

NO. 44198-5

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

PACIFIC HIGHWAY PARK, LLC,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF TRANSPORTATION

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

Appellant Pacific Highway Park, LLC's (hereinafter "PHP") alleged claims against Respondent Washington State Department of Transportation (WSDOT) relate to wetlands on property that PHP acquired in 2006, and are based primarily upon an earlier 2001 WSDOT widening project undertaken on State Route 99 (SR 99) adjacent to PHP's property. PHP's argument in support of its claims is based upon distorted assertions of the evidence and misapplied legal authorities. There is no genuine issue of material fact for trial, and the trial court's dismissal of PHP's claims should be affirmed.

The principal impediment to PHP's claims is the "subsequent purchaser" doctrine, which provides that a claim of inverse condemnation is personal to the owner of the property at the time of the governmental action alleged to have taken or damaged the property. *Hoover v. Pierce County*, 79 Wn. App. 427, 433-34; 903 P.2d 464 (1995), *review denied*, 129 Wn.2d 1007, 917 P.2d 129 (1996). A subsequent purchaser has no claim, and acquires the property as-is. The doctrine is distinct from prescriptive easements, and common law trespass or nuisance claims do not avoid the effect of the doctrine. Summary judgment in favor of WSDOT was appropriate on this basis alone.

PHP also failed to offer competent evidence that the actions of WSDOT in 2001 or later caused any harm to the subject property. The case is presented by PHP as though the wetland conditions arose after 2001. However, it is undisputed that the apparent “wetlands” impeding development existed prior to 2001 and are fed from many sources and directions other than the alleged contribution from the highway.

PHP’s reliance on the discovery rule to avoid dismissal is disingenuous. There are no cases holding that the discovery rule even applies in the present context. If there were legal support for the rule, the evidence still would not support its application in this case. The discovery rule imposes limitations based upon constructive knowledge, not actual knowledge as PHP argues. PHP’s claim of subjective ignorance is inapposite.

II. COUNTERSTATEMENT OF ISSUES ON APPEAL

1. When PHP failed to produce the evidence needed to support its claims, did the trial court properly conclude that there were no genuine issues of material fact, requiring a WSDOT summary judgment?

2. Under the “subsequent purchaser” doctrine, a claim that the government took or damaged real property by inverse condemnation can only be litigated by the person who owned the real property at the time of the governmental action, and a subsequent purchaser does not acquire the

cause of action. When the WSDOT action that allegedly damaged PHP's property occurred before PHP acquired the property in 2006, does the subsequent purchaser doctrine bar PHP's lawsuit?

3. A plaintiff suing for damages to land must prove that the defendant actually damaged the land. Can a claim for damage to land be asserted without competent proof that the defendant actually altered the pre-existing condition of the land?

4. When the property was already damaged at the time of purchase, can the subsequent purchaser acquire the prior owner's claim for inverse condemnation by claiming that the subsequent purchaser was subjectively unaware of information that was indisputably available at the time of its purchase?

5. Did the superior court properly dismiss PHP's surface water trespass claims because PHP was a subsequent purchaser, the common enemy doctrine forecloses liability for surface water management, and/or PHP failed to prove damages?

6. Do doctrines which serve finality and consistency in adjudications, including collateral estoppel, res judicata, and/or judicial estoppel, bar PHP from suing WSDOT for maintaining detention ponds on the property when PHP previously accepted a development permit based upon an adjudicated finding that same property features are "wetlands"?

III. STATEMENT OF THE CASE

A. Nature Of The Property At Issue

PHP's property is adjacent to and west of SR 99. The highway was constructed more than 80 years ago. It is undisputed that the land purchased by PHP in 2006 has always been the low point in the drainage basin west of SR 99, and collected water from numerous sources other than the alleged contribution from the SR 99 storm drainage system. Clerk's Papers (CP) at 138. The original construction of SR 99 had the effect of cutting off drainage from the west to the east. *Id.* From the original construction of SR 99 until the present, the basin area to the west, including PHP's property, has had only one outlet, a 24-inch culvert located near the lowest elevation in the basin area. The culvert is connected to Pierce County's storm sewer system.¹ *Id.*

In a 2001 project, WSDOT widened the surface of SR 99 in the vicinity of the subject property. The roadway widening necessitated replacement of what had been a largely open ditch stormwater conveyance along the west side of SR 99. The open system was replaced by culvert piping beneath the surface. Therefore, prior to construction of the 2001 project, WSDOT undertook a drainage study yielding a Stormwater Site

¹ The culvert pipe referenced in the SNR Company report (SNR report) is the one shown in the John Comis Assoc., Inc. report (JCA report), which is enlarged at CP 131-33.

Plan assessing the hydrology in the area. CP at 175 (Fred Tharp); CP at 255 (Norman Olson). The 2001 study identified wetlands that existed on the property. *See, e.g.*, CP at 256 l. 10. According to PHP's expert, the 2001 WSDOT study indicated that in extremely severe circumstances, even before 2001, the normal flow of water out of the western basin could exceed the capacity of the west-to-east cross culvert. CP at 256, ¶ 10.² There is no assertion that the 2001 report was flawed or concealed any information or analysis.³

WSDOT's intent with respect to the stormwater replacement was "not to change the balance" and to "maintain as closely as possible the existing hydraulic conditions." CP at 176, 178. It is undisputed that the project did not alter the pre-existing west-to-east crossing culvert beneath SR 99. The property in question remained the collection point for the basin west of the highway as it had been before the 2001 project. *See* CP at 131-33.

There have been no material alterations to the drainage along SR 99 by WSDOT since the 2001 project. PHP's assertion of

² PHP's expert reported that "[t]he calculations presented in the 2001 WSDOT Report actually show that highway flooding will occur if the Pacific Highway Park property were not used to store excess stormwater during high flow events. This causes the property to be unusable as planned and approved." CP at 256, ¶ 10.

³ PHP's expert Steven F. Neugebauer (Neugebauer) says that the 2001 analyses were merely "routine studies conducted by wetland scientists." Neugebauer stated that "we don't believe they falsified anything." CP at 555-57.

“modifications to the system after 2001” is unsupported. Brief of Appellant (Br. Appellant) at 9, 29. No specific post-2001 date is identified to indicate whether the asserted changes occurred before or after PHP’s 2006 purchase. The purported post-2001 change is to a wetland that is not on WSDOT property, and PHP does not claim that WSDOT had any hand in the purported change.⁴

B. The 2006 Acquisition Of The Property

PHP acquired the property at issue through a warranty deed dated November 21, 2006. CP at 111.

When PHP acquired the property, it had notice of the existence of wetlands on the property, as well as a connection between the wetlands and the SR 99 stormwater system. Prior to the purchase, PHP’s manager, Richard Wells (Wells), discussed the issue of wetlands with a person named Jack Johnson, who assigned him the rights to purchase the property. Mr. Johnson told Wells that there were no wetlands, but also told Wells “to hire this John Comis, JCA.” CP at 522-23.

On November 6, 2006, John Comis Assoc., Inc. prepared a Wetland Reconnaissance & Verification Report (JCA report) at Wells’ request. CP at 524; CP at 113-30. Wells paid for the report on November

⁴ PHP has not claimed or proven any basis for WSDOT to be vicariously liable for the actions of third parties for actions on their own land or unauthorized connections to stormwater systems.

17, 2006, but did not review the report until after purchasing the property on November 21, 2006. CP at 525-26.

The JCA report concluded that there appeared to be two Category III wetlands on the property, and that development would be limited due to generally required setbacks from the wetlands.⁵ *Id.* On Figure 7a of the JCA report, SR 99 is shown to the east of the subject property, and reflects the existence of a pipe connecting the wetland on the property with the stormwater drainage manhole to the east, adjacent to SR 99. *Id.*; CP at 120; CP at 131-33 (enlarged views of the connecting pipe).

After its purchase, on October 20, 2007, PHP obtained a follow-up report its property from the SNR Company (SNR report). CP at 134-45. The SNR report characterizes the 2006 JCA report as indicating that there were two Category III wetlands on the subject property, under which the “potential development of the subject property would be severely restricted.” CP at 144 (in the Overview section). It also references indications from the JCA report that there were “wetland delineation flags” on the subject property that were already in place before the property was inspected in 2006 for purposes of the JCA report. *Id.*; CP at 144 n.2.

⁵ References to the two Category III wetlands identified prior to PHP’s purchase of the property appear in numerous places in the JCA report. *See, e.g.*, CP at 114-15.

Wells indicated that he did not review the JCA report because he relied instead on Johnson's indication that there were no wetlands. Wells admitted that this was his first ever purchase of real estate and that he was naïve. CP at 523. Wells reviewed the JCA report "shortly after" completion of the purchase, and learned he may have been misinformed. But Wells sought no recourse against Johnson. CP at 526-27.

The property was available for inspection prior to purchase, and expert inspections identified wetland issues potentially affecting development. PHP made no effort to review either its own studies or information that was available from WSDOT at the time of the purchase, including the Stormwater Site Plan prepared before the 2001 widening project.

C. Alleged Damages

PHP has offered no proof of the difference between the condition of the land before and after the 2001 government actions alleged in this case. The only damages evidence offered relates to the gross effect of the 80-plus-year-old drainage conditions on the property PHP purchased in 2006. But those same conditions existed before and after the 2001 WSDOT project. In addition, the property is substantially impacted by surface water flowing from many origins other than the SR 99 drainage system. Yet, there is no evidence in the record to distinguish effects

caused by the 2001 widening from those caused by historic conditions or from unrelated surface water sources.

Even in the inapposite context of the overall historical impact of SR 99 drainage, there is no evidence of any actual impact on PHP's property. PHP's expert Norman L. Olson, P.E. (Olson) concedes that in less than extreme conditions, drainage goes *from* the subject property into the SR 99 drainage system, which does not support any claim. His opinion claims only that a flow *onto* the subject property requires a storm of something less than a 25-year event to trigger flooding. CP at 256, ¶ 9 ("times of high stormwater flow"; "in times of high flow"), ¶ 10 ("during high flow events"); CP at 258-59, ¶ 16 ("25-year design storm event"). However, there is no evidence of such an extreme event during any pertinent years. No weather data has been offered to show such an occurrence.

There is also no evidence that anyone has ever seen water flowing onto PHP's land from WSDOT's drainage system. PHP's agent Wells and expert Olson both testified that they had never seen water coming from the SR 99 drainage system onto the subject property, nor are they aware of anyone who has seen this. CP at 528 ("I would not watch water

running”); CP at 532 (“I have not seen it happen”).⁶ There is simply no evidence in the record which proves that the property has, in fact, been affected in the manner PHP theorizes.

D. Features On PHP’s Property Are Legally Established As Wetlands

According to PHP’s expert, Steven F. Neugebauer (Neugebauer), the features on PHP’s property “cannot be both a stormwater detention facility and a wetland.” CP at 542. He stated that “any category of wetland is inconsistent” with his opinion that WSDOT caused the property to be utilized as a detention pond. CP at 543.

After various administrative proceedings, on April 25, 2011, Pierce County approved, with conditions, a development request for the property.⁷ CP at 146-72. Among the findings and conclusions in the County’s approval, are the following:

- The property contains two Category III wetlands (consistent with the 2006 JCA report);
- A condition for approval of the development was that the proposed facility will “collect all stormwater from the west and convey it to the SR-99 drainage system.”

CP at 170, Conclusion No. 2; CP at 155.

⁶ Neugebauer, likewise, has never himself seen water coming onto the subject property from SR 99, and was unaware of anyone else who has seen this. CP at 554-55. He did offer hearsay about Wells’ observation, but Wells’ deposition testimony, quoted above, is plainly to the contrary.

⁷ The instant lawsuit originally contained an appeal from the administrative proceedings with Pierce County, which was later resolved and dismissed.

IV. ARGUMENT

A. Standard Of Review

An appellate court reviews a summary judgment motion de novo. *Hartley v. State*, 103 Wn.2d 768, 774, 698 P.2d 77 (1985). A defendant seeking summary judgment has the burden of showing the absence of evidence to support one or more elements of the plaintiff's case. *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). Once the moving party shows an absence of a genuine issue of material fact, the burden shifts to the nonmoving party. *Young*, 112 Wn.2d at 225.

While evidence and reasonable inferences are considered in the light most favorable to the nonmoving party, if the nonmoving party “fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial,” summary judgment is proper. *Young*, 112 Wn.2d at 225 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)); *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300-01, 45 P.3d 1068 (2002). The nonmoving party may not rely on speculation to create a material issue of fact. *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008). “[M]ere allegations, denials, opinions, or conclusory statements” do not establish a genuine

issue of material fact. *Int'l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.*, 122 Wn. App. 736, 744, 87 P.3d 774 (2004).

As the party seeking relief, PHP bears the burden of proof for its claims in inverse condemnation, trespass, and statutory waste. *See, e.g., Kahuna Land Co. v. Spokane County*, 94 Wn. App. 836, 841, 974 P.2d 1249 (1999); *Ventures Northwest Ltd. P'ship v. State*, 81 Wn. App. 353, 363, 914 P.2d 1180 (1996) (inverse condemnation).

CR 56(f) permits a party to conditionally seek to postpone a summary judgment “to permit affidavits to be obtained or depositions to be taken or discovery to be had.” PHP used this rule to obtain a continuance of WSDOT’s initial summary judgment motion.⁸ When the motion was later re-filed, PHP made no such motion. Therefore, this court should reject PHP’s request to assume facts when PHP admits that its proof “is not yet established.” Br. Appellant at 32 n.46.

B. PHP Failed To Prove A Prima Facie Case For Inverse Condemnation

1. Inverse Condemnation May Not Be Asserted By Later Purchasers

Inverse condemnation is an action “brought ‘to recover the value of property which has been appropriated in fact, but with no formal

⁸ Brief of Appellant (Br. Appellant) at 11.

exercise of the [governmental] power.” *Citoli v. City of Seattle*, 115 Wn. App. 459, 488, 61 P.3d 1165 (2002) (quoting *Bodin v. City of Stanwood*, 79 Wn. App. 313, 320, 901 P.2d 1065 (1995)). An inverse condemnation claim is personal to and actionable only by the owner of the property at the time of the government’s appropriation. *Hoover*, 79 Wn. App. at 433-34; *Gillam v. City of Centralia*, 14 Wn.2d 523, 530, 128 P.2d 661 (1942). Under the “subsequent purchaser” doctrine, a property owner generally may sue only for a taking that occurs during his or her ownership because the price of property is deemed to reflect its condition at the time of the sale, including any injury because of government interference. *Hoover*, 79 Wn. App. at 433-34.

No harmful governmental action or appropriation occurred after PHP’s purchase of the property in 2006. It is undisputed that the alleged damage to the property existed and was apparent when PHP bought the property, even though PHP chose not to assess the cause until later. PHP is a subsequent purchaser and, as a matter of law, is deemed to have acquired the land in the damaged condition. *Id.* This requires dismissal of the inverse condemnation claim.

The price of property “is deemed to reflect its condition at the time of sale, including any injury because of government interference.” *Crystal Lotus Enter. Ltd. v. City of Shoreline*, 167 Wn. App. 501, 274 P.3d 1054

(2012); *see also Tom v. State*, 164 Wn. App. 609, 267 P.3d 361 (2011). Any “right to damages for injury to property is a personal right belonging to a property holder, and does not pass to a subsequent purchaser unless expressly conveyed.” *Crystal Lotus*, 167 Wn. App. at 505, quoting *Hoover*, 79 Wn. App. at 433-34. PHP did not obtain any right to damages from the prior owner and does not allege that it did. Therefore, this inverse condemnation action is barred.

PHP contends that the 2001 project involved drainage connections that created a latent impact on the property. The claimed latency is not a condition of the property itself (which was readily apparent), but an alleged *cause* of the apparent condition.

The condition of the property, as opposed to the cause of the condition, is a key aspect of the subsequent purchaser doctrine. For example, in *Crystal Lotus*, the property owners’ sole indication of damage was when plaintiff “walked the property and found a swamp-like condition.” *Crystal Lotus*, 167 Wn. App. at 503. Plaintiff alleged that the condition was a result of stormwater drainage from the government system, which drained onto an adjacent lot and “travels underground and surfaces” on the plaintiff’s lot. *Id.* at 503. Despite this unseen mechanism, plaintiffs were barred from bringing their inverse condemnation action.

This Court recently rejected another claim of inverse condemnation, based on government actions that occurred prior to the claimants' purchase of the property. *Wolfe v. State Dep't of Transp.*, ___ Wn. App. ___, 293 P.3d 1244 (2013), petition for review filed April 3, 2013.⁹ In *Wolfe*, property owners alleged that WSDOT's improvement of a bridge in 1986 caused ongoing erosion to their property. The property was purchased in 2003 and 2004, but the owners claimed that they did not acquire an engineering analysis tying WSDOT's improvement of the bridge to the erosion until 2007. The property owners commenced their lawsuit in 2010, alleging inverse condemnation, nuisance, and negligence against WSDOT. The decision affirmed the trial court's dismissal of the case based upon the subsequent purchaser doctrine articulated in *Hoover*. *Wolfe*, 293 P.3d at 1248.

The *Wolfe* decision also rejected the assertion that ongoing erosion damage overcame the *Hoover* subsequent purchaser doctrine. The Court instead held that to bypass the subsequent purchaser rule, the owner must show ““*additional governmental action* causing a measurable decline in market value.”” *Id.* at 1247, quoting *Hoover*, 79 Wn. App. at 436 (emphasis original). The Court found that any inverse condemnation occurred prior to the purchase of the property, and therefore, the purchase

⁹ Copy attached hereto as Appendix A.

price is presumed to reflect the diminished value. *Wolfe*, 293 P.3d at 1248.

Here, as in *Wolfe* and *Hoover*, if an inverse condemnation ever occurred, it happened years before PHP acquired the property. As noted above, PHP's consultant reported the presence of wetlands prior to PHP's acquisition of the property. It is those very wetlands that PHP now asserts as the claimed damage. The condition purportedly caused by the government taking is presumed to be reflected in the purchase price. As in *Wolfe*, *Crystal Lotus*, and *Hoover*, the allegedly ongoing condition does not give rise to a new claim.

PHP contends that someone materially changed the stormwater system after 2001. Br. Appellant at 29. It contends that a wetland was filled in on a third person's property after 2001. This argument does not further PHP's claim because there is no proof it occurred after 2006, or that the event was a governmental action. Because there is no admissible evidence that this happened during PHP's ownership after 2006, dismissal under *Hoover* and *Crystal Lotus* is appropriate.¹⁰ The possible actions of a third person have no bearing on any actions of WSDOT or any exercise of

¹⁰ PHP seems to assert that it should be excused from its burden of proof because the discovery deadline had not yet passed at the time of the summary judgment. Br. Appellant at 32 n.46. However, PHP did not seek to continue the September 2012 summary judgment under CR 56(f) to allow further discovery, even though it had done so earlier, in June 2012. Br. Appellant at 11, ¶ 13. PHP waived any right to further discovery.

eminent domain. Only when an additional or different *government* activity causes further damage to property, can the current owner pursue a new condemnation claim for the additional or increased damage. *Petersen v. Port of Seattle*, 94 Wn.2d 479, 483, 618 P.2d 67 (1980); *Tom v. State*, 164 Wn. App. 609, 267 P.3d 361 (2011), *review denied*, 173 Wn.2d 1025, 272 P.2d 851 (2012). In *Tom*, in addition to noting the absence of government action, the court also rejected causation evidence comparable to that offered in the present case. The issue was an alleged increase in noise level:

But there is no evidence of past usage or sound levels with which to compare the current data and conclude that the noise has increased in intensity. Only a statement from Mr. Tom suggests that the noise from the firing range is louder than before and that the firing range is used more frequently now than in the past. Those conclusory statements are not enough to defeat a motion for summary judgment.

Tom, 164 Wn. App. at 614-15 (citation omitted).

Here, there is no competent proof of government action following PHP's 2006 purchase of the subject property. The trial court's dismissal of PHP's inverse condemnation claim should be affirmed on this basis alone.

2. PHP Failed To Prove That WSDOT's Actions In 2001 Or Later Caused Harm

The trial court properly concluded that PHP failed to produce competent evidence that WSDOT's actions in 2001 or thereafter caused damages. A plaintiff asserting a claim of inverse condemnation or trespass¹¹ has the burden to prove that the property damage was, in fact, caused by the asserted government actions. *Gaines v. Pierce County*, 66 Wn. App. 715, 722-26, 834 P.2d 631 (1992); *Keene Valley Ventures, Inc. v. City of Richland*, ___ Wn. App. ___, 298 P.3d 121 (2013).¹² PHP has failed to meet its burden to produce sufficient evidence that the 2001 drainage work was a cause in fact of the property condition complained of, and its claims should be dismissed on this basis alone.¹³

To establish cause in fact, a plaintiff must show a direct, unbroken sequence of events that link the acts or omissions of the defendant and the alleged harm. *See, e.g., Joyce v. State, Dep't of Corr.*, 155 Wn.2d 306, 322, 119 P.3d 825 (2005). Although cause in fact is usually a question for a jury, where reasonable minds cannot differ, it may be determined as a matter of law. *Id.* at 322.

¹¹ PHP's claim for intentional damage to property under RCW 4.24.630(1) also requires, by the plain language of the statute, proof of cause in fact. Copy attached hereto as Appendix B.

¹² Copy attached hereto as Appendix C.

¹³ CP at 93, 102-103. PHP appears to argue that it claims only intentional fault, and therefore PHP does not have a burden to prove cause in fact. Br. Appellant at 33-34. PHP cites no authority for this, and is mistaken.

There are two deficiencies in PHP's evidence and argument that the 2001 actions of WSDOT caused damage to the property. Each of these deficiencies is independently fatal to PHP's claims.

First, PHP's own evidence indicates that any impact could occur only in extreme conditions—a 25-year or more severe storm. Yet, PHP offered no evidence of such an event either since the 2001 WSDOT project or, more importantly, since their 2006 purchase of the subject property. It is important to note that PHP's argument that stormwater could flow from the WSDOT storm system onto PHP's property is theoretical only. PHP's expert Olson concedes that in less than extreme conditions, drainage instead goes *from* the subject property into the SR 99 drainage system, which does not support PHP's claim. He opines only that a flow *onto* the subject property, as opposed to the normal flow off of the property, requires a storm of something near a 25-year event.¹⁴

There is no evidence whatsoever that this theoretical extreme event has occurred. No weather data has been offered to show such an occurrence. There is also no anecdotal evidence of water flowing onto PHP's land. PHP's agent Wells and expert Olson both testified that they had never seen water coming from the SR 99 drainage system onto the

¹⁴ CP at 256, ¶ 9 (“times of high stormwater flow”; “in times of high flow”), ¶ 10 (“during high flow events”); CP at 258-59, ¶ 16 (“25-year design storm event”).

subject property, nor are they aware of anyone who has seen this.¹⁵ There is simply no evidence which proves that the property has, in fact, been affected in the manner PHP theorizes it could be.

Second, PHP completely disregards the continuous existence of wetland conditions on the property predating 2001 and dating back over 80 years to the original construction of SR 99. WSDOT offered evidence that it intended the 2001 drainage work to replicate the pre-existing roadside drainage, not to change it. It is undisputed that wetlands were identified on the site before 2001.¹⁶ There was no change in 2001 to the only outlet from the west and PHP's property, to the east across SR 99. PHP ignores the undisputed fact that the alteration to the drainage basin and PHP's property was brought about by the initial construction of SR 99 more than 80 years ago.

There is no competent evidence tending to prove that the 2001 project materially altered the drainage from its prior state. It is undisputed that before and after 2001, the subject property was subject to the same

¹⁵ CP at 528 ("I would not watch water running"); CP at 532 ("I have not seen it happen"). Neugebauer, likewise, has never himself seen water coming onto the subject property from SR 99, and was unaware of anyone else who has seen this. CP at 554-55. He did offer hearsay about Wells' observation, but Wells' deposition testimony, quoted above, is plainly to the contrary.

¹⁶ PHP does not even purport to claim damages due to any actions of WSDOT prior to the 2001 road widening. Nor could they make such a claim. As noted in CP at 93, a plaintiff claiming inverse condemnation must file his or her claim within 10 years from the time the government action first damaged his or her property. *Wallace v. Lewis County*, 134 Wn. App. 1, 23 n.17, 137 P.3d 101 (2006).

drainage issues.¹⁷ These opinions are consistent with WSDOT evidence, which is that the 2001 project was intended to “maintain” the existing drainage condition.¹⁸

PHP’s expert Olson testified in his deposition that “I can’t say” that more water reaches the property because of the 2001 project.¹⁹ PHP’s SNR report observes that “when Highway 99 (Pacific Highway) was built (at least 80 years ago), this natural drainage course was cutoff”, which indicates that the drainage conditions are very long-standing.²⁰ PHP’s expert, Neugebauer, specifically opines that the same amount of water reaches the property:

Q: And if that water coming from the west and the north goes through the 36-inch culvert on the western side of the highway or goes through other routes to the west of the highway, it would still arrive at the same end point, would it not?

A: Anything that runs on that subject property will run to the eastern portion of that property, to that catch basin [adjacent to the highway].

Q: And so unless water were to cross over from the west side, which is the side the subject property is on, to the east side of SR 99, it’s going to flow onto that property; correct?

¹⁷ CP at 536-37; CP at 549, 552 (Neugebauer claims that the depression on the subject property was a “detention pond” in the drainage system before 2001).

¹⁸ See CP at 212, quoting testimony about maintaining the pre-2001 drainage as the intent of WSDOT.

¹⁹ CP at 533.

²⁰ CP at 138. Events affecting plaintiff’s property which occurred more than 10 years prior to this suit would not be actionable because a prescriptive easement would arise. See *Crescent Harbor Water Co., Inc. v. Lyseng*, 51 Wn. App. 337, 341, 753 P.2d 555 (1988).

A: If it's inside the drainage basin, that's correct.²¹

Moreover, PHP's experts were unable to quantify any alteration to the usability of the subject property caused by WSDOT's 2001 road widening project, without engaging in speculation.²² Neugebauer offers no opinion about any difference in usability, and actually offers no independent opinion about whether the 2001 project had any impact on the property.²³ Olson's declaration claims that the whole property is not developable, but does not indicate whether this is due to the historic drainage or events from 2001 forward.²⁴ Olson's deposition testimony was clear that he could not quantify any impact on the property ("there's no way to know").²⁵ Absent a basis to quantify the impact, speculation would be required to find any damages. Speculation is insufficient to

²¹ CP at 565-66.

²² WSDOT objected to certain patently speculative damages testimony as inadmissible. CP at 514-15. This objection may be considered by the Court of Appeals even if the trial court did not consider it. A summary judgment may be affirmed on any grounds supported by the record even if the trial court did not consider those grounds. *LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989).

²³ CP at 553 (Neugebauer: "I can't tell you that it [the developable area] was any different or smaller or anything"), and CP at 552 (no change to the scope of the alleged detention pond).

²⁴ CP at 259 ll. 7-8. Despite the clear deposition testimony, Olson's declaration seeks to assert "calculations" based on "hypothetical" conditions that "might have existed" or that are "assumed", combining into a "flooding scenario [which] cannot be verified." CP at 259 ll. 11-25. This offered evidence is insufficient to prove anything material. It is either inadmissible as improper speculation and in conflict with clear deposition testimony, or its speculative nature actually verifies the deposition testimony that there is "no way to know." WSDOT preserved its objection to this incompetent evidence in the trial court. CP at 515.

²⁵ CP at 536.

avoid summary judgment, and the evidence does not present a *genuine* issue of material fact.

PHP also argues vaguely that an alleged filling of a wetland north of their property, at some unspecified time post-2001, independently supports claims against WSDOT.²⁶ However, there is no assertion that WSDOT owned or altered the wetland. PHP produced no evidence that the purported alteration occurred after PHP bought the subject property, again failing to produce evidence of a “taking” during PHP’s ownership. The proffered speculation is not probative of whether WSDOT’s actions during PHP’s ownership caused any harm to PHP’s property, and therefore does not create any genuine issue as to a material fact.

PHP has failed to offer competent admissible evidence to prove that WSDOT actions at issue actually caused any impact or damage to PHP’s property. All of PHP’s claims against WSDOT, including the trespass claims, were properly dismissed for failure to prove cause in fact.

3. Discovery Rule Is Neither Legally Nor Factually Supported

The trial court properly determined that there was no material issue of fact as to the information *discoverable* by PHP when it purchased the subject land in 2006, five years after WSDOT’s 2001 actions that

²⁶ CP at 260.

allegedly altered the condition of the land. All of the information PHP now relies upon to assert that WSDOT's 2001 actions altered the condition of the land was available to PHP's representative at the time of the purchase. The land was there to be inspected, and was actually inspected by Comis before the purchase. The 2001 WSDOT Stormwater Site Plan, even though only later obtained and relied upon by PHP's expert Olson, was available even before the 2001 WSDOT project. Nevertheless, PHP asserts that, because it did not investigate the available information until after it purchased the land, it is entitled under the discovery rule to assert a claim for actions pre-dating its ownership. This is insufficient because the discovery rule does not sanction a claimant putting their head in the sand in order to avoid the effect of time limitations.

A plaintiff who invokes the discovery rule bears the burden to show that facts constituting the cause of action were not discovered or *could not have been discovered* by due diligence earlier. *G.W. Constr. Corp. v. Prof'l Serv. Indus., Inc.*, 70 Wn. App. 360, 367, 853 P.2d 484 (1993); *accord Giraud v. Quincy Farm & Chem.*, 102 Wn. App. 443, 449, 6 P.3d 104 (2000) ("To invoke the discovery rule, the plaintiff must show

that he or she could not have discovered the relevant facts earlier.”²⁷ A “plaintiff is charged with what a reasonable inquiry would have discovered.” *1000 Virginia Ltd. P’ship v. Vertecs Corp.*, 158 Wn.2d 566, 581, 146 P.3d 423 (2006) (quoting *Green v. A.P.C.*, 136 Wn.2d 87, 95, 960 P.2d 912 (1998)). A court may decide the applicability of the discovery rule as a matter of law. *See Allen v. State*, 118 Wn.2d 753, 760, 826 P.2d 200 (1992) (discovery rule inapplicable and summary judgment on statute of limitations granted in wrongful death action where reasonable minds could reach but one conclusion).

Here, as in *Crystal Lotus*, PHP could have “walked the property and found a swamp-like condition.” 167 Wn. App. at 503. They could have further investigated and acquired all of the information now relied upon to assert their claims: the condition of the land, the details of the 2001 project, the JCA report identifying possible wetlands, and the 2001 WSDOT hydrology report. All of these were available to PHP before they bought the property in 2006.²⁸ PHP has not proven that it could not have

²⁷ PHP incorrectly suggests that the burden is on WSDOT to disprove the application of the discovery rule. Br. Appellant at 21. Here, WSDOT has shown what a reasonable inquiry would have discovered.

²⁸ In his deposition (CP at 519-528), Richard Wells testified that he is the speaking agent for PHP (CP at 521); this was the first real property he bought, he was naïve, he obtained no seller’s disclosures, but he did ask about wetlands (CP at 523); he commissioned the JCA report (CP at 522, 524), but recalls no effort to learn Comis’s determinations before buying the property (CP at 525). WSDOT records for the 2001 project were ultimately obtained by PHP via records request, but they obviously existed and could certainly have been acquired in 2006 or before.

discovered the facts now relied upon to support their claims before they purchased the subject property. There is no support for the application of the discovery rule.

C. Because There Is No Genuine Issue Of Material Fact, The Trespass Claims Were Properly Dismissed

A trespass is an intrusion onto the property of another that interferes with the other's right to exclusive possession. *Hedlund v. White*, 67 Wn. App. 409, 418 n.12, 836 P.2d 250 (1992). PHP's assertion that the trial court should be reversed because it did not directly address PHP's trespass claims when granting summary judgment is misplaced. The dismissal was proper under the record before the trial court because there was no genuine issue of material fact to support a trial on trespass claims.

Arguments above about the absence of evidence of damages caused by WSDOT actions in 2001 or later independently warrant dismissal of trespass or waste claims.²⁹ Moreover, the subsequent purchaser doctrine forecloses PHP's claim for trespass, just as for inverse condemnation. An injury to property is a personal right belonging to the property owner and does not pass to a subsequent purchaser unless expressly conveyed. *Hoover*, 79 Wn. App. at 433-34; *Crystal Lotus*,

²⁹ PHP inappropriately characterizes a claim under RCW 4.24.630 as a trespass claim, even though the statute requires that a defendant "wrongfully causes waste or injury to the land" and does not mention trespass. CP at 190. Absent injury to the land, the statute is plainly inapplicable. Copy attached hereto as Appendix B.

167 Wn. App. at 505. A conveyance of land, by itself, is not an assignment of grantor's action for damages for trespass previously sustained for trespass upon that land. *See Fed. Fin. Co. v. Gerard*, 90 Wn. App. 169, 178 n.19, 949 P.2d 412 (1998). "No damages should be allowed any appellant found to have acquired his property for a price commensurate with its diminished value." *City of Walla Walla v. Conkey*, 6 Wn. App. 6, 17, 492 P.2d 589 (1971).

In addition, a claim of permanent or chronic property interference by government is properly addressed under inverse condemnation, and trespass claims cannot be asserted in the alternative. Moreover, the common enemy doctrine forecloses the surface water claim presented here and, as noted above, PHP has not proven that damages were caused by the 2001 actions of WSDOT.

1. Trespass Claims Are Subsumed By Condemnation Claim

PHP's alternative claims of trespass and statutory damage to property are merely inverse condemnation claims in disguise. PHP alleges only permanent trespass or damages, arising from alleged WSDOT activities pre-dating PHP's acquisition of their property; the allegation is effectively a condemnation claim, and is properly dismissed as such. *See Crystal Lotus*, 167 Wn. App. at 501. A cause of action resulting from the

impact of the drainage system by the government is generally deemed to be properly addressed as condemnation. *Harkoff v. Whatcom County*, 40 Wn.2d 147, 151, 241 P.2d 932 (1952).

In *Wilber Development Corp. v. Les Rowland Construction, Inc.*, 83 Wn.2d 871, 876, 523 P.2d 186 (1974) this court held that if water is “collected and deposited upon the land in a different manner” than before development, compensation to the property owner may be required. Thus, in the proper case, damage caused by surface water may support an inverse condemnation action. *B & W Constr., Inc. v. City of Lacey*, 19 Wn. App. 220, 223, 577 P.2d 583 (1978).

Dickgieser v. State, 153 Wn.2d 530, 543, 105 P.3d 26 (2005); *see also Crystal Lotus*, 167 Wn. App. at 506, ¶ 13 (trespass claim and injunctive relief claim dismissed because no proof of any intentional act “since Crystal Lotus acquired its property”).

A trespass differs from governmental condemnation in that to constitute a taking for condemnation, the intrusion must be chronic and not merely a temporary interference which is unlikely to recur. *Lambier v. City of Kennewick*, 56 Wn. App. 275, 283, 783 P.2d 596 (1989) (citing *Orion Corp. v. State*, 109 Wn.2d 621, 747 P.2d 1062 (1987)); *Northern Pac. Ry. Co. v. Sunnyside Valley Irrig. Dist.*, 85 Wn.2d 920, 924, 540 P.2d 1387 (1975); *Phillips v. King County*, 136 Wn.2d 946, 958 n.4, 968 P.2d 871 (1998).

Here, there is no allegation or evidence of any “temporary” condition caused by WSDOT that interferes with PHP’s right to exclusive possession of its property.³⁰ There is no competent proof of any actions by WSDOT, either in or after 2001, that would have altered the flow of surface water in the area. PHP alleges only a “chronic” condition, and cannot bring a trespass claim against the government.³¹

2. Under The Common Enemy Doctrine, Trespass Claims Cannot Be Made For Surface Water

To the extent PHP’s alleged trespass and property damage claims are not barred because they are flawed claims of inverse condemnation, the common enemy doctrine warrants dismissal. Although this matter was briefed extensively in the trial court, PHP has not confronted the doctrine on appeal.

Our courts have limited the liability of landowners for impacts from their management of surface water, under the “common enemy”

³⁰ PHP identified the alleged damage as “permanent” in response to WSDOT’s Interrogatory No. 16. CP at 109.

³¹ To the extent there may be any assertion that the drainage conditions might be abatable, it is obvious that this would require alteration to the highway. Highway alterations may be funded only by the legislature. Highway improvements are statutorily constrained by the priority funding program under RCW 47.01.071 (Transportation Commission is responsible only for proposing legislative policies), and RCW 47.05 (priority programming for highway funding). Article VIII, section 4 of the Washington Constitution provides in part that “[n]o moneys shall ever be paid out of the treasury of this state, or any of its funds, or any of the funds under its management, except in pursuance of an appropriation by law.” Under these authorities and pursuant to the doctrine of separation of powers, courts may not interfere with or impose highway funding decisions. *See Avellaneda v. State*, 167 Wn. App. 474, 484-87, 273 P.3d 477 (2012).

doctrine. The common enemy doctrine applies to surface water, defined as water from precipitation or escaping from streams or rivers and which ceases to “maintain its identity and existence as a body of water.” *Fitzpatrick v. Okanogan County*, 169 Wn.2d 598, 607, 238 P.3d 1129 (2010). There can be no dispute that the allegations of “stormwater” by PHP, here, are allegations relating to surface water. Under the common enemy doctrine:

Water that meets the definition of surface water “is regarded as an outlaw and a common enemy against which anyone may defend himself, even though by so doing injury may result to others.” *Cass*, 14 Wash. at 78, 44 P. 113. The common enemy rule, therefore, provides that “[i]f one in the lawful exercise of his right to control, manage or improve his own land, finds it necessary to protect it from surface water flowing from higher land, he may do so, and if damage thereby results to another, it is [damage without remedy].”

Fitzpatrick, 169 Wn.2d at 607.

The Washington Supreme Court has held that:

[M]unicipal authorities may pave and grade streets and are not ordinarily liable for an increase in surface water naturally falling on the land of a private owner where the work is properly done, [but] they are not permitted to concentrate and gather such water into artificial drains or channels and throw it on the land of an individual owner in such *manner and volume as to cause substantial injury* to such land Surface waters may not be artificially collected and discharged upon adjoining lands in quantities greater than or in a manner different from the natural flow thereof. At the same time, it is the rule that the flow of surface water along natural drains may be hastened or

incidentally increased by artificial means, *so long as the water is not ultimately diverted from its natural flow onto the property of another.*

Wilber Dev. Corp. v. Les Rowland Const., Inc., 83 Wn.2d 871, 874-75, 523 P.2d 186 (1974) (italics added).

PHP argued in the trial court that because WSDOT used a ditch instead of the original watercourse, the common enemy doctrine did not apply. The argument is overly simplistic. In *Trigg v. Timmerman*, 90 Wash. 678, 682, 156 P. 846 (1916), the court quoted with approval the following:

Where the upper proprietor does no more than collect in a ditch, which ditch follows the course of the usual flow of surface water, the surface water which formerly took the same course toward the land of the lower adjacent proprietor, and causes to pass through this ditch the surface water which formerly took the same course but spread out over the surface, he has committed no actionable legal wrong of which the lower proprietor can complain.

Timmerman, in turn, is cited as valid law and standing for the proposition that “upper landowner acts lawfully ‘where no new watershed is tapped’”, in a case relied upon by PHP.³² *Hedlund v. White*, 67 Wn. App. 409, 417, 836 P.2d 250 (1992). Under this law, the common enemy doctrine bars liability unless a change alters the amount of water flowing onto a plaintiff’s property.

³² CP at 101.

PHP's own evidence in this case, notwithstanding misstatements in PHP's brief, is that the 2001 WSDOT project did not change the *amount* of water flowing to PHP's property. In *Patterson v. City of Bellevue*, 37 Wn. App. 535, 537, 681 P.2d 266 (1984), the court held:

The affidavit of plaintiffs' civil engineer, Mr. Dodds, does not assert that the quantity of water reaching the plaintiffs' property has been increased. Instead, he asserts an increased rate of flow. The City is not liable if it did not disturb the natural drainage of the area and no new water is collected or diverted into the drainway. *Baldwin v. Overland Park*, 205 Kan. 1, 468 P.2d 168, 172 (1970).

WSDOT's 2001 project was intended to match pre-existing drainage conditions, and preserve the pre-existing condition of PHP's property. The 2001 project did not create a wetland and is not the reason the property cannot be developed.³³

To the extent that the 2001 project may be alleged to have caused non-chronic and insubstantial intrusions, a trespass claim is barred by the common enemy doctrine cited above. To the extent PHP alleges a chronic and substantial condition, PHP's claim could only be as a "taking" based on the 2001 project, via inverse condemnation. A taking claim is foreclosed because the 2001 project predates PHP's acquisition of the property, and the same doctrine applies to the trespass claim. *Crystal*

³³ As noted above, under *Dickgieser* and *Crystal Lotus*, if the 2001 project had caused a substantial effect on the property, then the proper remedy would have been an inverse condemnation claim by the property owner in 2001, but no such action is available to PHP because it did not acquire the property until 2006.

Lotus, 167 Wn. App. at 505-06. In either event, PHP's trespass claim must be dismissed.

D. The Statute Of Limitations Forecloses Claims Based Upon Alleged Intentional Acts Of WSDOT That Occurred More Than Three Years Ago

RCW 4.16.080 imposes a three-year statute of limitations for waste or trespass upon real property.³⁴ PHP first raised trespass and RCW 4.24.630 intentional³⁵ waste claims in its Amended Complaint, filed in February 2012.³⁶ In order to be actionable, WSDOT would have had to engage in any intentional (or negligent) action after approximately the end of 2008.³⁷

There is no evidence of any relevant acts by WSDOT, intentional or otherwise, within the three-year statute of limitations under RCW 4.16.080. In fact, PHP was actively investigating hydrologic conditions prior to purchasing the property in 2006, as reflected by the JCA report. Clearly, there was notice of the surface water conditions well

³⁴ RCW 4.16.080 provides in pertinent part: "The following actions shall be commenced within three years: (1) An action for waste or trespass upon real property."

³⁵ RCW 4.24.630 requires proof of actions taken "intentionally and unreasonably." Copy attached hereto as Appendix B.

³⁶ It is believed to be stipulated by PHP that the trespass and statutory waste claims cannot relate back to the original filing of this lawsuit, and may be deemed properly commenced only by the Amended Complaint in 2012, due to the requisite under RCW 4.92 for the filing of an administrative tort claim more than 60 days prior to the "commencement" of a lawsuit for the same claims.

³⁷ An action for negligent injury to real property is subject to a two-year statute of limitations. RCW 4.16.130; *White v. King County*, 103 Wash. 327, 329, 174 P. 3 (1918); *Mayer v. City of Seattle*, 102 Wn. App. 66, 75, 10 P.3d 408 (2000), *review denied*, 142 Wn.2d 1029, 21 P.3d 1150 (2001); *Will v. Frontier Contractors, Inc.*, 121 Wn. App. 119, 125, 89 P.3d 242 (2004), *review denied*, 153 Wn.2d 1008, 111 P.3d 856 (2005).

before the commencement of the three-year limitations period. Claims for intentional statutory waste and trespass are foreclosed by the statute of limitations.

E. The Administrative Finding Of Wetlands Forecloses PHP's Conflicting Claims Against WSDOT For Detention Facilities

1. The Existence Of A Wetland On The Subject Property Is Legally Established

PHP's claims in the instant action depend upon the fact that their property was used as a detention facility by WSDOT, as opposed to wetlands. Whether the wet areas are "wetlands" is important, because according to PHP's expert Neugebauer, the area "cannot be both a stormwater detention facility and a wetland."³⁸ He concedes that "any category of wetland is inconsistent" with his opinion.³⁹ In other words, PHP's claims against WSDOT require detention ponds, and fail if the property features are, in fact, wetlands.

Under the doctrines of collateral estoppel, res judicata, and/or judicial estoppel, the features have legally and conclusively been found to be wetlands. The existence of wetlands on the subject property was established by final findings from PHP's administrative land use dispute with Pierce County.⁴⁰ The final disposition of the land use dispute

³⁸ CP at 542.

³⁹ CP at 543.

⁴⁰ See CP at 101.

contained a factual finding that there are two wetlands on the subject property.⁴¹ It would plainly be prejudicial to allow PHP to assert a damages claim against WSDOT premised on the absence of wetlands and the inability to develop the land but, at the same time, retain a right to develop from the county premised on the presence of wetlands.⁴² This patent inconsistency is unjust and should not be permitted.

The doctrine of collateral estoppel serves judicial economy and consistency by foreclosing re-litigation of issues in successive actions. Under collateral estoppel “issues actually litigated and necessarily determined are precluded.” *Shoemaker v. City of Bremerton*, 109 Wn.2d 504, 507, 745 P.2d 858 (1987). This applies to issues decided in an administrative decision, so long as there is a right to appeal the decision. *See Olympic Tug & Barge, Inc. v. Washington State Dep’t of Revenue*, 163 Wn. App. 298, 259 P.3d 338, 341 (2011).

The doctrine of collateral estoppel forecloses any claims inconsistent with the findings and conclusions reached in the April 25, 2011, Land Use Decision. These findings conclusively establish that the wet areas on PHP’s property are Category III wetlands. To the extent PHP

⁴¹ See CP at 93.

⁴² Br. Appellant at 9, 26 (PHP “stipulated” to the wetland in order “to obtain its CUP [Conditional Use Permit]”).

may claim that the features on their property are something other than wetlands, the claim cannot stand.

Contrary to PHP's argument, the wetland issue was actually litigated in the county land use dispute. It is a matter of record in this case that when PHP began its land use dispute, the focus was to prove that the features on its land were *not* wetlands.⁴³ This plainly demonstrates that PHP had a full and fair opportunity and did, in fact, litigate the issue. Although the earlier order was later vacated, the later *final* order contained wetland findings which were never vacated or otherwise voided and, in fact, were incorporated into the settlement of the land use dispute.⁴⁴

PHP does not dispute this, but argues instead that the "finding" does not support collateral estoppel because the final outcome to the land use appeal was not litigated and was merely stipulated.⁴⁵ *See*

⁴³ *See* CP at 9-28 (Complaint, Ex. A), which recites evidence, findings, and conclusions amply demonstrating that the central dispute was over wetland status (*e.g.*, CP at 22 (Finding 4 -- Plaintiffs "appeal a determination . . . that two regulated wetlands exist on its parcel.")). That this order was not the final order does not alter the fact that the issue of wetland status was actually litigated.

⁴⁴ PHP may be attempting to analogize a settlement whereby a dispute is dismissed. However, this resolution was not a dismissal or withdrawal, but a final disposition *authorizing* development, and the final findings remain in place by the explicit terms of the concluding instrument.

⁴⁵ PHP does not dispute the necessity of a finding of wetlands for the land use petition. The presence of the wetlands was the primary impediment to the development sought by PHP.

CP at 207-09. This assertion is disingenuous, and without legitimate support.⁴⁶

Moreover, the administrative settlement was presented to and approved by the superior court in the context of the present lawsuit. In effect, WSDOT was a party to the land use appeal. Thus, the final decision in the land use dispute may be deemed to be the law of this case. The law of the case doctrine ensures that a “holding will be followed in subsequent stages of the same litigation.” *Roberson v. Perez*, 156 Wn.2d 33, 41, 123 P.3d 844 (2005).⁴⁷

Furthermore, the conclusion in one case that there is a wetland (by stipulation or otherwise), coupled with assertion of the opposite in this case, justify the application of judicial estoppel. “Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in a

⁴⁶ PHP may try to argue, incorrectly, that collateral estoppel can be asserted only in a subsequent proceeding between the same parties. It is well established that offensive collateral estoppel allows a party to invoke findings against another, even if the party was not a participant in the previous proceeding. See *Fahlen v. Mounsey*, 46 Wn. App. 45, 50, 728 P.2d 1097 (1986); *Medrano v. Schwendeman*, 66 Wn. App. 607, 612, 836 P.2d 833 (1992); *Hadley v. Maxwell*, 144 Wn.2d 306, 311, 27 P.3d 600 (2001); *City of Seattle, Executive Services Dep't v. Visio Corp.*, 108 Wn. App. 566, 574, 31 P.3d 740 (2001) (principle does not apply to the U.S. government). PHP relies on only one case, which happens to involve the same parties in a subsequent dispute, but which does not foreclose the application of collateral estoppels by a litigant who was not a party to the prior proceeding. *Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wn.2d 299, 306, 96 P.3d 957 (2004).

⁴⁷ The law of the case doctrine “is often confused with other closely related doctrines, including collateral estoppel, res judicata, and stare decisis.” *Roberson v. Perez*, 156 Wn.2d 33, 41, 123 P.3d 844 (2005).

court proceeding and later seeking an advantage by taking a clearly inconsistent position.” *Bartley-Williams v. Kendall*, 134 Wn. App. 95, 98, 138 P.3d 1103 (2006). Whether the trial judge shall apply judicial estoppel turns on three core factors: (1) inconsistent positions, (2) that misled a court, and (3) results in an unfair advantage or detriment on the opposing party. *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538-39, 160 P.3d 13 (2007). Clearly, a so-called stipulation in one context to wetlands, and a contradictory assertion in the instant case, are not consistent positions. In one context or the other, the court is misled. As noted above, the potential for PHP to recover damages and yet retain development authorization from the county is detrimental and unfair to WSDOT.

Under the elements of collateral estoppel, the law of the case, and/or judicial estoppel, PHP is foreclosed from re-litigating the issue of the existence of wetlands on its property. The features at issue are wetlands, which, as noted above, warrant dismissal of PHP’s claims.

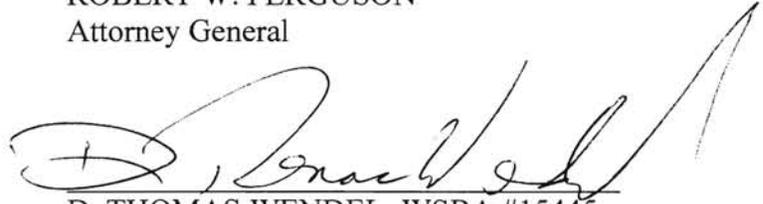
V. CONCLUSION

Respondent Washington State Department of Transportation submits that the trial court properly granted summary judgment in its favor

and respectfully requests that this court AFFIRM the decision of the trial court dismissing Appellant Pacific Highway Park, LLC's claims.

RESPECTFULLY SUBMITTED this 13 day of May, 2013.

ROBERT W. FERGUSON
Attorney General

A handwritten signature in black ink, appearing to read "D. Thomas Wendel", written over a horizontal line.

D. THOMAS WENDEL, WSBA #15445
Assistant Attorney General
Attorneys for Respondent Washington
State Department of Transportation

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C

Court of Appeals of Washington,
Division 2.
Charles and Janice WOLFE, husband and wife;
John and Dee Anttonen, husband and wife, Appel-
lants,
v.
STATE OF WASHINGTON DEPARTMENT OF
TRANSPORTATION, Respondents.

No. 42636–6–II.

Jan. 29, 2013.

Background: Property owners brought action against Department of Transportation (DOT) alleging nuisance, negligence, and inverse condemnation stemming from DOT's placement of bridge support piers in river. The Superior Court, Pacific County, Michael J. Sullivan, J., granted summary judgment in favor of DOT. Property owners appealed.

Holdings: The Court of Appeals, Hunt, P.J., held that:

- (1) negligence claim was barred by statute of limitations, and
- (2) inverse condemnation claim was barred by the subsequent purchaser rule.

Affirmed.

West Headnotes

[1] Water Law 405 ↪1415

405 Water Law

405VI Riparian and Littoral Rights

405VI(C) Injuries to Riparian Rights in General

405VI(C)5 Injury Caused by Acceleration of Flow or Increase in Volume in Watercourse

405k1415 k. In general. Most Cited Cases

Two-year statute of limitations for actions as-

serting negligent injury to real property applied to riverfront landowner's claim that Department of Transportation (DOT) negligently failed to follow state hydraulic code when it installed angled bridge piers. West's RCWA 4.16.130.

[2] Municipal Corporations 268 ↪723

268 Municipal Corporations

268XII Torts

268XII(A) Exercise of Governmental and Corporate Powers in General

268k723 k. Nature and grounds of liability. Most Cited Cases

The "public duty doctrine" provides that a duty to all is a duty to no one.

[3] Eminent Domain 148 ↪280

148 Eminent Domain

148IV Remedies of Owners of Property; Inverse Condemnation

148k278 Defenses

148k280 k. Consent or acquiescence of owner. Most Cited Cases

Eminent Domain 148 ↪284

148 Eminent Domain

148IV Remedies of Owners of Property; Inverse Condemnation

148k284 k. Persons entitled to sue. Most Cited Cases

Property owners' inverse condemnation claims against Department of Transportation (DOT) concerning alleged damage to riverfront property due to installation of bridge piers in river was barred by the "subsequent purchaser rule," where, although property owners alleged that erosion of property was ongoing, installation of the bridge piers occurred prior to property owners' purchase of property and no further governmental action was alleged since the installation, and property owners were aware of the erosion prior to purchase.

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[4] Eminent Domain 148 ↪266

148 Eminent Domain

148IV Remedies of Owners of Property; Inverse Condemnation

148k266 k. Nature and grounds in general.

Most Cited Cases

An inverse condemnation claim alleges a governmental taking or damaging without any formal exercise of the power of eminent domain and without just compensation having been paid. West's RCWA Const. Art. 1, § 16.

[5] Eminent Domain 148 ↪266

148 Eminent Domain

148IV Remedies of Owners of Property; Inverse Condemnation

148k266 k. Nature and grounds in general.

Most Cited Cases

To prevail on an inverse condemnation claim, a party must show that there has been: (1) a taking or damaging; (2) of private property; (3) for public use; (4) without just compensation having been paid; (5) by a governmental entity that has not instituted formal proceedings. West's RCWA Const. Art. 1, § 16.

[6] Eminent Domain 148 ↪284

148 Eminent Domain

148IV Remedies of Owners of Property; Inverse Condemnation

148k284 k. Persons entitled to sue. Most Cited Cases

Pursuant to the "subsequent purchaser rule," a grantee or purchaser of land cannot sue for a taking or injury that occurred before he acquired title; rather, the subsequent purchaser may sue only for a new taking or injury.

[7] Eminent Domain 148 ↪302

148 Eminent Domain

148IV Remedies of Owners of Property; Inverse Condemnation

148k301 Damages and Amount of Recovery

148k302 k. In general. Most Cited Cases

When taking or injury has occurred to real property, a subsequent purchaser pays a price that presumably reflects the diminished property value in light of this earlier taking; consequently, a subsequent purchaser cannot be said to have suffered any true loss.

[8] Eminent Domain 148 ↪284

148 Eminent Domain

148IV Remedies of Owners of Property; Inverse Condemnation

148k284 k. Persons entitled to sue. Most Cited Cases

To bypass the "subsequent purchaser rule," a new taking cause of action requires additional governmental action causing a measurable decline in market value.

Allen T. Miller, Law Offices of Allen T. Miller, PLLC, Olympia, WA, for Appellants.

Amanda G. Phily, Office of the Attorney General, Olympia, WA, for Respondents.

HUNT, P.J.

¶ 1 Charles and Janice Wolfe and John and Dee Anttonen appeal the superior court's summary judgment dismissal with prejudice of their nuisance, negligence, and inverse condemnation claims against the Washington State Department of Transportation (DOT). The Wolfes and the Anttonens argue that the superior court erred in granting summary judgment to the DOT because issues of fact exist concerning each of their claims and exceptions to the public duty doctrine as they apply to their nuisance claim. Holding that the subsequent purchaser rule and the statute of limitations preclude the Wolfes' and the Anttonens' private causes of actions against the DOT, we affirm.

FACTS

¶ 2 In 1925–1926, the State constructed a State Route 4 bridge across the Naselle River; the piers supporting this bridge were parallel to the river's

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flow. According to the Wolfes and the Anttonens, the Naselle River banks remained stable until 1986, when the DOT reconstructed the bridge and placed new support piers at a 15-degree angle to the river's flow. That same year, Gil Erickson, then owner of property bordering the Naselle River's southern bank 500 feet downstream from the bridge, complained to the DOT that he believed the placement of the new piers had diverted the river toward his property.

¶ 3 In 2003 and 2004, Charles and Janice Wolfe purchased Gil Erickson's property, which comprised two neighboring parcels. The river bank along the properties' northern edge was suffering from erosion. Like Erickson, Charles Wolfe believed that the angled bridge piers were causing the river to flow toward his property and to erode the bank in that area, causing a loss of at least 32,000 cubic yards of soil since 1986. Charles Wolfe informed his son-in-law, John Anttonen, about the erosion before later conveying one of the two parcels to Anttonen and his wife, Dee.

¶ 4 In 2007, the Wolfes quitclaimed one of the parcels to the Anttonens. The Wolfes and the Anttonens (collectively, Wolfes) hired environmental engineer Russell A. Lawrence to analyze the bridge and erosion. Lawrence concluded that the bridge piers' placement had redirected the river and had caused the erosion to the properties.

¶ 5 In June 2010, the Wolfes sued the DOT, alleging nuisance, negligence, inverse condemnation, and violations of the state hydraulic code (chapter 77.55 RCW). The DOT moved for summary judgment, arguing that (1) the superior court should dismiss the Wolfes' Hydraulic Code violation claim because it did not fall within any exception to the public duty doctrine, (2) the subsequent purchaser rule barred the Wolfes' inverse condemnation and nuisance claims because no government action had occurred after they purchased their properties, and (3) the two-year statute of limitations barred the Wolfes' negligence claim. The DOT also submitted its own expert analysis disputing the Wolfes' claim

that the reconstructed bridge piers had caused their properties to erode along the river's bank.

¶ 6 The superior court granted the DOT's motion for summary judgment and dismissed all of the Wolfes' claims with prejudice. The Wolfes appeal.

ANALYSIS

¶ 7 The Wolfes argue that the superior court erred in entering summary judgment for the DOT and dismissing its negligence, inverse condemnation, and nuisance claims because issues of fact exist regarding the elements of each of these claims. This argument fails.

I. STANDARD OF REVIEW

¶ 8 In reviewing a summary judgment, we perform the same inquiry as the trial court. *Jones v. Allstate Ins. Co.*, 146 Wash.2d 291, 300, 45 P.3d 1068 (2002). Thus, the standard of review is de novo. *Bostain v. Food Express, Inc.*, 159 Wash.2d 700, 708, 153 P.3d 846, cert. denied, 552 U.S. 1040 (2007). Summary judgment is proper 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). We consider the facts in the light most favorable to the nonmoving party. *Jones*, 146 Wash.2d at 300, 45 P.3d 1068. Summary judgment is proper only if reasonable persons could reach but one conclusion from the evidence presented. *Bostain*, 159 Wash.2d at 708, 153 P.3d 846.

II. STATUTE OF LIMITATIONS; NEGLIGENCE

[1] ¶ 9 The Wolfes first argue that the superior court erred in dismissing the negligence claim component of their 2010 lawsuit because issues of fact exist regarding the cause of the erosion to their properties. Such issues of fact are irrelevant, however, if their claim is barred by the statute of limitations.

[2] ¶ 10 RCW 4.16.130 prescribes a two-year statute of limitations for actions asserting negligent

injury to real property. *Wallace v. Lewis County*, 134 Wash.App. 1, 13, 137 P.3d 101 (2006). The Wolfes contend that the superior court erred in dismissing their negligence claim because (1) the question of standing constitutes a genuine issue of material fact, and (2) the “legislative intent” and “failure to enforce” exceptions to the public duty doctrine^{FN1} permit their claim. The DOT argued in its motion for summary judgment, however, and the Wolfes do not contest on appeal, that RCW 4.16.130's two-year statute of limitations for tort actions applies to the Wolfes' negligence claim.

FN1. The public duty doctrine provides that “a duty to all is a duty to no one.” *Osborn v. Mason County*, 157 Wash.2d 18, 27, 134 P.3d 197 (2006) (quoting *Babcock v. Mason County Fire Dist. No. 6*, 144 Wash.2d 774, 785, 30 P.3d 1261 (2001)).

¶ 11 The Wolfes do not directly contest application of this two-year statute of limitations to their negligence claim.^{FN2} RAP 10.3(a)(6). To the extent that their negligence claim rests on DOT's alleged failure to follow the state hydraulic code when it installed the angled bridge piers in 1986, we hold that the two-year statute of limitations bars this claim. Therefore, we need not address whether this negligence claim falls within any public duty doctrine exception.

FN2. Rather, they contend that RCW 4.16.130 merely “restricts the period for which damages may be recovered” and does not bar their action because the river bank erosion is a continuing *nuisance*, trespass, and *taking* of their property for statute of limitations purposes. Br. of Appellants at 9. Thus, to the extent that the Wolfes' negligence claim rests on the diverted river flow's constituting a continuing nuisance, trespass, or taking, their separate takings claim subsumes these continuing negligence, nuisance, and trespass claims, as discussed with counsel at oral argument. Thus, we do not further address

whether the statute of limitations applies to these subsumed claims in either the Wolfes' negligence claim or in the following inverse condemnation portion of our analysis.

III. SUBSEQUENT PURCHASER RULE; INVERSE CONDEMNATION

[3][4] ¶ 12 Central to the Wolfes' next argument is that the river bank erosion is a “continuing nuisance” and taking of their property for which the DOT owes them just compensation under our state constitution.^{FN3} Br. of Appellants at 8. As the Wolfes acknowledged at oral argument, what they have characterized as a “continuing nuisance” claim is essentially an unconstitutional taking claim, such that these two claims conflate into a single claim—that the DOT has continually eroded and, thus, taken their river bank without just compensation, in violation of the state constitution, which is, in short, inverse condemnation.^{FN4} Accordingly, we address the Wolfes' nuisance claim as a takings claim in the context of inverse condemnation. This conflated inverse condemnation/takings claim, however, fails.

FN3. The Washington Constitution provides, “No private property shall be taken or damaged for public or private use without just compensation having been first made.” CONST. art. I, § 16.

FN4. An inverse condemnation claim alleges a governmental “taking” or “damaging” without any formal exercise of the power of eminent domain and without just compensation having been paid. *Fitzpatrick v. Okanogan County*, 169 Wash.2d 598, 605–06, 238 P.3d 1129 (2010).

[5] ¶ 13 To prevail on an inverse condemnation claim, a party must show that there has been (1) a taking or damaging (2) of private property (3) for public use (4) without just compensation having been paid (5) by a governmental entity that has not

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instituted formal proceedings. *Fitzpatrick v. Okanogan County*, 169 Wash.2d 598, 605–06, 238 P.3d 1129 (2010). The DOT argues that the Wolfes' inverse condemnation claim fails under, the subsequent purchaser rule, citing *Hoover v. Pierce County*, 79 Wash.App. 427, 903 P.2d 464 (1995), review denied, 129 Wash.2d 1007, 917 P.2d 129 (1996). We agree.

[6] ¶ 14 In *Hoover*, a case on point here, we reinforced the general principle that a grantee or purchaser of land cannot sue for a taking or injury that occurred before he acquired title; rather, the subsequent purchaser may sue only for a new taking or injury. *Hoover*, 79 Wash.App. at 433, 903 P.2d 464. The Wolfes respond that the subsequent purchaser rule does not apply to block their inverse condemnation action against the DOT because the erosion of their shoreline has continued unabated (essentially, a “continuing nuisance”) since they acquired ownership of the property. Reply Br. of Appellants at 11. Despite the continuing nature of the erosion here, we previously rejected this argument in *Hoover*.

[7] ¶ 15 The Hoovers were subsequent purchasers of land that had experienced flooding problems related to construction of a road 60 years before and a culvert completed 16 years before they purchased the property. *Hoover*, 79 Wash.App. at 428–29, 903 P.2d 464. The Hoovers argued that the subsequent purchaser rule did not bar their suing the county because they had experienced flooding problems on multiple occasions since their purchase and, therefore, each new flooding incident gave rise to a new taking claim. These arguments failed. Rejecting the Hoovers' reasoning, we adhered to the established principle that a taking is a privately held right. *Hoover*, 79 Wash.App. at 433, 903 P.2d 464. This is so because it is the original owner who suffers from the true harm. Thus, a subsequent purchaser pays a price that presumably reflects the diminished property value in light of this earlier taking; consequently, a subsequent purchaser cannot be said to have suffered any true loss.

FN5 *Hoover*, 79 Wash.App. at 433–34, 903 P.2d 464.

FN5. Similar to the erosion here, the flooding problems were evident before the Hoovers bought the properties; and a county record contained notice of the land's propensity for flooding. *Hoover*, 79 Wash.App. at 429–30, 903 P.2d 464. Based on these facts, we held that the purchase price of the property “either did reflect or should have reflected the diminished value of the land” and that damages are inappropriate when a party has acquired property for a price commensurate with its diminished value. *Hoover*, 79 Wash.App. at 434, 903 P.2d 464 (citing *City of Walla Walla v. Conkey*, 6 Wash.App. 6, 17, 492 P.2d 589 (1971), review denied, 80 Wash.2d 1007, 1972 WL 39931 (1972)).

[8] ¶ 16 To bypass this subsequent purchaser rule, “a new taking cause of action requires additional governmental action^[FN6] causing a measurable decline in market value.” *Hoover*, 79 Wash.App. at 436, 903 P.2d 464 (emphasis added). But the Wolfes have neither alleged nor offered evidence of any new governmental action by the DOT or any other governmental entity contributing to the erosion of their river bank since they purchased the properties in 2003 and 2004.^{FN7} On the contrary, they allege that the erosion has been ongoing since construction of the new piers some 17 years earlier in 1986. As in *Hoover*, any inverse condemnation of the property here occurred when the Wolfes' predecessor in interest owned the property; thus, presumably the Wolfes' purchase price reflected this diminution in value.

FN6. In reversing the superior court's directed verdict for the Hoovers against the county, we noted that the county had not engaged in any new action that had negatively affected the Hoovers' property. *Hoover*, 79 Wash.App. at 436, 903 P.2d

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464.

FN7. In rebuttal closing oral argument, the Wolfes' counsel asserted for the first time that there had been new government action when the DOT installed additional erosion-causing riprap and weir projects along the riverbank near the bridge after the Wolfes purchased and took possession of their properties. In response to the panel's questions, the Wolfes' counsel asserted that he had presented these facts at trial and incorporated them into his arguments in the Wolfes' appellate briefs. After careful review of the record and the Wolfes' briefs, however, we conclude that these statements were material misrepresentations: The Wolfes neither presented these points to the trial court nor argued them in their briefs on appeal.

Furthermore, we find no support in the record before us on appeal for the Wolfes' factual assertions that the DOT installed riprap and weir projects *after* the Wolfes' purchase; therefore, we do not further consider these assertions. But, having no reason to believe that counsel intended to mislead the court, we do not impose sanctions. RAP 18.9(a).

¶ 17 Although the record does not expressly reflect a reduction in purchase price, it does contain Charles Wolfe's deposition testimony that he was aware the property was eroding before he purchased it. Thus, the Wolfes had the opportunity to negotiate a price that factored in this ongoing erosion and its resultant diminution in property value. As was the case with the Hoovers, the Wolfes have not shown that they have suffered any loss compensable under their inverse condemnation claim that was not already factored into their purchase price. Accordingly, we hold that the superior court did not err in granting summary judgment to DOT on this claim.

¶ 18 We affirm.

We concur: VAN DEREN, J., and BRIDGEWATER, J.P.T.

Wash.App. Div. 2,2013.
Wolfe v. State Dept. of Transp.
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RCW 4.24.630

Liability for damage to land and property — Damages — Costs — Attorneys' fees — Exceptions.

(1) Every person who goes onto the land of another and who removes timber, crops, minerals, or other similar valuable property from the land, or wrongfully causes waste or injury to the land, or wrongfully injures personal property or improvements to real estate on the land, is liable to the injured party for treble the amount of the damages caused by the removal, waste, or injury. For purposes of this section, a person acts "wrongfully" if the person intentionally and unreasonably commits the act or acts while knowing, or having reason to know, that he or she lacks authorization to so act. Damages recoverable under this section include, but are not limited to, damages for the market value of the property removed or injured, and for injury to the land, including the costs of restoration. In addition, the person is liable for reimbursing the injured party for the party's reasonable costs, including but not limited to investigative costs and reasonable attorneys' fees and other litigation-related costs.

(2) This section does not apply in any case where liability for damages is provided under RCW 64.12.030, *79.01.756, 79.01.760, 79.40.070, or where there is immunity from liability under RCW 64.12.035.

[1999 c 248 § 2; 1994 c 280 § 1.]

Notes:

***Reviser's note:** RCW 79.01.756, 79.01.760, and 79.40.070 were recodified as RCW 79.02.320, 79.02.300, and 79.02.340, respectively, pursuant to 2003 c 334 § 554. RCW 79.02.340 was subsequently repealed by 2009 c 349 § 5.

Severability -- 1999 c 248: See note following RCW 64.12.035.

--- P.3d ----, 2013 WL 1286645 (Wash.App. Div. 3)
(Cite as: 2013 WL 1286645 (Wash.App. Div. 3))

Only the Westlaw citation is currently available.

Court of Appeals of Washington,
 Division 3.
 KEENE VALLEY VENTURES, INC., a Washing-
 ton corporation, Appellant,
 v.
 CITY OF RICHLAND, a municipal corporation,
 Respondent and Cross Appellant,
 Applewood Estates Homeowner Association, a non-
 profit Washington corporation; Cherrywood Estates
 Homeowner Association, a nonprofit Washington
 corporation; and Gregory Carpenter and Lareina
 Carpenter, husband and wife, and the marital com-
 munity thereof, Defendants.

No. 30286–5–III.
 March 28, 2013.

Background: Property owner brought inverse con-
 demnation action against city. The Superior Court,
 Benton County, Bruce A. Spanner, J., granted nom-
 inal damages to property owner and declined to
 award attorney fees. Property owner appealed.

Holdings: The Court of Appeals, Korsmo, C.J.,
 held that:

- (1) property owner failed to establish amount of its
 actual damages, and
- (2) on an issue of first impression, property owner
 had burden of establishing amount of actual dam-
 ages.

Affirmed.

West Headnotes

[1] Eminent Domain 148  **266**

148 Eminent Domain
 148IV Remedies of Owners of Property; Inverse
 Condemnation
 148k266 k. Nature and Grounds in General.
 Most Cited Cases

In order to prevail in an inverse condemnation
 action, the plaintiff must establish a “taking” by the
 government.

[2] Eminent Domain 148  **266**

148 Eminent Domain
 148IV Remedies of Owners of Property; Inverse
 Condemnation
 148k266 k. Nature and Grounds in General.
 Most Cited Cases

In the context of inverse condemnation, a
 “taking” consists of an appropriation of private
 property without exercise of the power of eminent
 domain.

[3] Eminent Domain 148  **266**

148 Eminent Domain
 148IV Remedies of Owners of Property; Inverse
 Condemnation
 148k266 k. Nature and Grounds in General.
 Most Cited Cases

The elements of a taking in the context of in-
 verse condemnation are: (1) a taking or damaging;
 (2) of private property; (3) for public use; (4)
 without just compensation being paid; (5) by a gov-
 ernmental entity that has not instituted formal pro-
 ceedings.

[4] Eminent Domain 148  **2.1**

148 Eminent Domain
 148I Nature, Extent, and Delegation of Power
 148k2 What Constitutes a Taking; Police and
 Other Powers Distinguished
 148k2.1 k. In General. Most Cited Cases

In order to establish inverse condemnation, the
 plaintiff must establish more than simply interfer-
 ence with the owner's property rights.

[5] Eminent Domain 148  **2.1**

148 Eminent Domain
 148I Nature, Extent, and Delegation of Power

--- P.3d ---, 2013 WL 1286645 (Wash.App. Div. 3)
 (Cite as: 2013 WL 1286645 (Wash.App. Div. 3))

148k2 What Constitutes a Taking; Police and Other Powers Distinguished

148k2.1 k. In General. Most Cited Cases

In order to establish inverse condemnation, there must be a permanent or recurring interference that destroys or derogates a fundamental ownership interest.

[6] Eminent Domain 148 ↪300

148 Eminent Domain

148IV Remedies of Owners of Property; Inverse Condemnation

148k294 Evidence

148k300 k. Weight and Sufficiency. Most Cited Cases

Property owner failed to establish the amount of its actual damages in inverse condemnation action against city, where, although property owner presented testimony establishing the cost of restoring the property with fill dirt, there was no appraisal of the property, previous sales agreements did not establish the fair market value of the property, and there was no evidence that the alleged taking prevented the property from being developed.

[7] Eminent Domain 148 ↪295

148 Eminent Domain

148IV Remedies of Owners of Property; Inverse Condemnation

148k294 Evidence

148k295 k. Presumptions and Burden of Proof. Most Cited Cases

Property owner had burden of establishing the amount of its actual damages in inverse condemnation action against city; the party claiming inverse condemnation was required to prove a taking, one element of which was the loss of the property or the diminution in its value, and, unless the taking element was conceded, not placing the burden of proof on the property owner would have relieved the property owner of proving one element of its case.

[8] Eminent Domain 148 ↪200

148 Eminent Domain

148III Proceedings to Take Property and Assess Compensation

148k199 Evidence as to Compensation

148k200 k. Presumptions and Burden of Proof. Most Cited Cases

Eminent Domain 148 ↪295

148 Eminent Domain

148IV Remedies of Owners of Property; Inverse Condemnation

148k294 Evidence

148k295 k. Presumptions and Burden of Proof. Most Cited Cases

The general proposition that each party has the burden to prove the affirmative of an issue does not apply to land valuation in condemnation actions.

[9] Damages 115 ↪109

115 Damages

115VI Measure of Damages

115VI(B) Injuries to Property

115k107 Injuries to Real Property

115k109 k. Temporary Injuries. Most Cited Cases

Damages 115 ↪110

115 Damages

115VI Measure of Damages

115VI(B) Injuries to Property

115k107 Injuries to Real Property

115k110 k. Permanent and Continuing Injuries. Most Cited Cases

Eminent Domain 148 ↪303

148 Eminent Domain

148IV Remedies of Owners of Property; Inverse Condemnation

148k301 Damages and Amount of Recovery

148k303 k. Compensation for Property Taken or for Injury. Most Cited Cases

In awarding damages for injury to real property, including cases of inverse condemnation, a

--- P.3d ----, 2013 WL 1286645 (Wash.App. Div. 3)
 (Cite as: 2013 WL 1286645 (Wash.App. Div. 3))

court must first determine if the damage is temporary or permanent.

[10] Damages 115 ↪110

115 Damages

115VI Measure of Damages

115VI(B) Injuries to Property

115k107 Injuries to Real Property

115k110 k. Permanent and Continuing Injuries. Most Cited Cases

“Permanent damage” to real property is valued by determining the market value of the property before and after the damage.

[11] Damages 115 ↪109

115 Damages

115VI Measure of Damages

115VI(B) Injuries to Property

115k107 Injuries to Real Property

115k109 k. Temporary Injuries. Most Cited Cases

“Temporary damage” to real property is valued in accordance with the cost of restoring the property.

[12] Damages 115 ↪208(1)

115 Damages

115X Proceedings for Assessment

115k208 Questions for Jury

115k208(1) k. In General. Most Cited Cases

Whether damage to real property is permanent or temporary is a factual question.

Appeal from Benton Superior Court; Honorable Bruce A. Spanner, J.Terry Elgin Miller, Attorney at Law, Kennewick, WA, for Appellant.

George Fearing, Attorney at Law, Kennewick, WA, for Respondent and Cross Appellant.

PUBLISHED OPINION

KORSMO, C.J.

¶ 1 The trial court in this inverse condemnation action granted nominal damages to plaintiff Keene Valley Ventures (KVV) and declined to award attorney fees. In this appeal, KVV argues that it had no burden of proving the amount of its damages. We disagree and affirm.

FACTS

¶ 2 Ron Johnson is the sole shareholder and director of Baines Corporation, as well as the sole shareholder, sole director, and president of KVV. Baines purchased 21.6 acres of undeveloped land in the City of Richland for \$47,500 in 2000. KVV subsequently purchased the property from Baines in 2003 for the sum of \$189,170.^{FNI} The property is at Keene and Shockley Roads at the low point of Keene Valley in an area known as Sub-basin 3.

¶ 3 Richland has been developing Keene Road in stages. Part of that development included culverts that move water from south of Keene Road to ditches on the north side of the road adjacent to KVV's property. A Storm Water Management Plan (SWMP) adopted by Richland in 2005 includes two projects that involve Sub-basin 3. One project would include the creation of a retention pond in the general vicinity of KVV's property; it has not yet been designed or funded. A second project would involve piping more water to the area; that project likewise has not yet been approved by the city council.

¶ 4 Shortly after purchasing the property, Mr. Johnson discovered a large man-made wetland in the northwest corner of the KVV property. He retained a wetland scientist who determined that there were three man-made wetlands on the property. Irrigation of neighboring properties was identified as the source of the wetlands. Mr. Johnson calculated that he would need 27,000 cubic yards of dirt to fill the three wetlands. Development of the upper valley continued throughout the decade following Baines' purchase of the land. More and more water was funneled from those properties down to the bottom of the valley and, subsequently, onto KVV's property.

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¶ 5 A geotechnical engineering study conducted for KVV in January 2005 drilled three test pits. Groundwater was located in the pits at 5.5, 7.5, and 2 feet. A different company drilled three test pits in the same general area in November 2005. It discovered groundwater at 1.1, 1.2, and 2.5 feet, respectively. The testing company recommended a five-foot fill depth on the property. Mr. Johnson calculated that recommendation would require 145,000 to 150,000 cubic yards of fill.

¶ 6 KVV marketed the property. It entered into an agreement to sell the land in January 2006 for \$541,500. A second agreement a year later involved a purchase price of \$575,000. Neither sale closed; no evidence was admitted that explained the failure of either sale to close.

¶ 7 Water regularly collected in the ditch on the north side of Keene Road. Water also would occasionally flow from the ditch onto the KVV property. Mr. Johnson wrote a letter to Richland complaining about standing water in the ditch as well as the rising water table. Richland responded by explaining that the water was routed to the Keene Road ditch by design and was consistent with the SWMP.

¶ 8 KVV filed suit ^{FN2} in 2008; the matter proceeded to a four-day bench trial in May 2011, and the parties filed written arguments. The trial court entered a memorandum decision the following month. The court ruled that KVV had proved trespass, nuisance, and inverse condemnation, but that the damage to the land was temporary because Richland could re-route the water to flow away from the property. The court also ruled that KVV had failed to prove that it had sustained damage. The court awarded KVV nominal damages of \$1 and declined to award attorney fees.

¶ 9 After reconsideration was denied, KVV timely appealed to this court. Richland filed a cross appeal from the determination that the taking was temporary.

ANALYSIS

¶ 10 The trial court was unconvinced that KVV had been harmed by Richland's direction of water to its property. KVV vigorously argues both that it had no obligation in a condemnation case to establish its losses and that it nonetheless did so. We conclude that KVV did bear the burden to establish its losses and that its failure to convince the trial judge is not something that we can remedy for it on appeal. We decline to consider Richland's cross appeal except to the extent this issue is also argued by KVV.

[1][2][3][4][5] ¶ 11 In order to prevail in an inverse condemnation action, the plaintiff must establish a "taking" by the government. *Borden v. City of Olympia*, 113 Wash.App. 359, 374, 53 P.3d 1020 (2002). In this context, a taking consists of an appropriation of private property without exercise of the power of eminent domain. *Phillips v. King County*, 136 Wash.2d 946, 957, 968 P.2d 871 (1998). The elements are "(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." *Id.* The plaintiff must establish more than simply interference with the owner's property rights. Rather, there must be a permanent or recurring interference that "destroys or derogates" a fundamental ownership interest. *Borden*, 113 Wash.App. at 374, 53 P.3d 1020.

¶ 12 This court reviews a trial court's decision following a bench trial to determine whether substantial evidence supports any challenged findings and whether the findings support the conclusions of law. *State v. Hovig*, 149 Wash.App. 1, 8, 202 P.3d 318 (2009). "Substantial evidence" is sufficient evidence to persuade a fair-minded person of the truth of the declared premise. *Panorama Vill. Homeowners Ass'n v. Golden Rule Roofing, Inc.*, 102 Wash.App. 422, 425, 10 P.3d 417 (2000). Conclusions of law are reviewed de novo. *Robel v. Roundup Corp.*, 148 Wash.2d 35, 42, 59 P.3d 611 (2002). We defer to the trial court's credibility de-

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terminations; we will not reweigh evidence even if we would have resolved conflicting evidence differently. *Thorndike v. Hesperian Orchards, Inc.*, 54 Wash.2d 570, 575, 343 P.2d 183 (1959); *Quinn v. Cherry Lane Auto Plaza, Inc.*, 153 Wash.App. 710, 717, 225 P.3d 266 (2009). Stated another way, an appellate court is not in a position to find persuasive evidence that the trier of fact found unpersuasive. *Quinn*, 153 Wash.App. at 717, 225 P.3d 266.

[6] ¶ 13 These principles resolve KVV's argument that it did in fact prove its damages. We agree with KVV that there was evidence from Mr. Johnson's testimony that would have established the cost of restoring the property with fill dirt.^{FN3} However, the trial judge was not required to credit that information and find it persuasive, and this court is not in the position of reweighing that evidence. Although the evidence would have supported a contrary finding, it was entirely the trial court's prerogative to decide how persuasive it found the evidence. Having concluded it was not persuasive, the story ended there.

[7] ¶ 14 KVV also argues that once it established that its property had been damaged, it had no burden to prove the amount of its damages. It analogizes to a condemnation action in which the government, desiring to take private property for public use, must present evidence of the fair market value of the property, although no party has a burden of proving value. *Kg.*, *State v. Amunsis*, 61 Wash.2d 160, 164, 377 P.2d 462 (1963).^{FN4}

¶ 15 No Washington court appears to have yet considered the burden of proof, if any, on the damages component of an inverse condemnation action.^{FN5} Our courts have assigned the burden of proof to the property owner to establish that a taking occurred. *E.g.*, *Kahuna Land Co. v. Spokane County*, 94 Wash.App. 836, 841, 974 P.2d 1249 (1999) (landowner had burden of establishing regulatory taking); *Burton v. Clark County*, 91 Wash.App. 505, 516, 958 P.2d 343 (1998) (same).

¶ 16 Richland cites numerous cases which it argues show that all jurisdictions in this country to consider the issue have concluded that the landowner bears the burden of proving damages. Included among that list are *Carolina Chloride, Inc. v. Richland County*, 394 S.C. 154, 170, 714 S.E.2d 869 (2011); *Lawrence County v. Miller*, 2010 S.D. 60, 786 N.W.2d 360, 366; *Taylor v. Department of Transportation*, 879 So.2d 307, 319 (La.Ct.App.2004); and *DeKalb County v. Daniels*, 174 Ga.App. 319, 329 S.E.2d 620, 623-24 (1985). While the cases cited by Richland support its argument, they are of limited utility due to the varying state constitutional provisions that undergird condemnation and inverse condemnation actions.

[8] ¶ 17 The general proposition that "each party has the burden to prove the affirmative of an issue" does not apply to land valuation in condemnation actions. *State v. Templeman*, 39 Wash.App. 218, 224, 693 P.2d 125 (1984). As explained in *Amunsis*, the reason is that juries will consider competing land valuations and select the appropriate value in light of the evidence. There simply is no issue of law or fact to which the burden "may intelligently and reasonably be applied." *Amunsis*, 61 Wash.2d at 163, 377 P.2d 462 (quoting *Martin v. City of Columbus*, 101 Ohio St. 1, 127 N.E. 411 (1920)).^{FN6}

¶ 18 However, the *Amunsis* concern is not presented in an inverse condemnation case. Instead, the party claiming inverse condemnation must prove a taking, one element of which is the loss of the property or a diminution in its value. *Phillips*, 136 Wash.2d at 957, 968 P.2d 871. Unless the taking element is conceded, which it was not here, the *Amunsis* rule would relieve the plaintiff of proving one element of its case. Accordingly, we hold that the plaintiff in an inverse condemnation action bears the burden of proof in establishing the diminution in value of its property. The *Amunsis* rule is inapplicable when the diminution of value element of a taking claim is contested at trial. The trial court did not err in concluding that KVV failed to

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sustain its burden of proving damages.

¶ 19 Two other damages-related arguments remain.^{FN7} KVV contends that the trial court applied the wrong damages standard because it treated this case as a recurring temporary taking rather than a permanent taking. Richland argues in its cross appeal that the court erred in finding a temporary taking rather than a permanent taking because it has no specific plans to remediate its drainage plan and its effect on the KVV property. We decline to consider Richland's argument, except to the extent that it overlaps KVV's argument, because it has not established that a ruling will have any future impact; it is essentially a moot question in light of our disposition.

[9][10][11][12] ¶ 20 In awarding damages for injury to real property, including cases of inverse condemnation, a court must first determine if the damage is temporary or permanent. *Harkoff v. Whatcom County*, 40 Wash.2d 147, 152, 241 P.2d 932 (1952). Permanent damage is valued by determining the market value of the property before and after the damage. *Id.* Temporary damage is valued in accordance with the cost of restoring the property. *Id.* Whether damage is permanent or temporary is a factual question. *Barci v. Intalco Aluminum Corp.*, 11 Wash.App. 342, 355, 522 P.2d 1159 (1974).

¶ 21 The parties both argue that the trial court erred by finding the taking to be temporary rather than permanent. Since this is a factual question, we would normally defer to the trier of fact on this point. *Quinn*, 153 Wash.App. at 717, 225 P.3d 266. However, we need not consider this challenge because KVV failed to prove its case under either standard.

¶ 22 The trial court determined the taking was temporary, but found the proof of remediation costs insufficient to grant relief. The trial court additionally addressed the diminution in value question and also found KVV's proof lacking.^{FN8} It specifically found that there was no proof of the property's

value before the groundwater began rising or afterwards. Thus, even if the court had erred in determining that the damage was temporary rather than permanent, the alleged error was of no consequence to the outcome of the trial. Under either measure of damage, the trial court was not convinced that KVV had shown that it actually suffered a loss.

¶ 23 The trial judge concluded that Richland had harmed KVV through its channeling of waters to its ditches adjoining KVV's property, resulting in occasional flooding and significant increases in the water table. The evidence supports those determinations. The trial judge also found that KVV had not shown that its property value suffered from the city's actions or that it had adequately proven the cost of remedying the situation. As the trier of fact, the judge was not required to find the evidence convincing. Accordingly, the court did not err when it ruled that although Richland had inversely condemned the property through its water management actions, KVV was not entitled to actual damages.

¶ 24 Affirmed.

WE CONCUR: KULIK and SIDDOWAY, JJ.

FN1. There was no appraisal of the land. Mr. Johnson testified at trial that his accountant set the value of the land, but there was no explanation of how that value was calculated.

FN2. There were additional parties that were dismissed from the action before trial and different causes of action against Richland that also were dismissed before trial. Of the claims tried to the bench, only the inverse condemnation claim presents issues for our review.

FN3. KVV did not necessarily prove that the fair market value of the property had been diminished, let alone destroyed. There was no appraisal of the property. The two sales agreements did not establish

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the market value because neither sale went through. They did suggest that the value of the land had appreciated greatly in less than a decade despite the rising groundwater levels. There also was no evidence that the land could not still be developed. Under the circumstances, the trial court understandably did not find actual damage.

FN4. The same rule applies at a condemnation hearing in which the parties agree that a special benefit to the land exists and the remaining question is the value of the land with the benefit. *State v. Templeman*, 39 Wash.App. 218, 223–24, 693 P.2d 125 (1984).

FN5. A justice dissenting in a condemnation case suggested that the landowner bore the burden of proof in an inverse condemnation case. *State v. Ward*, 41 Wash.2d 794, 798, 252 P.2d 279 (1953) (Grady, J., dissenting).

FN6. “ ‘You might as well undertake to fit a hat to a headless man as to fit the doctrine of burden of proof to a proceeding of this character, which is absolutely wanting an issue to which such a doctrine can be applied.’ ” *Amunsis*, 61 Wash.2d at 164, 377 P.2d 462 (quoting *Martin*, 101 Ohio St. 1, 127 N.E. 411).

FN7. KVV also assigns error to the trial court failing to award its attorney fees after prevailing at trial. *See* RCW 8.25.075(3). However, the award of nominal damages does not satisfy the statutory directive awarding attorney fees to a landowner who establishes an entitlement to compensation. In a different context, our court has consistently noted that nominal damages are not “real damages.” *E.g.*, *Gilmartin v. Stevens Inv. Co.*, 43 Wash.2d 289, 294, 261 P.2d 73 (1953) (quoting *Bellingham Bay & British Columbia R.R. v. Strand*, 4

Wash. 311, 314, 30 P. 144 (1892)).

FN8. *See* Findings of Fact 69, 70, 71, and 75. Clerk's Papers at 414.

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NO. 44198-5-II

COURT OF APPEALS FOR DIVISION II
STATE OF WASHINGTON

PACIFIC HIGHWAY PARK, LLC,

Appellant,

v.

WASHINGTON STATE
DEPARTMENT OF
TRANSPORTATION,

Respondent.

PROOF OF SERVICE
OF BRIEF OF
RESPONDENT

FILED
COURT OF APPEALS
DIVISION II
2013 MAY 14 AM 11:25
STATE OF WASHINGTON
BY DEPUTY

I, Melissa J. Calahan, do hereby certify that I am a citizen of the United States of America, over 18 years of age, and am competent to be a witness herein.

On May 13, 2013, I transmitted a true and correct copy of the Washington State Department of Transportation's Brief of Respondent, and this Proof of Service, via United States Postal Service to:

Paul J. Hirsch
Hirsch Law Office
PO Box 771
Manchester, WA 98353-0771

An electronic copy was also sent on May 13, 2013, via email addressed to:

Paul J. Hirsch at pjh@hirschlawoffice.com and
hirschlaw@gmail.com

DATED this 13 day of May, 2013, at Tumwater, Washington.


Melissa J. Calahan
Melissa J. Calahan