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DIVISION II

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STATE OF WASHINGTON

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No. 44198-5-II

**COURT OF APPEALS, DIVISION TWO,
OF THE STATE OF WASHINGTON**

PACIFIC HIGHWAY PARK, LLC,

Appellant

v.

WASHINGTON STATE DEPARTMENT OF TRANSPORTATION

Respondent

BRIEF OF APPELLANT

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I. INTRODUCTION

While planning for the development of a vacant parcel in northern Pierce County into a semi-trailer storage facility and staging facility, plaintiff/appellant Pacific Highway Park, LLC discovered that the Washington State Department of Transportation (WSDOT) is using a portion of its property as a stormwater storage and detention facility. This use by WSDOT, the extent of which was only realized late in the planning and permitting process due to the latent nature of WSDOT's use of the heavily vegetated parcel, materially interferes with the local jurisdiction's approved use of the property.

While it is readily apparent that the Pacific Highway Park property drains to the WSDOT stormwater conveyance system along the west side of State Route 99 (SR 99), it took quantitative analysis of the drainage by an experienced civil engineer to realize that at times of high storm flow, the WSDOT system backflows under hydraulic pressure from the WSDOT system on to the Pacific Highway Park property where the stormwater is stored until the storm flow abates. Then, the stormwater flows under gravity back into the WSDOT system. If not for the backflow, as well as storage and detention of the storm flow on the Pacific Highway Park property, the WSDOT system could not function properly and the

highway would flood. This is due to fact that at a WSDOT-owned catch basin just off the Pacific Highway Park property, WSDOT puts a 36 inch pipe coming from up gradient into a *24 inch* culvert that takes the flow under the highway. It is from this same catch basin that two buried pipes go to the Pacific Highway Park property. At high storm flows the water flows from the catch basin to the property, while at low flows the water drains back to the WSDOT catch basin. Neither a wetland specialist nor a hydrogeologist/engineering geologist, both of whom had studied the exact area prior to the engineer, had recognized the existence of this two-way flow.

Upon becoming aware of this trespassory invasion of its property, Pacific Highway Park filed a complaint against WSDOT for inverse condemnation for the taking its property for public use without condemning it or paying just compensation. Later, Pacific Highway Park amended its complaint to include causes of action in trespass and damage to property pursuant to RWC 4.24.630. WSDOT denies these claims, saying that it was just keeping the “natural balance” of the local drainage when it first did its project in 2001 and, in any case, it is too late for Pacific Highway Park to do anything about it. Pacific Highway Park here contends WSDOT is wrong in both assertions.

In granting WSDOT's amended motion for summary judgment, the trial court, in a three page decision, improperly *resolved* factual disputes and entered "findings of fact." However, as shown even by the trial court's fact finding, there are material facts in dispute. Therefore, the trial court's decision should be reversed and Pacific Highway Park allowed to have its day in court.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The trial court erred in granting WSDOT's amended motion for summary judgment.
2. The trial court erred in deciding factual questions and entering "findings of fact" in its Memorandum/Decision on summary judgment.
3. The trial court erred in finding that any defect or damage to Pacific Highway Park's property by WSDOT would have been discoverable prior to purchase through the exercise of reasonable diligence.
4. The trial court erred in applying a "proximate cause" analysis, argued by the defendant as a policy consideration different from and beyond cause in fact, to a case based on allegations of purely intentional conduct.
5. The trial court erred in characterizing the analytical studies of Pacific Highway Park's expert Olson as "hypothetical studies as to what will

happen during abnormal rainfall,” and thereby erred in concluding that “[t]here has been no current taking [or damage] of the property...”

6. The trial court erred when it found that “any attempt to claim inverse condemnation is based on future speculation.”

7. On a motion for summary judgment, the trial court erred when it assessed the credibility of the “S & R Report [sic],” finding the report unconvincing.

8. The trial court erred by failing to address, or even mention, Pacific Highway Park’s causes of action in trespass and RWC 4.24.630 wastage of property in its Memorandum/Decision, and thereupon dismissing them without denomination in its bare Order.

B. Issues Pertaining to Assignments of Error

1. In deciding a motion for summary judgment, should the trial court resolve disputed factual disputes? (Assignments of Error 1, 2, and 8.)

2. In evaluating limitations on actions for inverse condemnation, trespass, and wastage to property, should the trial court have analyzed the existence of latent defect, the application of the discovery rule, and the continuing nature of the injuries alleged, as argued by Pacific Highway Park? (Assignments of Error 1, 3, and 8.)

3. Does proximate cause, a negligence law concept based on policy considerations, belong in the analysis of this case which is predicated

solely on allegations of intentional conduct by the defendant?
(Assignments of Error 1 and 4.)

4. Was it accurate for the trial court to characterize a quantitative study based on engineering principles and data, applying WSDOT's own Hydraulic Report and 25-year design storm, as hypothetical studies when they are stated to a reasonable degree of engineering certainty by a professional engineer? (Assignment of Error 5 and 6.)

5. Was it proper for the trial court, on summary judgment, to decide the credibility of an expert report? (Assignment of Error 7.)

6. Was it proper for the trial court to decide a motion for summary judgment against the plaintiff while completely ignoring two of the three causes of action pleaded by plaintiff, when all causes of action were briefed and argued by plaintiff Pacific Highway Park? (Assignment of Error 1 and 8.)

III. STATEMENT OF THE CASE

1. In November, 2006, Pacific Highway Park, LLC purchased the property that it alleges WSDOT has damaged and is damaging. The property was purchased for use by a related company, Ocean Terminals, Inc. ("Ocean Terminals"). Ocean Terminals currently operates a cargo-trailer storage facility at the Port of Tacoma on rented land. The owners of the rented land, the Puyallup Tribe, intend to use the land for port

expansion, forcing Ocean Terminals to relocate. The purchase was accomplished by Pacific Highway Park taking an assignment from one Jack Johnson who had the right to purchase the property from the then owners. Before Pacific Highway Park entered the picture, the price was set by Johnson and the sellers at \$800,000. By the terms of the assignment, the services and costs of John Comis, a wetland biologist, were assumed by Pacific Highway Park.¹

2. The wetland report prepared by Comis showed a pipe extending from one of the wetlands Comis identified to the WSDOT stormwater conveyance system along the west side of State Route 99 (“SR 99”), in Pierce County, just south of the county line with King County. Comis’s drawing indicates by an arrow that the flow is *from* the Pacific Highway Park property to the WSDOT stormwater system (“manhole”).²

3. Richard P. Wells, a member of Pacific Highway Park, testified at deposition that he did not review the report prepared by Mr. Comis (the report of John Comis & Assoc., hereinafter the “JCA report”) prior to closing on the purchase.³

¹ Clerk’s Papers (CP) 220

² CP 130, 131, 132

³ CP 223, line 14

4. After considering the JCA report's finding that two category III wetlands existed on the property, Mr. Wells decided to seek a second opinion. He hired SNR Company (whose principal is a Washington State licensed hydrogeologist and engineering geologist experienced in wetland delineation) to do a comprehensive wetland delineation and report. SNR Company found no ratable wetlands existed on the property (i.e., no wetlands that met Pierce County's definition of critical area wetlands). Like Mr. Comis, SNR Company's report noted a drainage pipe going from the property to a "manhole" (i.e., catch basin) along State Route 99 (SR 99"). Also like Mr. Comis, SNR believed the purpose of this pipe was to drain water from the Pacific Highway Park property to the SR 99 stormwater system.⁴

5. Pacific Highway Park then applied for a conditional use permit ("CUP") from Pierce County to develop the subject property for its intended purpose. Pierce County's Planning and Land Services department ("PALS") reviewed the SNR report and disagreed with its finding of no jurisdictional wetlands on the property. Pacific Highway Park appealed the wetland issue to the Pierce County Hearing Examiner. In preparation for the hearing on that appeal, counsel for Pacific Highway Park asked

⁴ CP 281-82, ¶¶ 8,9 of Neugebauer declaration

Norman L. Olson, PE, to further investigate the subject property's drainage issues. Mr. Olson reviewed the drainage issues on the property in light of the county's contention that wetlands existed on the property. Mr. Olson became aware that, besides there being drainage from the property to the WSDOT-owned stormwater system along SR 99, at times of high stormwater flow, water would *back up from* the WSDOT system on to the Pacific Highway Park property (i.e., backflow would occur). Also, Mr. Olson found that there are, in fact, two pipes connecting the Pacific Highway Park and WSDOT system, not one. Mr. Olson informed Pacific Highway Park of these facts in early August, 2009, shortly before the hearing before the County examiner.⁵

6. Pacific Highway Park and its counsel were unsuccessful in persuading the Pierce County Hearing Examiner that PALS's finding of two category III wetlands on the property was clearly erroneous, the standard of proof required by county code. The Pierce County Hearing Examiner issued his final decision on February 19, 2010, finding that two jurisdictional wetlands existed on the property.⁶

7. On March 12, 2010, plaintiff filed a LUPA petition against Pierce County, appealing the Hearing Examiner's decision, and thereto joined an

⁵ CP 257, ¶ 14 of Olson declaration

⁶ CP 10 ff, Report and Decision of Pierce County Hearing Examiner

action for inverse condemnation against both Pierce County and WSDOT. The claim against WSDOT was based on the newly discovered backflow from the SR 99 stormwater sewer on to the Pacific Highway Park property.⁷ The WSDOT project was built in 2001. The extent of modifications to the system after 2001 is a matter of dispute between the parties.

8. Following commencement of the lawsuit, Pierce County and Pacific Highway Park entered into negotiations to determine to what extent development could go forward, given the Hearing Examiner's decision and assuming the WSDOT backflow problems could be cured.

9. Pierce County and Pacific Highway Park, pursuant to an Interim Settlement Agreement,⁸ agreed to jointly put before the Hearing Examiner applications for a CUP and a wetland variance which stipulated two jurisdictional wetlands existed but reduced the wetland buffers to less than required by county code. By decisions entered on April 25, 2011, the Hearing Examiner approved the CUP and wetland variance as submitted, leaving Pacific Highway Park to develop 5.31 acres of the 8.31 acre property.⁹

⁷ CP 255-56, ¶¶ 5-10 of Olson declaration

⁸ CP 225-31, Ex. C of Hirsch declaration

⁹ CP 147-164, CUP decision; CP 233- 39, Variance decision

10. Upon the rendering of the Hearing Examiner's decisions of April 25, 2011, Pierce County and Pacific Highway Park elected to compromise their disputes and by mutual agreement requested that the Examiner vacate his earlier decision finding Pacific Highway Park had failed to prove two wetlands did not exist on the property. The Hearing Examiner did vacate his Report and Decision of February 19, 2010, by an order entered on September 29, 2011¹⁰.

11. Upon a joint motion by Pierce County and Pacific Highway Park, the LUPA petition and the inverse condemnation claim against Pierce County were dismissed pursuant to an October 25, 2011 stipulated order of the trial court.¹¹ That left only the inverse condemnation claim against WSDOT remaining in the original complaint, a claim the prosecution of which had been held in abeyance by mutual agreement of all parties pending the resolution of the LUPA petition.

12. On February 7, 2012, Pacific Highway Park filed an amended complaint, adding claims of trespass and RCW 4.24.630 statutory

¹⁰ CP 145-46

¹¹ Since that time, the City of Milton has annexed the area that includes the Pacific Highway Park property. The city recognizes the county-granted CUP as a valid development permit.

trespass/wastage against WSDOT.¹² WSDOT timely answered denying all allegations and interposing a pro forma counterclaim stating that if a taking were proved and damages awarded WSDOT got the property.¹³

13. On May 18, 2012, WSDOT filed a motion for summary judgment. In response, Pacific Highway Park brought a motion under CR 56(f) for additional time to take the depositions of two WSDOT employees thought to be most knowledgeable about WSDOT's drainage system in the vicinity of Pacific Highway Park's property. The trial court granted plaintiff's motion and the two depositions were taken.

14. WSDOT filed an amended motion for summary judgment on August 31, 2012.¹⁴ Following oral argument on the amended motion, the court below granted summary judgment to WSDOT on October 23, 2012, dismissing Pacific Highway Park's complaint in its entirety.¹⁵

15. This appeal was timely filed on November 14, 2012¹⁶.

¹² CP 75-81

¹³ CP 82-86

¹⁴ CP 89-103

¹⁵ CP 572-73, Order Granting Defendant's Amended Motion for Summary Judgment; CP 569-71, Memorandum/Decision

¹⁶ CP 574-81

IV. STANDARDS OF REVIEW

A. Summary Judgment

The appropriate standard of review for an order granting or denying summary judgment is de novo. *Sheikh v. Choe*, 156 Wn.2d 441, 447, 128 P.3d 574 (2006). An appellate court engages in the same inquiry as the trial court, with questions of law reviewed de novo and the facts and all reasonable inferences from the facts viewed in the light most favorable to the nonmoving party. *Williamson, Inc. v. Calibre Homes, Inc.*, 147 Wn.2d 394, 398, 54 P.3d 1186 (2002). *Accord Del Guzzi Constr. Co. v. Global Northwest Ltd.*, 105 Wn.2d 878, 882, 719 P.2d 120 (1986) (The burden is on the moving party to prove there is no genuine issue as to a fact which could influence the outcome at trial.)

The purpose for summary judgment is to examine the sufficiency of legal claims and to narrow issues. It is not meant to be an unfair substitute for trial. *City of Seattle v. State Dep't of Labor and Industries*, 136 Wn.2d 693, 696-97, 965 P.2d 619 (1998). *Babcock v. State*, 116 Wn.2d 596, 599, 809 P.2d 143 (1991). It is a procedure for testing the existence of a party's evidence. *Landberg v. Carlson*, 108 Wn. App. 749, 753, 33 P.2d 406 (2001). As such, it must be employed with caution lest meritorious causes are dismissed short of a determination of their true value. *Smith v. Acme Paving Co.*, 16 Wn. App. 389, 392, 558 P.2d 811 (1976).

Summary judgment is appropriate when there are no genuine issues as to any material fact and the moving party is entitled to judgment as a matter of law. “A genuine issue of material fact exists where reasonable minds could differ on the facts controlling the outcome of the litigation.” *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008). However, the nonmoving party avoids summary judgment when it sets forth specific facts that sufficiently rebut the movant’s contentions and discloses the existence of genuine issues as to material facts. *Id.*

The burden is on movant to demonstrate there is no genuine dispute as to any material fact and reasonable inferences from the evidence must be resolved against the moving party. *Lamon v. McDonnell Douglas Corp.*, 91 Wn.2d 345, 349, 588 P.2d 1346 (1979). *Morris v. McNicol*, 83 Wn.2d 491, 494-95, 519 P.2d 7 (1974). For a determination of what actually happened, cause in fact is left to the fact finder at trial. It is not appropriate to determine questions of fact on summary judgment unless but one reasonable conclusion is possible. *Hartley v. State*, 103 Wn.2d 768, 778, 698 P.2d 77 (1985).

B. Statutes of Limitation

Below, WSDOT urged dismissal on statute of limitation grounds. “The determination of the time at which a plaintiff suffered actual and appreciable damage is a question of fact. Since the statute of limitations is

an affirmative defense, CR 8(c), the burden [is on the movant] to prove those facts which established the defense.” *Haslund v. City of Seattle*, 86 Wn.2d 607, 620-21, 547 P.2d 1221 (1976).

V. ARGUMENT

A. THE TRIAL COURT IMPROPERLY RESOLVED FACTUAL DISPUTES ON A MOTION FOR SUMMARY JUDGMENT

On summary judgment the court's function is to determine whether a genuine issue of material fact exists; it is not to resolve existing factual issues. *Jones v. State*, 140 Wn. App. 476, 494, 166 P.3d 1219 (2007), *rev'd on other grounds*, 170 Wn. 2d 338, 242 P.3d 825 (2010). Summary judgment may not be used to try a question of fact but is limited to those instances in which there is no genuine dispute of fact. *Thoma v. C.J. Montag & Sons, Inc.*, 54 Wn.2d 20, 26, 337 P.2d 1052 (1959). Since a trial court does not resolve factual disputes on summary judgment, it does not enter findings of fact. *See Duckworth v. City of Bonney Lake*, 91 Wn.2d 19, 21-22, 586 P.2d 860 (1978).

But here, the trial court explicitly did enter “findings of fact,”¹⁷ thereby recognizing that material facts *were* in dispute. For example, the court found “that any defect, which the Plaintiff alleges as being the

¹⁷ CP 569-71, Memorandum/Decision

proximate cause of any future damage to its property, was preexisting prior to the Plaintiff's purchase of the property in 2006 and *would have been discoverable prior to the Plaintiff purchasing said property.*"(Emphasis added.)¹⁸ This certainly is WSDOT's position, but Pacific Highway Park alleges that it lacked such knowledge. The member of Pacific Highway Park who was the person directly involved in the purchase, Richard P. Wells, testified upon oral deposition that did he did not review the JCA report (2006) before closing on the property.¹⁹ And even if he had, that wetland report would not have put him on notice that WSDOT was causing stormwater to flow on to the property since it showed only water draining off the property into the WSDOT stormwater system.²⁰ Likewise, Mr. Neugebauer, author of the SNR Report (2007), a second opinion concerning jurisdictional wetlands by a professional geologist with license endorsements in hydrogeology and engineering geology, also failed to recognize that stormwater not only drained from the Pacific Highway Park property to the WDOT system, as the JCA report observed, but that stormwater flowed from the WSDOT system on to the

¹⁸ CP 570, finding of fact "1"

¹⁹ CP 223, line 14, Ex. B of Hirsch declaration

²⁰ CP 130, 131, 132, Ex. E of Wendel declaration

property.²¹ It was only when a civil engineer and site planner, N.L. Olson was preparing for a county hearing in 2009 that he recognized, by quantitative analysis, the existence of backflow from the WSDOT system on to the Pacific Highway Park at times of high storm flow.²²

In its response, Pacific Highway Park put in admissible evidence on all three points made above regarding lack of discovery of this hidden, i.e., latent, defect by the plaintiff. Yet, the trial court resolved this factual dispute in favor of the moving defendant. Summary judgment is not appropriate where an ultimate fact such as a party's knowledge is implicated. *Preston v. Duncan*, 55 Wn.2d 678, 681-82, 349 P.2d 605 (1960).

Other instances of fact finding by the trial court will be discussed below, where appropriate. Here, Pacific Highway Park will only further note that the rule is settled that “[t]he court does not weigh credibility in deciding a motion for summary judgment.” *Jones v State*, 170 Wn.2d 338, 354 n.7, 242 P.3d 825 (2010) (quoting Karl B. Tegland, 14A *Washington Practice: Civil Procedure* § 25:16 (2d ed. 2009)). As Tegland explains: “If the facts as presented by the parties would require the court to weigh credibility on any material issue, a genuine issue of fact exists and

²¹ CP 282, ¶ 9 of Neugebauer declaration

²² CP 257, ¶ 14 of Olson declaration

summary judgment will normally be denied.” *Id.* Nevertheless, the trial court, referring to the SNR Report, opines that it “does not find the S & R Report convincing.”²³

Black’s Law Dictionary 366 (6th ed. 1990), defines ‘credibility’ as “[w]orthiness of belief; that quality in a witness which renders his evidence worthy of belief.” *Webster’s New International Dictionary* 584 (2d ed. 1959), defines “convincing” as “[s]atisfying by argument or proof.” To say one does not find a witness convincing is no different than saying he is not worthy of belief. Hence, the trial court did impermissibly weigh the credibility of a witness on a motion for summary judgment.

B. THE TRIAL COURT DID NOT CONSIDER PACIFIC HIGHWAY PARK’S TRESPASS AND RCW 4.24.630 CLAIMS

Neither in the trial court’s Memorandum/Decision²⁴ nor in the Order Granting Defendant’s Amended Motion for Summary Judgment²⁵ does the court acknowledge that Pacific Highway Park pleaded causes in trespass and wastage to property under RCW 4.24.630.²⁶ The court only mentions inverse condemnation.

²³ CP 570, finding of fact “6” of the court’s Memorandum/Decision

²⁴ CP 569-71

²⁵ CP 572-73

²⁶ CP 75-81; Trespass, CP 78-79 ¶¶ 18-25; RCW 4.24.630, CP 79 ¶¶ 26-28

While both common law trespass and statutory trespass/wastage to land (RCW 4.24.630) have three year limitation periods (RCW 4.16.080(1)), both are subject to the doctrines of continuing trespass and the discovery rule. Therefore, even if the last modification to the WSDOT drainage system at issue here was in 2001 as contended by the defendant, a claim plaintiff disputes, under the existing conditions Pacific Highway Park's claims can be and are timely. Pacific Highway Park particularly pleaded, in the alternative, permanent trespass and continuing trespass in its amended complaint filed on February 7, 2012²⁷.

What distinguishes a continuing trespass from a permanent trespass is that the former is reasonably abatable while the latter is not. *Fradkin v. Northshore Utility Dist.*, 96 Wn. App. 118, 125-26, 977 P.3d 1265 (1999). *See also Restatement, Second, Torts* § 162 cmt. e. Since WSDOT categorically denies *any* wrong doing, the factual question of continuing versus permanent trespass – is what WSDOT has done *reasonably* abatable? – is not before this Court at this time and Pacific Highway Park continues to plead in the alternative.²⁸

²⁷ CP 79, ¶¶ 24 and 25

²⁸ “A trespass is abatable, irrespective of the permanency of any structure involved, so long as the defendant can take curative action to stop the continuing damages. The

“If a condition causing damage to land is reasonably abatable, the statute of limitations does not bar an action for continuing trespass. So long as the intrusion continues, the statute of limitation serves only to limit damages to those incurred in the three-year period before the suit was filed.” *Fradkin*, 96 Wn. App. at 119. *Accord Bradley v. American Smelting and Refining Co.*, 104 Wn.2d 677, 709 P.2d 782 (1985) and *Doran v. City of Seattle*, 24 Wash. 182, 64 P. 230 (1901). Since the trespasser is under a continuing duty to cure the intrusion, sequential actions are permitted so long as the trespass continues. *Bradley*, 104 Wn.2d at 693-94. *Fradkin* applies continuing trespass to a defective sewer line, i.e., a drainage case. *Id.* at 126 (“Periodic flooding due to defective construction of a drainage system is a recognized fact pattern in the category of continuing trespass.”)

The fact that the trespass by WSDOT may have begun before Pacific Highway Park took possession is not pertinent. *Restatement, Second, Torts* § 161, *Failure to Remove Thing Tortiously Placed on Land*, observes at cmt. e, *Effect of transfer of the land*:

The rule of continuing trespass ... is of particular importance where there has been a transfer of the possession of the land or of the ownership of the thing. If

condition must be one that can be removed without unreasonable hardship and expense.” *Fradkin*, 96 Wn. App. at 125-126 (Internal quotation and citation omitted.)

the possessory interest in the land has been transferred subsequent to the actor's placing of the thing on the land, the transferee of the land may maintain an action for its continuance there ...

With respect to § 161, cmt. e, see *Rosenthal v. City of Crystal Lake*, 171 Ill. App.3d 428, 525 N.E.2d 1176, 1181 (1988) (The fact that the plaintiff did not own the property at the time storm sewer was first installed did not prohibit his present claim for trespass.)

Similarly, *Restatement, Second, Torts* § 162, *Extent Of Trespasser's Liability For Harm*, observes at cmt. d. *Effect of a transfer of the land*: “If the conduct of the actor is a continuing trespass, any person in possession of the land at any time during its continuance may maintain an action for trespass.”

In the case of a permanent trespass, a discovery rule is applicable. Where a delay occurs between the injury and the plaintiff's discovery of it, the court may apply the discovery rule. *Crisman v. Crisman*, 85 Wn. App. 15, 20, 931 P.2d 163 (1997). As shown by the declaration of Norman L. Olson,²⁹ it took an experienced civil engineer, quantitatively analyzing the drainage issues on the Pacific Highway Park property, to recognize what WSDOT had done. Two individuals, a specialist in wetland studies (John

²⁹ CP 253-70

Comis, author of the JCA Report) and a licensed hydrogeologist/engineering geologist (Steven F. Neugebauer, author of the SNR Report), failed to recognize the situation for what it was even though they both looked right at the visible manifestations.

The discovery rule works to toll the running of the limitation period until a time when a plaintiff, through the exercise of due diligence, should have discovered the basis for the cause of action. *Allen v. State*, 118 Wn.2d 753, 758, 826 P.2d 200 (1992). Under this rule, the cause of action accrues and the limitation period begins to run when the plaintiff discovers all the essential elements of the cause of action, *In re Estates of Hibbard*, 118 Wn.2d 737, 744, 826 P.2d 690 (1992), and who the responsible party is. *Orear v. Int'l Paint Co.*, 59 Wn. App. 249, 257, 796 P.2d 759 (1990). In *Bradley*, 104 Wn.2d at 693, the court, while finding the case to be one of continuing trespass, recognized that the discovery rule can be applied in trespass cases under the right set of facts.

“Whether the plaintiff has exercised due diligence under the discovery rule is a question of fact, which is the defendant's burden to prove.” *Wallace v. Lewis County*, 134 Wn. App. 1, 13, 137 P.3d 101 (2006) (internal citation omitted).

It was not until August, 2009 that Mr. Olson discovered and informed the client and its counsel of the backflow problem created by the

WSDOT system, less than three years before the filing of the amended complaint in March of 2012 that alleged causes of action sounding in trespass.³⁰

Although the trial court chose not to acknowledge it, Pacific Highway Park put in credible evidence that WSDOT deposits and stores stormwater on its property. In fact, to properly function it *must* put a portion of its stormwater on to the Pacific Highway Park property.³¹

C. PACIFIC HIGHWAY PARK’S INVERSE CONDEMNATION CLAIM IS VIABLE

1. WSDOT’S INTENTIONAL CREATION OF BACKFLOW ON TO PACIFIC HIGHWAY PARK’S PROPERTY WAS EFFECTIVELY HIDDEN FROM OBSERVATION

The trial court found that the flooding complained of “was certainly a preexisting condition in 2006 [when Pacific Highway Park purchased the property] and any attempt to claim inverse condemnation is based on future speculation.”

In Washington, inverse condemnation, a constitutional claim, does not have a limitation period per se. The mere passage of time does not preclude a plaintiff from seeking recovery for inverse condemnation. *Wallace v. Lewis County*, 134 Wn. App. 1, 22, 137 P.3d 101, *as amended*

³⁰ CP 257, ¶ 14 of Olson declaration

³¹ CP 257, ¶ 12 of Olson declaration

(2006). However, if the defendant has otherwise satisfied the elements of transfer by way of prescriptive right, an otherwise valid claim for inverse condemnation may be barred. *Id.* The burden is on the defendant to establish the elements of a prescriptive right: that the defendant's use of the property was hostile, open, and notorious for an uninterrupted period of 10 years. *Id.*

On summary judgment, WSDOT cited *Hoover v. Pierce County*, 79 Wn. App. 427, 433, 903 P.2d 464 (1995) for the proposition that an inverse condemnation claim “ordinarily” belongs to the owner of the property at the time of the taking. This is indeed the rule in Washington and has been for many years, as the cases cited by *Hoover* show. The primary reason for the rule is that it generally can be *assumed* that the price paid by a subsequent purchaser reflects the damaged state of the property. *See, e.g., Walla Walla v. Conkey*, 6 Wn. App. 6, 17, 492 P.2d 589 (1971), *review denied*, 80 Wn.2d 1007 (1972) (“No damages should be allowed any appellant found to have acquired his property for a price commensurate with its diminished value.”)

With this assumption in mind, the court in *Hoover*, 79 Wn. App. at 434, denying plaintiff's inverse condemnation claim, pointedly observed that

the flooding problems caused by the county road were *evident* well before the Hoovers bought the two lots in 1988. Moreover, the rescinded plat, still in the County records, contained *notice* of the land's propensity for flooding that would reduce its value. The purchase price of the property, therefore, either did reflect or should have reflected the diminished value of the land caused by its propensity to flood. (Emphasis added.)

In the case sub *judice*, however, no one other than WSDOT knew that stormwater from the SR 99 system was *back-flowing* up on to the property until August 2009 when an experienced civil engineer, hired to plan the development of the site analyzed the data and realized that the WSDOT system could only work -- that is, not routinely flood SR 99 -- if stormwater backed up on to the Pacific Highway Park property and was stored there until the storm flow abated.³²

Below, WSDOT made much of the John Comis & Assoc. (“JCA”) report that found two wetlands on the property. Richard Wells, a member of Pacific Highway Park, LLC, has testified that he did not review this report prior to purchase.³³ But even if he had been, all he would have seen in the JCA Report, particularly its figure 7A, was a drawing showing by directional arrow water flowing *off* the property into a “manhole”, i.e., the

³² CP 257, ¶ 12 of Olson declaration

³³ CP 223, line 14 of Ex. B of Hirsch declaration

WSDOT catch basin adjacent to the property.³⁴ Nowhere in the JCA Report is there any mention of stormwater back-flowing out of the catch basin *on to* the property. Simply put, if Pacific Highway Park had reviewed the JCA Report before closing on the property, it would have learned that water from its property drained to the WSDOT stormwater conveyance along SR 99. Pacific Highway Park would not have had even a hint that stormwater flowed *from* the WSDOT system on to the property.

Similarly, when Pacific Highway Park retained an experienced hydrogeologist/engineering geologist, Steve Neugebauer of SNR Company, to review the JCA Report and look for the putative wetlands (which he did not find), Mr. Neugebauer, who happened to visited the site in relatively dry periods, saw one of the pipes connecting the property to the catch basin and thought it to be an outlet from the Pacific Highway Park property to the WSDOT system, not an inlet.³⁵

The seller of the property, a trust involving numerous out-of-state people whom it is doubtful ever saw the property³⁶, were most likely unaware of this latent defect. The purchaser certainly was not aware of it. It is a vacant, densely vegetated parcel. And the pipes between the

³⁴ CP 130, 131, 132, Ex. E of Wendel declaration

³⁵ CP 282, ¶ 9 of Neugebauer declaration

³⁶ CP 111, Ex. B of Wendel declaration

property and WSDOT's catch basin, in keeping with the general gradient of the land, slope *down* to SR 99.³⁷ It took expert analysis to find out what WSDOT had done. The engineer who undertook the analysis did so to try and understand just how much stormwater runoff the needed to deal with in developing that parcel. He knew much of the property was on a steep west to east slope and stormwater would naturally flow on to it from up-gradient. This he could deal with under the pre-2005 state stormwater manual. But he cannot deal with the WSDOT stormwater coming *up* from the highway. It is of an amount that will routinely flood his onsite stormwater works. Olson declaration at ¶¶ 16, CP 258; see particularly Olson's Exhibit D, (CP 270) which shows the extent of the WSDOT-caused flooding resulting from a 25-year storm. This flooding completely inundates the roadside "wetland" Pacific Highway Park stipulated to in order to obtain its CUP, as well as the adjacent stormwater-treatment pond required by the CUP and a significant amount of land besides, making Pacific Highway Park's development of the parcel impossible.³⁸

Olson's quantification of the extent of the WSDOT caused flooding is not "hypothetical" as the trial court found. It uses real data, including

³⁷ CP 226, ¶ 9 of Olson declaration

³⁸ CP 376-497, declaration of real property appraiser Strickland; CP 258-59, ¶ 16 of Olson declaration

that obtained from the defendant's Hydraulic Report, and applies recognized engineering principles to calculate the extend of the injury to Pacific Highway Park's property.³⁹

As for the trial court's contention that "any attempt to claim inverse condemnation is based on future speculation," in fact WSDOT's actions, beginning with the 2001 project, is an injury the results of which will continue in the future. *See, e.g., Brillhardt v. Ben Tipp, Inc.*, 48 Wn.2d 722, 728, 297 P.2d 232 (1956).

A latent defect is a defect "which could not be discovered by the exercise of ordinary and reasonable care." *Bichl v. Poinier*, 71 Wn.2d 492, 496, 429 P.2d 228 (1967) (A latent defect is a defect of which the owner had no knowledge, or which, in the exercise of reasonable care, he should have had no knowledge.) and *U.S. v. Lembke Const. Co., Inc.*, 786 F.2d 1386, 1387 (C.A. 9 1986) (A latent defect is one which cannot be discovered by observation or inspection made with ordinary care.). A defect that requires detailed, quantitative analysis by a professional

³⁹ CP 257-60, ¶¶ 15-18 of Olson declaration. The only "hypothetical" aspect of the Olson findings are presented in ¶ 17 where he assumes the previous storage capacity of an upstream wetland, off the Pacific Highway Park property, and how much it would *reduce* the flooding the Pacific Highway Park property if it had not been filled. See Section 2B, *infra*. The extend of the flooding shown in Olson's Ex. D (CP 270), described in ¶ 16 (CP 258-59), does not include this hypothetical.

engineer to recognize is, by any “reasonable” standard, a latent defect.⁴⁰

Two experts in water and drainage examined the property and did not recognize the defect or WSDOT’s role in causing it.

WSDOT should not be allowed to benefit from its duplicity in skillfully designing a system that looks to all the world to be doing one thing while in fact doing something more – something counterintuitive (water flowing uphill) and something unexpected. When confronted with Pacific Highway Park’s allegations, WSDOT admitted it was putting stormwater on to the Pacific Highway Park property. Fred Tharp, the WSDOT employee who was project engineer and engineer of record for the 2001 project testified at his deposition:⁴¹

79:10 Q ...would you anticipate that leaving -- that,
11 quote unquote," leaving the cross culvert open to the
12 wetland area" would also allow the water to exit from
13 the buried pipe system?
14 A That would be fundamentally correct.
15 Q Okay.
16 A It would be the balance that you would want to
17 maintain and the existing condition.
18 Q Okay. And if, as Exhibit 4 indicates, the wetland is
19 situated above the drainage ditch, would it be
20 possible then that the water would rise up into the

⁴⁰ *Black’s Law Dictionary* 883 (6th ed. 1990) defines “latent” as “Hidden; concealed; dormant; that which does not appear upon the face of a thing; as latent ambiguity or defect.” Perhaps a more exact description of the situation here is the definition of “latent” found in *Webster’s New International Dictionary* 1396 (2nd ed. 1961): “Disguised; being (something) in reality without having the appearance (of it).”

⁴¹ CP 252, Ex. G of Hirsch declaration

21 wetland as a result of its exit from the system?
22 A I think if you looked at whether or not you take the
23 statement above being within a gradient above, I'd
24 say that's consistent.

2. WSDOT'S STORMWATER SYSTEM HAS BEEN MATERIALLY CHANGED SINCE 2001

WSDOT repeatedly asserted below that the stormwater conveyance system along the stretch of SR 99 at issue here has not changed since its initial construction in 2001. However, the evidence shows otherwise. On sheet 22 of 62 of the as-constructed drainage plan (WSDOT Bates 20000077, attached as Ex. C to Olson declaration (CP 268)) two areas are mapped as wetlands: one in the vicinity of the Pacific Highway Park property near stations 129 and 130; and another to the north, off the Pacific Highway Park property, in the vicinity of stations 135 and 136. WSDOT documents do not indicate that this northern wetland was filled or otherwise disturbed during the 2001 project. Yet, today this wetland is, but for the northern-most sliver, filled; further, a constructed ditch carries surface water across the area toward the highway. Near the highway the ditch terminates in a sump. In the center of the sump is a pipe that heads toward and, by all appearances and indications, joins the WSDOT 36" line

at the catch basin at Station 135.20 upstream from the Pacific Highway Park property.⁴²

This connection to the 36" line is not shown on the as-constructed plan at Bates 20000082, i.e., it was not part of the 2001 project.⁴³ It was added after 2001. WSDOT denies any permit was issued for the connection, as does the City of Milton whose boundaries the area is now within. The online records of Pierce County give no indication of a development permit that would include such a connection.⁴⁴ Since it undisputed that WSDOT owns the 36" pipe and catch basin, it is WSDOT that would require a utility permit for the connection.⁴⁵

⁴² CP 257-258, ¶ 15 and CP 259-60, ¶ 17 of Olson declaration

⁴³ CP 259-60, ¶ 17 of Olson declaration

⁴⁴ CP 217, ¶ 8 of Hirsch declaration

⁴⁵ At his deposition, Brad Lindgren, WSDOT regional engineer for the area, testified as follows:

21:16 Q When you say except for when they become a
17 utility permit, what do you mean?

18 A If they have a tight line connection to our right-of-
19 way, has a pipe, then they're issued a storm water
20 utility permit.

21 Q I see.

22 A So if they have a discharge pipe and it comes into
23 our right-of-way, that's permitted now. If it's a
24 ditch it's not. But if they come inside our right-
25 of-way --

22:1 Q All right.

2 A -- then it's a utility permit.

See CP 245-46, Ex. F of Hirsch declaration

This post-2001 connection is no minor matter. Before the installation of the 36" pipe, stormwater would flood out of the roadside ditch into this wetland where it would be stored during high flows and where a portion of the water would infiltrate. (Olson declaration at ¶¶ 15; CP 257-58.) Once the 36" pipe was installed, this storage area was cut off and more water would reach the Pacific Highway Park property. But the access to the ditch to drain the northern wetland, as flows receded, was also cutoff in 2001. By means of the aforementioned drainage channel, sump, and connecting pipe, this access for drainage of the property containing the now-filled northern wetland was restored, greatly increasing the amount of stormwater entering the WSDOT system and, due to the backflow phenomenon, being dumped on the Pacific Highway Park property.

In *Hoover*, the court reviews numerous cases where increases in amount or changes in the character of the taking have allowed a subsequent purchaser to maintain an action for inverse condemnation. Among these is *Highline Sch. Dist. 401 v. Port of Seattle*, 87 Wn.2d 6, 15, 548 P.2d 1085 (1976), a Sea-Tac Airport case, "where the court found that a new cause of action accrued where the intensity of the interference had increased over time." *Hoover*, 79 Wn. App. at 435. In *Buxel v. King County*, 60 Wn.2d 404, 409, 374 P.2d 250 (1962), a case sounding in trespass by water, when a relatively minor drainage problem was

exacerbated by a new connection to the old, existing drainage system, a new cause of action accrued.

While the exact date of the filling and draining of this northern wetland, and date of this new and significant connection to the WSDOT stormwater system is not yet established⁴⁶, there can be no reasonable dispute that it entails a significant post-2001 change to the WSDOT-owned stormwater conveyance system. Therefore, despite WSDOT's repeated assertions that nothing has changed in the system post-2001, the facts indicate otherwise. It is unbelievable that WSDOT would not know of, nor apparently have any interest in finding out about, a new connection to its stormwater system.

D. THE TRIAL COURT'S APPARENT RELIANCE ON A LACK OF PROXIMATE CAUSE IN GRANTING SUMMARY JUDGMENT IS INAPPOSITE THIS CASE

At finding no. 1,⁴⁷ the trial court uses the term "proximate cause," particularly the lack thereof, when addressing the allegations of Pacific Highway Park. It is not clear from the court's terse decision how this term is to be understood. However, WSDOT argued below as follows:

⁴⁶ Discovery in this case did not close until December 10, 2013, and plaintiff's investigation of this post-2001 connection was continuing at the time defendant's amended motion for summary judgment was filed. Although the matter of this new connection is one particularly within the knowledge and competency of defendant WSDOT, it denies any knowledge of the matter. See CP 217 ¶ 8, Hirsch declaration

⁴⁷ CP 570

[e]ven if there were support for any claim that the SR 99 stormwater system causes water to flow onto plaintiff's property, plaintiff cannot prove that such flow was proximately caused by the 2001 project or any action of WSDOT thereafter. Washington law recognizes two elements to proximate cause: cause in fact and legal causation. Cause in fact refers to the "but for" consequences of an act. Legal causation is a policy determination by the courts that, as a matter of law, forecloses any duty in this case. *Hartley v. State*, 103 Wn.2d 768, 779, 698 P.2d 77 (1985).⁴⁸

While a fair statement of one meaning Washington court's have given "proximate cause," it is not appropriate in this case where plaintiff has only pleaded intentional actions by WSDOT. Negligence considerations such as "duty" and "policy determinations" as to how far liability will extend have no place in a constitutional claim (inverse condemnation) or intentional torts (trespass and RWC 4.24.630 damage to property).

Hartley, which WSDOT cites as authority for its proximate-cause argument, is itself a *negligence* case. It turned on the remoteness and insubstantiality of the government's responsibility, given its granting of a driver's license, for the actions of the drunk driver who killed Mrs. Hartley. There is no such policy questions with respect to trespass, taking of land, or damage to land when done by the intentional action of the

⁴⁸ CP 102, Defendant's Amended Motion for Summary Judgment

government itself. Pacific Highway Park's case turns only on cause in fact. "As a determination of what actually occurred, cause in fact is generally left to the jury ... [S]uch questions of fact are not appropriately determined on summary judgment unless but one reasonable conclusion is possible." *Id.* at 778.

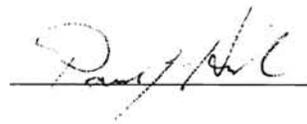
VI. CONCLUSION

Plaintiff/Appellant Pacific Highway Park, LLC., for the reasons argued above, requests that the trial court's grant of summary judgment to WSDOT be reversed and the case remanded for trial.

DATED this 29th day of March, 2013.

Respectfully submitted,

HIRSCH LAW OFFICE

A handwritten signature in cursive script, appearing to read "Paul J. Hirsch", is written over a horizontal line.

PAUL J. HIRSCH,
WSBA No. 33955
Attorney for Appellant

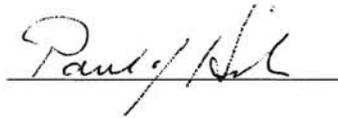
CERTIFICATE OF SERVICE

A copy of this document was properly addressed and mailed, postage prepaid, to the following individual on the date indicated below.

D. Thomas Wendel, AAG
Attorney for Washington State Department of Transportation
Office of the Attorney General
Transportation & Public Construction Division
7141 Cleanwater Drive SW, PO Box 40113
Olympia WA 98504-0113

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

At: Manchester, Washington
Date: March 29, 2013



Paul J. Hirsch

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