

FILED  
COURT OF APPEALS  
DIVISION II

2012 AUG -3 AM 11:59

STATE OF WASHINGTON

BY  DEPUTY

No. 42636-6-II

---

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

---

WASHINGTON STATE DEPARTMENT OF TRANSPORTATION,

Respondent,

v.

CHARLES and JANICE WOLFE, and JOHN and DEE ANTTONEN,

Appellants.

---

SECOND AMENDED REPLY BRIEF OF APPELLANTS

---

Allen T. Miller  
The Law Offices of Allen T. Miller, PLLC  
1801 West bay Dr. NW, Suite 205  
Olympia, WA 98502  
(360) 754-9156  
Attorney for Appellant

**TABLE OF CONTENTS**

I. INTRODUCTION.....1

II. STATEMENT OF THE CASE..... 1

III. ASSIGNMENTS OF ERROR .....4

IV. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR .....4

V. SUMMARY OF ARGUMENT..... 5

VI. ARGUMENT..... 6

    A. ISSUES OF FACT EXIST CONCERNING INVERSE CONDEMNATION..... 7

    B. ISSUES OF FACT EXIST REGARDING THE STATE’S NEGLIGENCE  
    AND NUISANCE .....11

    C. ISSUES OF FACT EXIST REGARDING THE STATE’S VIOLATION OF THE  
    STATE HYDRAULIC CODE AND CH. 77.55 RCW.....13

    D. ISSUES OF FACT EXIST REGARDING THE LEGISLATIVE  
    INTENT EXCEPTION OF THE PUBLIC DUTY DOCTRINE.....14

    E. ISSUES OF FACT EXIST REGARDING THE FAILURE TO  
    ENFORCE EXCEPTION OF THE PUBLIC DUTY DOCTRINE.....17

VII. CONCLUSION.....19

## TABLE OF AUTHORITIES

### TABLE OF CASES

<i>Akins v. State of California</i> , 48 Cal.App4th, 50 Cal.Rptr 2d 531 (1996).....	9
<i>Bodin v. City of Stanwood</i> , 79 Wn.App 313, 320, 901 P.2d 1065 (1995).....	9, 10
<i>Bradley v. American Smelting and Refining Co.</i> , 104 Wn.2d 677, 709 P.2d 782 (1985).....	11
<i>Citoli v. City of Seattle</i> , 115 Wn.App 459, 61 P.3d 1165 (2002).....	9
<i>Conger v. Pierce County</i> , 116 Wn. 27, 42, 198 P. 377 (1921).....	8
<i>Crystal Lotus Enterprises Ltd. v. City of Shoreline</i> 167 Wn.App 501, 274 P.3d 1054 (2012) . . .	8
<i>Donohoe v. State</i> 135 Wn.App. 824, 849, 142 P.3d 654 (2006).....	18
<i>Enterprise Leasing Inc. v. Tacoma</i> , 139 Wn.2d 546, 551, 988 P.2d 961 (1999).....	6
<i>Fitzpatrick v. Okanogan County</i> , 169 Wn.2d 598; 238 P.3d 1129 (2010).....	8
<i>Fradkin v. Northshore Utililty Dist.</i> , 96 Wn.App. 118, 977 P.2d 1265 (1999).....	12
<i>Halleran v. Nu West., Inc.</i> , 123 Wn.App. 701, 98 P.3d 52 (2004).....	15, 17, 18
<i>Honcoop v. State</i> 111 Wn.2d 182, 190, 759 P.2d 1188 (1988).....	17
<i>Hoover v. Pierce County</i> 79 Wash App. 427, 432, 903 P.2d 464 (1995).....	8, 10
<i>Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.</i> , 162 Wn.2d 59, 70, 170 P.3d 10 (2007).....	6
<i>Johnson and Johnson v. The Board of County Commissioners of Pratt County and Kansas Department of Transportation</i> , 259 Kan. 305, 913 P.2d 119 (1996).....	11
<i>Laymon v. Washington State Department of Natural Resources</i> , 99 Wn.App. 518; 529, 994 P .2d 232 (2000).....	13
<i>Mangini v. Aerojet-General Corp.</i> 12 Cal.4 <sup>th</sup> 1087, 912 P.2d 1220 (1999).....	12
<i>Marshland Flood Control District v. Great Northern Railway</i> , 71 Wn.2d 365, 428 P.2d 531(1967).....	8

<i>Milender, Milender, and Milander &amp; Sons Seafood Co., Inc.</i> , 774 So.2d 767 (2000).....	10
<i>Mills County v. Hammock</i> , 200 Iowa 251, 202 N.W. 521 (1925).....	12
<i>Osborn v. Mason County</i> , 157 Wn. 2d 18, 27, 134 P.3d 197 (2006).....	14
<i>Owen v. United States</i> , 851 F.2d 1404 (1988).....	12
<i>Pierce v. Yakima County</i> , 161 Wn.App. 791, 251 P.3d 270 (2011).....	15
<i>Smith v. State</i> 59 Wn.App. 808, 814, 802 P.2d 133 (1990) .....	17
<i>Taylor v. Stevens County</i> 111 Wash.2d 159, 164, 759 P.2d 447 (1988).....	14
<i>Tomasek v. Oregon State Highway Commission</i> , 196 Ore. 120, 248 P.2d 703 (1952).....	10
<i>Transamerica Title Ins. Co., v. Johnson</i> , 103 Wash.2d 409, 413, 693 P.2d 697 (1985).....	13
<i>Vergeson v. Kitsap County</i> , 145 Wash.App. 526, 186 P.3d 1140 (2008).....	19
<i>Wallace v. Lewis County</i> , 134 Wn.App. 1, 22, 137 P.3d 101 (2006).....	10, 11
<i>Woldson v. Woodhead</i> , 159 Wash.2d 215, 149 P.3d 361 (2006).....	11
<i>Warner/Electra/Atlantic Corporation and Fierman's Fund Insurance Co. v. County of Dupage Illinois</i> , 771 F.Supp 911(1991).....	9, 12

**Statutes**

Chapter 77.55 RCW.....	5, 6, 14
RCW 4.16.130.....	11
RCW 43.21C.....	18
RCW 43.21C.020(1).....	15
RCW77.55.021.....	13, 16
RCW 77.55.021(2).....	18
RCW 77.55.031.....	16
RCW 77.55.041.....	16

RCW 77.55.051.....	16
RCW 90.58.....	16, 18
RCW 90.58.020.....	19

**REGULATIONS AND RULES**

CR 56(c) .....	6
CR 56 (h).....	5, 6
WAC 197-11.....	17, 18
WAC 220-110-070(h) .....	13, 18
WAC 220-110-070(1)(h).....	13, 18

**OTHER AUTHORITIES**

<i>Restatement Second of Torts section 282</i> .....	13
--	----

## **I. INTRODUCTION**

This case was dismissed by the trial court on summary judgment without indicating the evidence relied upon or the basis of the order. The evidence submitted before the Superior Court raised numerous issues of fact and the Appellants ask the court to reverse the trial court's decision and remand for trial.

## **II. STATEMENT OF THE CASE**

In 2003, Mr. and Mrs. Wolfe purchased two adjacent properties in Naselle, which included the waterfront property along the southern bank of the Naselle River, immediately downstream of the State Highway 4 (SR-4) bridge . In 2007, the Wolfe's transferred one parcel to their daughter and son-in-law, the Anttonens. The river frontage of the two properties extends approximately 600 feet from the SR-4 bridge to the mouth of Salmon Creek. (CP 164, 170-73, 175.)

The Washington State Department of Transportation (WSDOT) constructed the original SR-4 Naselle River Bridge in 1925-1926. The piers of the original bridge were placed parallel to the flow of the river. (CP 212-213, 275-282, 297, 303-304.)

In 1986 WSDOT built a replacement SR-4 Bridge over the Naselle River. Rather than building the support piers of the new bridge parallel to the old piers, the replacement bridge piers were built at a 15 degree angle so the

flow of the river was directed at the plaintiffs' properties. (CP 164-165, 185-192, 210.)

After repeated reviews of public records, it became apparent that the 1986 SR-4 Bridge did not match the plans, specifications, and SEPA compliance documents that were approved by local and federal agencies prior to the construction of the bridge. The approved bridge plans, specifications, and SEPA compliance documents were actually those of another bridge designed and built for a location on another part of the Naselle River location downstream of the Wolfes' properties. The Wolfes further learned that the new SR-4 Bridge plans and specifications were never approved for construction. (CP 165-168, 211-220, 222-232.)

The Wolfes did not learn of the erosion of the property and the causal relationship of the bridge until after they purchased the properties in 2003. Mr. Wolfe asked for assistance from Pacific County, WDOE, WDFW, the Conservation District, and finally WSDOT, to no avail. By February 20, 2008, Mr. Wolfe had drafted a 22-page report for WSDOT wherein Mr. Wolfe explained that the 1986 bridge "has significantly altered the hydraulics of the river, and that has led to significant erosion problems ever since." ( CP 000070.)

Appellants retained the services of Russell A. Lawrence, a Fluvial Geomorphologist, Registered Land Surveyor, and Registered Professional Engineer. Mr. Lawrence concluded that the placement of the piers had caused a redirection of the river and erosion downstream. (CP 255-317.) He further concluded that the earth fill approach to the northwest end of the bridge constrained the 800 foot wide floodwaters of the river to flow through the 200 foot wide opening of the bridge. This led to higher floodwater velocities underneath the bridge, increasing riverbed scour. It also led to the higher flooding backwater elevations. These higher flooding levels, now directed towards the Appellants' property, are the inanimate agent of the state that continues to erode the property. (CP 164-234.)

On May 29, 2009 and March 16, 2010, the Wolfes filed state Tort Claims against WSDOT. The State of Washington did not respond to either Tort Claim.

On June 2, 2010, Appellants filed their civil complaint against WSDOT in the Superior Court of Pacific County. (CP 1-10.) Appellants requested monetary damages and injunctive relief asking that WSDOT take all necessary actions to repair the river bank on Appellants' properties and prevent future erosion of the river bank and future flooding of their property. (CP 000114-115.)

On July 26, 2011, WSDOT moved for Summary Judgment. ( CP 000123.) After a hearing on August 29, 2011, Judge Sullivan granted WSDOT's motion for summary judgment and dismissed Appellants' claims with prejudice. ( CP 000390.) The decision of the trial court did not identify the reasons for dismissal. The decision did not identify any documents or other evidence that may have been reviewed by the trial court.

Appellants timely appealed. ( CP 000392.)

### **III. ASSIGNMENT OF ERROR**

1. The trial court erred in entering the order of August 29, 2011 granting Defendant Department of Transportation's Motion for Summary Judgment. (CP 390-391.)

### **IV. ISSUES PERTAINING TO THE ASSIGNMENT OF ERROR**

1. Genuine issues of material fact exist regarding Respondent's knowledge of recurring water damage that precluded Summary Judgment on Appellants' claims of Inverse Condemnation, Nuisance claims, Trespass claims, and relief of monetary damages.

2. Genuine issues of material fact exist that precluded Summary Judgment on Appellants' claims of Nuisance and Negligence.

3. Genuine issues of material fact exist that precluded Summary Judgment on Plaintiffs' claims based upon the state Hydraulic Code, Ch. 77.55 RCW.

4. Genuine issues of material fact exist that precluded Summary Judgment on Appellants' claims based upon the Legislative Intent exception and Failure to Enforce exception of the Public Duty Doctrine.

5. The Summary Judgment Order failed to comply with CR 56 (h) by failing to set forth any of the documents and evidence presented to the court.

#### **V. SUMMARY OF ARGUMENT**

The trial court granted Summary Judgment, dismissing the case, despite the evidence presented by the declarations of Russell A. Lawrence, the Appellants' expert Fluvial Geomorphologist, Registered Professional Engineer, and Land Surveyor, which was not contradicted by any evidence on Summary Judgment. (CP 390-391, CP 255-317.)

Under the record before the trial court, genuine issues of material fact existed that would preclude Summary Judgment on all of Appellants' claims in this matter. In order to prevail on their Motion for Summary Judgment Respondent WSDOT had to meet the following standard by showing:

“(c) The judgment sought shall be rendered forthwith 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.”  
CR 56 (c).

The moving party has the burden of showing that there is no genuine issue of fact. *Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 70, 170 P.3d 10 (2007). All reasonable inferences are to be considered in the light most favorable to the non-moving party. *Enterprise Leasing Inc. v. Tacoma*, 139 Wn.2d 546, 551, 988 P.2d 961 (1999).

Respondent Department of Transportation’s Motion for Summary Judgment challenged Appellants’ claims of Inverse Condemnation, Nuisance, violations of the state Hydraulic Code, Ch. 77.55 RCW, trespass and negligence. (CP 123-146, 21-24, 25-122, 328-339, 340-352.) The Declarations of Fluvial Geomorphologist Russell A. Lawrence (CP 255-317), plaintiff Charles Wolfe (CP 164-234), and Registered Professional Engineer plaintiff John Anttonen (CP 235-254) set forth genuine issues of material fact in this matter. Genuine issues of material fact precluded Summary Judgment on these claims. The trial court failed to consider the contradictory evidence and failed to set forth the documents in the order granting Summary Judgment upon which the trial court relied. The Summary Judgment order violates CR 56(h) on its face.

## **VI. ARGUMENT**

In a nutshell, the Respondent, Washington State Department of Transportation (WSDOT), failed to meet the standard of care and created a

nuisance by failing to comply with all applicable laws in constructing the replacement SR4 Bridge over the Naselle River in 1986, including the northwest approach earthfill, with a 15 degree angle placement of the piers forcing the water flow onto the Wolfe/Anttonen properties which has resulted in damage to their property. Appellants' claims should not have been dismissed on Summary Judgment based on the conflicting evidence which raised genuine issues of material fact.

**A. Issues of fact exist regarding Inverse Condemnation:**

The Declarations and evidence submitted by Appellants show that the design changes and construction of the 1986 SR-4 Bridge caused a redirection of the river and subsequent on-going flooding and continuous erosion of the banks of the Appellants' property. (CP 164-234, 235-254, 255-317.)

At Respondents' Brief, page 3 – 6, Respondent suggests that Appellants intentionally purchased eroding property. Respondent's reliance on limited sections of Mr. Wolfe's deposition is taken out of context. The Wolfes did not learn of the causal relationship of the bridge until after they purchased the properties in 2003. By February 20, 2008, Mr. Wolf had drafted a 22-page report for WSDOT wherein Mr. Wolfe explained that he learned that the 1986 gridge "has significantly altered the hydraulics of the river, and that has led to significant erosion problems ever since." (CP 000070.)

The factual circumstances in the case at bar constitute inverse condemnation under *Fitzpatrick v. Okanogan County*, 169 Wn.2d 598; 238 P.3d 1129 (2010), which is directly on point. *Hoover v. Pierce County*, 49 Wn.App. 427, 903 P.2d 464 (1995) is not controlling in this matter. The recently decided case of *Crystal Lotus Enterprises Ltd. V. City of Shoreline*, 167 Wn.App. 501, 274 P.3d 1054 (2012) is not controlling in this matter. Respondents ignore the holding of *Fitzpatrick v. Okanogan*.

In *Fitzpatrick*, joint owners of riverfront property brought a claim for inverse condemnation from the county and state after a significant portion of their land was swept away by the Methow River. In *Fitzpatrick*, the county engaged in road and dike construction in 1975. The Fitzpatricks purchased their property in the early 1980's. In 2002, the Methow River changed course as a result of the upstream dike, resulting in damage to the landowners. The court reversed dismissal of the case on summary judgment since there were genuine issues of fact on the inverse taking of the Plaintiffs' property. The state cannot be relieved from liability to downstream owners when the government alters the waterway, causing the course of the river's current to shift and erode the downstream landowners' property. *Conger v. Pierce County*, 116 Wn. 27, 42, 198 P. 377 (1921); *Marshland Flood Control District v. Great Northern Railway*, 71 Wn.2d 365, 428 P.2d 531(1967).

In this case, the State breached its standard of care by constructing the replacement Highway 4 bridge in 1986 in a manner that increased flooding and forced the water to be diverted towards the Appellants' properties and has caused 32,000 cubic yards of erosion and continues to cause erosion of the Appellants' properties at the rate of 1,500 cubic feet per year. (CP 175, 210, 211-220, 221-232, 255-256, 275-282, 283-287, 288-317.)

Inverse condemnation is an action "brought to recover the value of property which has been appropriated by the government but with no formal exercise of governmental power." *Citoli v. City of Seattle*, 115 Wn.App 459, 61 P.3d 1165 (2002) (quoting *Bodin v. City of Stanwood*, 79 Wn.App 313, 320, 901 P.2d 1065 (1995); SEE also *Warner/Electra/Atlantic Corporation and Fireman's Fund Insurance Co. v. County of Dupage Illinois*, 771 F.Supp. 911 (1991); *Akins v. State of California*, 48 Cal.App.4<sup>th</sup>, 50 Cal.Rptr 2d 531 (1996).

The State is incorrect to argue that Appellants are seeking damages for a taking that occurred prior to Appellants establishing their ownership interest in the property. (CP 123-146, CP 21-24.) The offending replacement bridge was constructed in 1986. Appellants purchased their properties in 2003 and 2007 respectively. (CP 164-168, 235-239.) From the moment Appellants established their ownership interest, the recurring erosion has continued. (CP 209-220, 221-232, 288-317.) Further erosion will occur unless the bank is stabilized. A taking

is a permanent or *recurring* (emphasis added) invasion of private property that is likely to reoccur in the future. *Hoover v. Pierce County*, 79 Wn. App. 427, 432, 903 P.2d 464 (1995); SEE also, *Millender, and Millender & Sons Seafood Co., Inc.* 774 So.2d 767 (2000); and *Tomasek v. Oregon State Highway Commission*, 196 Ore. 120, 248 P.2d 703 (1952).

The taking of the Wolfes' property by the ongoing erosion constitutes a continuing course of action that is a recurring invasion and is reoccurring due to the redirection of the river by the changed angle of the bridge supports and the resulting erosion of Appellants' properties. The damage to Appellants' property is permanent, recurring, and chronic such that the ongoing nature of the erosion is "perpetual, habitual, constant, continuing for a long time, recurring" and causes damage. *Bodin v. City of Stanwood*, 79 Wn.App, 313, 320-322, 901 P.2d 464 (1995). The ongoing nature of the erosion to Appellants' properties constitutes inverse condemnation and that inverse condemnation is within the applicable statute of limitations and during Appellants' ownership of the properties. *Wallace v. Lewis County*, 134 Wn.App. 1, 22, 137 P.3d 101 (2006).

Finally, in addition to monetary damages, Appellants asked the trial court for an equitable remedy to stop the ongoing and continuing damage to Plaintiffs' property. (CP 1-10, 255-317.)

**B. Issues of fact exist regarding the State's Negligence and Nuisance:**

Appellants' nuisance, trespass, and negligence claims are not time barred. The damage occurring to Appellants' properties is not a one-time static incident. The situation is ongoing, continuing, recurring, and chronic. (CP 209, 220, 221-230, 275-281, 283-287, 288-317.) In the case of a continuing nuisance, the two-year statute restricts the period for which damages may be recovered but does not bar the action in its entirety. *RCW 4.16.130*; *Wallace v. Lewis County*, 134 Wn.App. 1, 137 P.3d 101 (2006). In this case, the Appellants are seeking primarily injunctive relief to have the state implement a remedy to address the past erosion and prevent future erosion. (CP 1-10, 288-317.) Additional remedies are available and Appellants asked the trial court for injunctive relief.

The Washington Supreme Court has not ruled on the period of time for which damages from a continuing nuisance may be claimed. The Court has ruled in a continuing trespass case allowing the recovery of damages from the limitation period preceding the filing of suit (for trespass, three years) until the time of trial. The Supreme Court has held that the theories of trespass and nuisance are (1) not inconsistent, (2) the theories may apply concurrently, and (3) the injured party may proceed under both theories when the elements of both actions are present. *Woldson v. Woodhead*, 159 Wn.2d 215, 149 P.3d 361 (2006); *Bradley v. American Smelting and Refining Co.*, 104 Wn.2d 677, 709 P.2d 782 (1985). *SEE* also *Johnson and Johnson v. The Board of County Commissioners of Pratt*

*County and Kansas Department of Transportation*, 259 Kan. 305, 913 P.2d 119 (1996); *Mills County v. Hammack*, 200 Iowa 251; 202 N.W. 521 (1925); *Owen v. United States*, 851 F.2d 1404 (1988); and *Warner/Elektra/Atlantic Corporation and Fireman's Fund Insurance Co. v. County of Dupage Illinois*, 771 F.Supp. 911 (1991). In the instant case, the diversion of river water onto Appellants' properties and resulting erosion is a continuing trespass, nuisance, and taking for the purposes of the statute of limitations.

Respondent argues that the nuisance in this case is "unabatable" and therefore does not qualify as a continuing nuisance. However, Appellants are not asking Defendant to demolish and reconstruct the bridge. Appellants' have proposed a remedial action that would restore the bank and prevent further erosion caused by the offending angle of the mis-aligned piers. Appellants are also asking Respondent to restore the river bank by application of protective devices. (CP 8-10, 288-317.) Appellants are asking Respondent to do the job correctly, today, that should have been done in 1986.

The requested remedies are not an unreasonable hardship or an unreasonable expense. (CP 275-282, 283-287, 316-317.) The offending condition created by the mis-aligned bridge piers is definitely abatable. *Fradkin v. Northshore Utility Dist.*, 96 Wn.App. 118, 977 P.2d 1265 (1999) quoting *Mangini v. Aerojet-General Corp.*, 12 Cal.4<sup>th</sup> 1087, 912 P.2d 1220 (1999). The trial court should have denied summary judgment in order to allow the jury to determine these

issues of fact. The trial court should have heard the facts supporting Appellants' request for injunctive relief.

**C. Issues of fact exist regarding the State's violation of the State Hydraulic Code, Ch. 77.55 RCW:**

Appellants claimed negligence in their civil complaint. (CP 1-10.). Proof of negligence is established by showing: (1) that the defendant had a duty or obligation to conform to a certain standard of conduct for the protection of others against unreasonable risks; (2.) that the defendant breached that duty; (3) that the breach was the proximate cause of the plaintiff's injury; and (4) that the plaintiff suffered legally compensable damages. *Restatement Second of Torts section 282; Laymon v. Washington State Department of Natural Resources*, 99 Wn.App. 518, 529, 994 P.2d 232 (2000.) A duty is an "obligation" to which the law will give recognition and effect to conform to a particular standard of conduct toward another. *Transamerica Title Ins. Co., v. Johnson*, 103 Wn.2d 409, 413, 693 P.2d 697 (1985).

In this matter, RCW 77.55.021, Construction Projects in State Waters, the state hydraulics code, mandates a HPA, and requires action to correct a violation pursuant to WAC 220-110-070(h) which states that

(h) Abutments, piers, piling, sills, approach frills . . . shall not constrict the flow so as to cause any appreciable increase (not to exceed .2 feet) in backwater elevation (calculated at the 100-year flood) or channel wide scour and shall be aligned to cause the least effect on the hydraulics of the watercourse

The state's hydraulic code, Ch. 77.55 RCW, defines the duty Respondents owed to the Appellants. RCW 77.55 and WAC 220-110-070(h) establish the duty or obligation to conform to certain standards of conduct. Respondents have breached that standard of conduct by failing to properly design and install the replacement bridge.

**D. Issues of fact exist regarding the Legislative Intent Exception to Public Duty Doctrine.**

The public duty doctrine was adopted by the Washington Supreme Court for application in most negligence cases against public entities. The public duty doctrine provides that if the duty breached by the governmental entity was merely a breach of an obligation owed to the public in general, then a cause of action would not lie for any individual injured by the state's breach of that duty. Put another way, "a duty to all is a duty to no one." *Osborn v. Mason County*, 157 Wn.2d 18, 27, 134 P.3d 197 (2006) quoting *Taylor v. Stevens County* 111 Wn.2d 159, 164, 759 P.2d 447 (1988). The public duty doctrine is essentially a "focusing tool" used to determine whether the state owes a specific duty to an individual, the breach of which is actionable, or merely a duty to the "nebulous public," the breach of which is not actionable. *Osborne v. Mason County* 157 Wn.2d 18, 27, 134 P.3d 197 (2006.)

In *Pierce v. Yakima County*, 161 Wn.App. 791, 251 P.3d 270 (2011)

the court noted the four circumstances, referred to as “exceptions,” that exist to the public duty doctrine:

- 1.) where there is a “legislative intent” to impose such a duty;
- 2.) where the state is guilty of “failure to enforce” a mandatory statutory duty,
- 3.) where the government has engaged in “volunteer rescue” efforts, and
- 4.) where a “special relationship” exists between the plaintiff and the State.

Plaintiffs’ Declarations submitted to the trial court provide sufficient facts to meet the legislative intent exception. (CP164-234, 235-254.) This exception applies where a regulatory statute contains a clear intent to identify and protect a particular and circumscribed class of persons. *Halleran v. Nu West, Inc.*, 123 Wn.App. 701, 98 P.3d 52 (2004).

Each statute and regulation cited specifically express the legislative purpose of the law in a preamble or in other language in the statute. The language describes a specific purpose for the law and identifies the circumstances and/or persons to be protected.

For example, SEPA, at RCW 43.21C.020(1) states:

- (1) The legislature . . . recognizing the profound impact of a human being’s activity on the interrelations of all components of the natural environment . . . declares that it is the continuing policy of the

State of Washington, in cooperation with federal and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to . . .create and maintain conditions under which human beings and nature can exist in productive harmony

....  
....

(c) Attain the widest range of beneficial uses of the environment without degradation, risk to health or safety of other undesirable and unintended consequences; . . . .

Likewise, the Shoreline Management Act, RCW 90.58.020 states:

The legislature finds that the shorelines of the state are amount the most valuable and fragile of its natural resources and that there is great concern throughout the state relating to their utilization, protection, restoration, and preservation. In addition it finds that ever increasing pressures of additional uses are being placed on the shorelines necessitating increased coordination in the management and development of the shorelines of the state . . . There is, therefore, a clear and urgent demand for a planned, rational, and concerted effort, jointly performed by the federal, state and local governments, to prevent the inherent harm in an uncoordinated . . . development of the state shorelines . . . .

Accordingly, the Construction Projects in State Waters statute, RCW 77.55.021 states:

(1) Except as provided in RCW 77.55.031, 77.55.051, and 77.55.041, in the event that any person or government agency desires to undertake a hydraulic project, the person or government agency shall, before commencing work thereon, secure that approval of the department in the form of a permit as to the adequacy of the means proposed for the protection of fish life. . . . .

Clearly, the articulated goals of the statutes and the language in the statutes establish mandatory duties and are not permissive or discretionary. In this

matter, defendant WSDOT simply failed to obtain the proper permits when it replaced the SR-4 Bridge.

The legislative intent exception applies to Appellants' claims precluding summary judgment.

**E. Issues of fact exist regarding the Failure to Enforce exception to the Public Duty Doctrine:**

Appellants raise sufficient facts to show the application of the “failure to enforce” exception. The “failure to enforce” exception applies when (1.) government agents responsible for enforcing statutory requirements possess actual knowledge of a statutory violation, (2) a statutory duty exists to take corrective action, (3.) the agents fail to take corrective action, and (4) the plaintiff is within the class the statute is intended to protect. *Halleran v. Nu West Inc.*, 123 Wn. App. 701, 714, 98 P.3d 52 (2004) ; *Smith v. State* 59 Wn.App. 808, 814, 802 P.2d 133 (1990); *Honcoop v. State* 111 Wash.2d 182, 190, 759 P.2d 1188 (1988).

It should be noted that, in the present case, the government agency responsible for enforcing statutory requirements dealing with SEPA compliance was WSDOT itself for the 1985 bridge construction, a direct violation of SEPA. WAC 197-11-926 Lead Agency for Government Proposals states that:

(2) Whenever possible, agency people carrying out SEPA procedures should e different from the agency people making the proposal.

The Public Duty Doctrine exception is applicable when the relevant statute mandates specific action to correct a violation. The action must be required by language within the statute. Such a mandate does not exist if the government agent has broad discretion regarding whether and how to act. *Donohoe v. State* 135 Wn.App. 824, 849, 142 P.3d 654 (2006). The exception is narrowly construed. *Halleran v. Nu West, Inc.* 123 Wn. App. 701, 714, 98 P.3d 52 (2004).

The facts here show that the hydraulics of the river have been changed by the new bridge, WSDOT did not disclose the plans to WDFW in the application for the HPA, and the HPA was issued by WDFW according to the plans for the Highway 101 Bridge, not the SR-4 bridge. (CP 211-220, CP 221-232.)

The Declaration of Mr. Wolfe, shows that there are numerous other failures by the state to enforce applicable law on the part of Defendants. (CP 164-234.) (WAC 220-110-070(1)(h), RCW 77.55.021(2), RCW 90.58, RCW 43.21C, WAC 197-11.) The Declaration of Mr. Wolfe shows that various employees of Respondent WSDOT knowingly and intentionally violated the specific mandates of applicable state environmental statutes and state waterway construction statutes. (WAC 220-110-070(1)(h), RCW 77.55.021(2), RCW 90.58, RCW 43.21C, WAC 197-11). (CP 164-234.)

The Appellants have raised issues of fact as to whether documents existed or are missing, or were an “after the fact” creation and submission of documents. (CP 209-220, 221-232.)

It is an issue of fact as to whether the SR-4 bridge was permitted without any design plans except for the design plans applicable to another bridge in another location for another time. These material issues of fact, should have prevented the court from granting dismissal on Summary Judgment. *Vergeson v. Kitsap County*, 145 Wn.App. 526, 186 P.3d 1140 (2008).

### **VII. CONCLUSION**

The Court of Appeals should conclude that there are genuine issues of material fact and reverse the trial court's order on Summary Judgment and remand this case for trial.

DATED this 2nd day of August, 2012.



Allen T. Miller, WSBA # 12936  
The Law Offices of Allen T. Miller, PLLC  
1801 West bay Dr. NW, Suite 205  
Olympia, WA 98502  
(360) 754-9156  
Attorney for Appellants

No. 42636-6-II

FILED  
COURT OF APPEALS  
DIVISION II

COURT OF APPEALS FOR DIVISION II  
STATE OF WASHINGTON

2012 AUG -3 AM 11:58

STATE OF WASHINGTON

BY C. [Signature]  
DEPUTY

CHARLE and JANICE WOLFE, husband and wife;  
JOHN and DEE ANTONEN, husband and wife,

DECLARATION OF SERVICE

Appellants,

V.

STATE OF WASHINGTON DEPARTMENT OF TRANSPORTATION

Respondent.

MARY-MARGARET O'CONNELL declares:

I am now, and at all times herein mentioned was a resident of the State of Washington, over the age of eighteen years and not a party to this action, and I am competent to be a witness herein.

That on August 2, 2012, I caused a copy of the Appellants' Second Amended Reply Brief and this Declaration of Service to be served to the following in the manner noted below:

Douglas Shaftel Assistant Attorney General 7141 Clean Water Drive SW Olympia, WA 98504	<input type="checkbox"/> US Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input checked="" type="checkbox"/> E-Mail DougS@atg.wa.gov
<a href="mailto:tpcef@atg.wa.gov">tpcef@atg.wa.gov</a> <a href="mailto:MelissaM3@atg.wa.gov">MelissaM3@atg.wa.gov</a> <a href="mailto:MaudelleP@atg.WA.gov">MaudelleP@atg.WA.gov</a>	

--	--

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 2<sup>nd</sup> day of August, 2012.



Mary-Margaret O'Connell  
Associate to Allen T. Miller