

of the challenging party. *KS Tacoma Holdings, LLC v. Shorelines Hearings Bd.*, 166 Wn. App. 117, 127, 272 P.3d 876 (2012) (citing *Lujan v. Def. of Wildlife*, 504 U.S. 555, 561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)). Every case prior to this one that has addressed the burden of proof of the subsequent purchaser rule has allocated the burden to the claimant. *See, e.g. Crystal Lotus*, 167 Wn. App. at 505 (barring claim because "[t]here is no evidence, or any assertion by Crystal Lotus," that action during plaintiff's ownership changed amount of water discharged); *Pac. Highway Park, LLC v. WSDOT*, No. 44198-5-II, 2014 WL 2547695, at *5 (Wash. Ct. App. June 3, 2014) (unpublished opinion) (barring claim because "PHP did not submit evidence that WSDOT owned or altered this wetland and did not submit evidence that the change occurred after PHP purchased the property in 2006."). These decisions correctly recognized that the plaintiff must bear the burden of proving that the taking took place during their *own* ownership as part of their prima facie case. The Court of

Appeals' decision creates a conflict with *Crystal Lotus* and this Court should accept review to resolve the conflict. *Cf.* RAP 13.4(b)(2).

B. The Decision Is Inconsistent with Case Law Against Parallel Inverse Condemnation and Tort Claims

The law of Washington has long held that the state, as sovereign, is not liable in tort when it takes private property for public use. *Kincaid v. City of Seattle*, 74 Wash. 617, 620, 134 P. 504 (1913). Because the government is not liable in tort, inverse condemnation instead supplies the cause of action. *Highline Sch. Dist. No. 401, King Cnty. v. Port of Seattle*, 87 Wn.2d 6, 17, 548 P.2d 1085 (1976) (quoting *Ackerman v. Port of Seattle*, 55 Wn.2d 400, 408, 348 P.2d 664 (1960)); *Pepper v. King Cnty.*, 61 Wn. App. 339, 347 n.6, 810 P.2d 527 (1991) ("Because the government could not be sued in tort, inverse condemnation was developed to provide a remedy where none previously existed.").

Courts have refused to allow plaintiffs to plead both inverse condemnation and tort theories for the same

governmental conduct, whether or not the inverse condemnation claim is ultimately successful. *See, e.g. Highline*, 87 Wn.2d at 16–18 (upholding inverse condemnation but dismissing nuisance and trespass claims); *Ackerman*, 55 Wn.2d at 404 (abrogated on other grounds by *Highline*, 87 Wn.2d 6) (upholding inverse condemnation but dismissing nuisance claim); *Wolfe v. WSDOT*, 173 Wn. App. 302, 306 n.2, 293 P.3d 1244 (2013) (dismissing both inverse condemnation and negligence, nuisance, and trespass claims).

Prior to the Court of Appeals' decision here, no published case has held that a party can bring both inverse condemnation and tort claims arising out of the same action. In so holding, the Court of Appeals relied on *Pacific Highway Park*, in which the Court of Appeals held that a trespass claim could be brought even where an inverse condemnation claim failed. 2014 WL 2547695, at *6. That case relied on case law stating generally that not every governmental tort affecting property rises to the level of a taking. *See Id.* at *6 (citing

Dickgieser, 153 Wn.2d at 541; *Olson v. King County*, 71 Wn.2d 279, 284, 428 P.2d 562 (1967)). But these cases do not support the proposition that a tort claim can be brought for a deprivation that would constitute a taking.

In *Dickgieser*, the plaintiffs' negligence and inverse condemnation claims arose out of different actions: the inverse condemnation claim arose out of the state's logging activities on state forest lands adjacent to the plaintiff's land, while the negligence claim arose out of DNR's alleged negligence in constructing safeguards to the stream bed on the *plaintiff's* land in an attempt to mitigate flooding arising from the logging. 153 Wn.2d at 532–33, 541.

Olson is somewhat closer in the sense that an inverse condemnation claim was denied, but negligence and nuisance claims were upheld. 71 Wn.2d at 295. However, *Olson* held that the inverse condemnation claim was invalid because the alleged damage to the plaintiff's land constituted a "mere temporary interference with a private property right" and did

not rise to the level of a taking. *Olson*, 71 Wn.2d at 285 (quoting *Wong Kee Jun v. City of Seattle*, 143 Wash. 479, 505, 255 P. 645 (1927)). *Lakey v. Puget Sound Energy*, 176 Wn.2d 909, 296 P.3d 860 (2013), which the Court of Appeals relied on here, is similar. There, the inverse condemnation claim failed because the only action alleged to be a taking was the approval of a variance, which cannot form the basis for an inverse condemnation claim as a matter of law. *Id.* at 928–29. Because the plaintiffs in *Olson* and *Lakey* failed to allege action rising to the level of a taking in the first instance, neither case stands for the proposition that a parallel tort claim can be brought for an alleged taking.

Even if a party could allege both inverse condemnation and tort theories, no published case prior to the Court of Appeals' decision here has held that a party can bring a tort claim where an inverse condemnation claim is barred by the subsequent purchaser rule. Rather, where a party lacks standing to bring an inverse condemnation claim because the alleged

taking did not occur during their ownership, that lack of standing is equally fatal to a tort claim. In *Crystal Lotus*, the Court of Appeals rejected both an inverse condemnation claim *and* a trespass claim for the same reason: there was no allegation that the city had engaged in any intentional act regarding the stormwater system after the plaintiff acquired the property. 167 Wn. App. at 505–506.

By permitting tort claims for the exact same deprivation for which inverse condemnation is alleged, the Court of Appeals created a conflict with previous published decisions of this Court and the Court of Appeals, and this Court should accept review in order to resolve the conflict. *Cf.* RAP 13.4(b)(1), (2).

C. The Court of Appeals' Decision Raises Questions of Substantial Public Interest Requiring Resolution by This Court

The Court of Appeals' decision is not only inconsistent with prior case law, but damages the public interest in the efficient construction and maintenance of public infrastructure.

Under the Court of Appeals' decision, government entities will be required to prove that their actions had some negative impact on the value of land during a previous owner's tenure—to produce evidence of the economic effects of activities that may have taken place many years ago, with respect to a non-party. In some cases, this burden may be impossible to meet. The former owner may be unavailable in the jurisdiction, and government records of the challenged action may no longer be within the six-year retention period mandated by RCW 40.14.060. Even if a government entity is ultimately successful in meeting its burden, gathering the required evidence will add significant expense and administrative burden to every inverse condemnation claim. The Court of Appeals' decision will generate significant costs that will ultimately be borne by the taxpaying public. *Cf.* RAP 13.4(b)(4).

V. CONCLUSION

For the above referenced reasons, this Court should grant the PUD's Petition for Review.

This document contains 2490 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 31st day of October 2022.

ROBERT W. FERGUSON
Attorney General

/s/ Albert H. Wang
ALBERT H. WANG, WSBA No. 45557
Assistant Attorney General
PO Box 40113
Olympia, WA 98504-0113
OID No. 91028
Counsel for State of Washington
Department of Transportation

CERTIFICATE OF SERVICE

Pursuant to RCW 9A.72.085, I certify, under penalty of perjury under the laws of the state of Washington, that on October 31, 2022, I served a true and correct copy of the foregoing document in the above-captioned matter upon the parties herein via the Appellate Court filing portal as indicated below:

Elizabeth A. Tellessen Beverly L. Anderson Winston & Cashatt, Lawyers, P.S. 601 W. Riverside Ave., Ste. 1900 Spokane, WA 99201	☒ COA E-Service Portal ☒ Email: eat@winstoncashatt.com bla@winstoncashatt.com
Richard T. Wetmore Dunn & Black, P.S. 111 North Post, Ste. 300 Spokane, WA 99201	☒ COA E-Service Portal ☒ Email: rwetmore@dunnandblack.com

DATED this 31st day of October 2022 at Olympia, Washington.

/s/ Samantha Pringle
SAMANTHA PRINGLE
Legal Assistant

ATTORNEY GENERAL'S OFFICE/TRANSPORTATION AND PUBLIC CONSTRUCTION

October 31, 2022 - 1:38 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

The following documents have been uploaded:

- 1012411_Motion_20221031131437SC314299_7178.pdf
  This File Contains:
  Motion 1 - Amicus Curiae Brief
  The Original File Name was Motion_AmicusBrief.pdf

A copy of the uploaded files will be sent to:

- bla@winstoncashatt.com
- eat@winstoncashatt.com
- laura.reese@atg.wa.gov
- lhoober@gth-law.com
- respegard@gth-law.com
- rwetmore@dunnandblack.com
- samantha.pringle@atg.wa.gov
- swiley@dunnandblack.com
- tpcef@atg.wa.gov

Comments:

Motion for Leave to File Amicus Curiae Memorandum

Sender Name: Samantha Pringle - Email: samantha.pringle@atg.wa.gov
Filing on Behalf of: Albert Henry Wang - Email: albert.wang@atg.wa.gov (Alternate Email: tpcef@atg.wa.gov)

Address:
PO Box 40113
Olympia, WA, 98504-0113
Phone: (360) 586-7777

Note: The Filing Id is 20221031131437SC314299