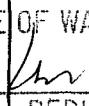


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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY  _____
DEPUTY

NO. 44240-0-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

JUSTIN NELSON and ALLISA ADAMS-NELSON,

Appellants,

v.

SKAMANIA COUNTY,

Respondent,

and

SHANNON FRAME,

Additional Defendant.

BRIEF OF RESPONDENT SKAMANIA COUNTY

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I. IDENTITY OF RESPONDENT

Skamania County is the Respondent herein. Skamania County requests that the Court affirm the summary judgment of dismissal entered by the trial court.

II. INTRODUCTION

This lawsuit involves a claim by Justin Nelson and Allisa Adams-Nelson (“Nelson”) against Skamania County, arising from an old landfill/burn dump that was operated by Skamania County many decades ago. The site was replaced by a transfer station more than 30 years ago, and the old dump site was cleaned up around the same time. (CP 42-43).

The property on which the County’s transfer station is located consists of 9.5 acres. The transfer station is more than 700 feet from the boundary with the neighboring property to the north. (CP 2). Nelson purchased the adjacent property in 2007, some 30 years after the dumpsite had been discontinued and cleaned up. (CP 47). Nelson observed debris on his property in early 2007 which he attributed to the old County dumpsite. (CP 49-50). He filed this lawsuit against Skamania County in 2012, seeking recovery of damages under theories of tort and inverse condemnation.

The trial court properly dismissed the action, based on the statute of limitations, the absence of the elements of a “continuing trespass” and the absence of standing for an inverse condemnation claim. Skamania County respectfully asks this Court to affirm.

III. ISSUES PERTAINING TO ASSIGNMENT OF ERRORS

Skamania County believes that the issues pertaining to Nelson's assignment of errors can best be stated as follows:

A. Whether a landowner's tort claim arising from dumping of debris from an adjacent property is subject to dismissal where (1) any tortious activity occurred more than 30 years before suit was filed; and (2) the landowner was aware of the alleged damage more than three years before filing suit.

B. Whether the theory of "continuing tort" is inapplicable where (1) there has been no tortious activity by the defendant for more than 30 years; and (2) there is no competent evidence of new and different damage which occurred within three years prior to suit; and (3) the plaintiff admitted to the trial court that any remaining damage is permanent and cannot be reasonably abated.

C. Whether an inverse condemnation claim is subject to dismissal where (1) the plaintiff did not own the property at the time of the alleged taking; and (2) the condition of which plaintiff complains has been present for several decades.

IV. STATEMENT OF FACTS

Nelson purchased undeveloped property in February 2007 that is more than 700 feet from a transfer station owned and operated by Respondent Skamania County. (CP 73-74). The transfer station property was formerly the site of a "landfill-burn dump" operated by Skamania

County between the 1950s and the late 1970s. (CP 42-43). The dump site was replaced by a transfer station in the early 1980s with funding and approval from the Washington State Department of Ecology. (CP 45). For the past several decades, debris that is brought to the transfer station has been placed into containers, which are then trucked to a different location for disposal. The current facility is clean and safely operated, as photos submitted by Nelson clearly show. (CP 115-126). There is no evidence of any dumping of refuse by Skamania County (outside of the transfer containers) for the past 35 years.

After the old dump was closed, Skamania County substantially cleaned up debris which originated from the dump. (CP 43). The land between the old dumpsite and Nelson's property is heavily forested, as shown by photographs. (CP 112).

Nelson visited and inspected the adjacent property on three separate occasions before purchasing it. (CP 47). Shortly after Nelson purchased the property in early 2007, he commissioned a survey to confirm the boundaries of his property. The surveyor discussed with Nelson that there was debris on his property. Nelson concluded that the debris on his property originated from the old County dumpsite. (CP 50). Nelson took no action against Skamania County at that time.

In September 2008, a neighbor complained to Skamania County that Nelson had been clearing vegetation and building bonfires on a portion of Nelson's property next to Canyon Creek. An investigation by

Skamania County revealed unpermitted logging and other disturbances within the riparian buffer area of Canyon Creek, including the construction of a bridge and other structures without permits. (CP 50-55). Nelson was ordered to undertake mitigation measures for his unpermitted activity within the critical area.

Nelson refused to mitigate the damage he had caused. Instead, he retaliated by claiming that debris on his property originated from Skamania County's old dumpsite. (CP 56). He notified the Washington State Department of Ecology (DOE) in October 2008 of his complaint. DOE investigated but took no action against Skamania County.

In March 2012, Nelson sued Skamania County, alleging that the County's operation of the old landfill decades earlier allowed debris to reach the adjoining property he purchased in 2007. He subsequently amended his Complaint to add a claim against Shannon Frame, who sold the land to Nelson in 2007. His Amended Complaint alleged that Frame did not fully disclose that a portion of the property had been "taken" by the County. (CP 12-13).

Nelson contends that the value of his property is diminished because of the presence of debris from the old landfill. The County denies that there is significant debris from the old landfill on Nelson's undeveloped property. As noted above, Nelson's lot is at least 700 feet (more than two football fields) from the current transfer station. Moreover, after the old dump was closed, Skamania County cleaned up

the significant debris which may have originated from the dump. (CP 43). The County believes that most of the debris on Nelson's property is from illegal dumping from private parties.

But even if Nelson could produce competent evidence that some of the debris on his property originated from operation of the old Skamania County landfill decades ago, his claims are not timely, and he has no standing to assert such claims.

After taking the deposition of Justin Nelson, Skamania County moved for summary judgment. At the summary judgment hearing on October 5, 2012, the Honorable Diane Woolard requested additional briefing from the parties with respect to the "continuing trespass" claim. Following submission of that supplemental briefing, the trial court entered summary judgment in favor of Skamania County on October 30, 2012. A revised order also dismissed Nelson's claim against Mr. Frame. This appeal followed.

V. ARGUMENT

A. The Elements of Continuing Trespass Are Not Present.

It is undisputed that any dumping of debris by Skamania County on or near the property of Nelson occurred more than 30 years ago. Nelson concedes that the old dumpsite was closed in 1978. Nelson makes no assertion that Skamania County has engaged in tortious activity since that time. (CP 58). Therefore his "standard" tort claims are surely barred by the statute of limitations.

Nelson seeks to rely on a “continuing trespass” theory, but the elements of that claim are clearly absent, as the trial court properly held.

1. The Trespass Claim Is Subsumed Into a Standard Negligence Claim.

The Amended Complaint asserts that Skamania County is liable under theories of nuisance and trespass, for allowing “migration” of debris onto the property purchased by Nelson. There is no allegation that the County engaged in intentional misconduct since 1978 (and certainly not within the statutory limitations period). Instead, Nelson’s nuisance and trespass claims are based on alleged negligence (inaction) by Skamania County:

Q. Can you identify any action by the County in the past 10 years that has caused or contributed to the problem that is the basis of your claims against the County?

A. Any action they have taken?

Q. Yes.

A. Does that count action they haven’t taken?

Q. No. Can you identify any action that they have taken in the last 10 years that forms the basis –

A. If you want to call negligence an action. No, they haven’t done anything.

Justin Nelson Deposition, p. 87 (CP 58).

Because Nelson’s trespass claim is based on alleged negligence, it is in reality a claim for negligent injury to real property, which is subject

to a 2-year statute of limitations. RCW 4.16.130; Mayer v. City of Seattle, 102 Wn. App. 66, 75, 10 P.3d 408 (2000), rev. denied, 152 Wn.2d 1029.

Where a trespass claim arises from the same facts that support a negligence claim, the trespass claim is subsumed into the general claim for negligent injury to real property, and the trespass cause of action may be dismissed. Pepper v. J.J. Welcome Construction Co., 73 Wn. App. 523, 547, 871 P.2d 601 (1994); Kaech v. Lewis County PUD, 106 Wn. App. 260, 282, 23 P.3d 529 (2001).

The same rule applies with respect to nuisance. Where a nuisance claim arises from alleged negligent conduct by the defendant, the courts will not consider the nuisance claim apart from the negligence claim. Atherton Condominium Apartment Owners v. Blume Development Co., 115 Wn.2d 506, 527-28, 799 P.2d 250 (1990). In such circumstances, negligence rules apply and the trespass and nuisance claims are properly dismissed.

2. A Continuing Tort Theory Does Not Apply to Negligence Claims.

Recognizing that his standard tort claims are untimely, Nelson sought to ground his lawsuit in a “continuing trespass” theory. But the theory is unavailing. The “continuing tort” theory does not apply to negligence claims. It applies only to intentional torts:

The continuing trespass statute of limitations does not apply to negligence and implied warranty of habitability claims; each of these causes of action has its own applicable statute of limitations.

Will v. Frontier, 121 Wn. App. 119, 124, 89 P.3d 242 (2004), rev. denied, 153 Wn.2d 1008. Because there has been no intentional misconduct by the County within the past 30 years, the theory of continuing tort simply has no application in this case.

3. Continuing Trespass Does Not Apply Unless the Tortious Conduct Occurred Within the Statutory Limitations Period.

Even if a claim for “continuing negligent trespass” were legally cognizable, the elements of such a claim are not present here. Simply stated, there was no misconduct by Skamania County in the two or three years before suit was filed in 2012. While it is true that Washington law recognizes a claim for continuing trespass when repeated trespasses occur over a period of years, the rule does not apply to extend the statute of limitations for ongoing damages resulting from an existing condition which was created many years before:

Generally, under theories of continuing nuisance or continuing trespass, each harmful act constitutes a new cause of action for statute of limitations purposes and, therefore, the accrual of a cause of action is not measured from the day that the initial act so as to bar the entire action. However, while later continuing acts may prevent the running of the statute of limitations on the claim, damages cannot be recovered for the initial time barred acts.

Washington Real Property Deskbook, Vol. 7, § 106.4(4), p. 106-23 (emphasis added). The above rule was recently applied as a basis for dismissing a continuing trespass claim based on ongoing water discharges from a city’s 40-year-old stormwater system:

This claim [continuing trespass] also fails because Crystal Lotus does not allege that either Shoreline or Lake Forest Park engaged in an intentional act regarding the stormwater system since Crystal Lotus acquired its property.

Crystal Lotus v. City of Shoreline, 167 Wn. App. 501, 506, 274 P.3d 1054 (2012).

The cases in which the continuing tort theory has been applied involved *ongoing intentional activities* by the defendant causing regular or periodic discharges of noxious materials onto the plaintiff's property. See, e.g., Riblet v. Spokane-Portland Cement Co., 41 Wn.2d 249, 248 P.2d 380 (1952) (ongoing cement production facility releasing dust particles onto plaintiff's property); Bradley v. American Smelting and Refining Co., 104 Wn.2d 677, 709 P.2d 782 (1985) (ongoing discharge of arsenic and cadmium from operating copper smelter); Tiegs v. Watts, 135 Wn.2d 1, 954 P.2d 877 (1998) (ongoing discharge of contaminants from pulp mill's waste water facility).

In contrast, in this case the only allegedly tortious conduct by Skamania County occurred more than 30 years ago, before it closed its dump in 1978. There has been no activity by Skamania County during the three years preceding the filing of this lawsuit which caused or exacerbated Nelson's alleged damages. Therefore, the standard limitations rule applies and Nelson's tort claims were properly dismissed as a matter of law.

In his Opening Brief, Nelson acknowledges that the statute of limitations for claims arising from construction activity accrues on the date when construction activity ceases (if damage has occurred by that date). (Opening Brief, p. 23). Recognizing that there has been no dumping of refuse by Skamania County in the past 30 years, Nelson seeks to satisfy the “intentional misconduct” and timeliness requirements by arguing that the County is still “intentionally” operating a transfer station, which he refers to as “mitigation” for the burn dump. (Brief, p. 15). This argument is illogical on its face. First, Nelson offers no evidence whatsoever for his suggestion that the transfer station - which has been operated lawfully for 30 years - constitutes “mitigation” for the old dump site which was closed in 1978. The County’s cleanup efforts were completed in the 1980s. (CP 42-43).

Moreover, even if one were to construe the new transfer station as “mitigation,” that surely would not extend the statute of limitations for damage caused from a dump site which closed more than 30 years previously. No court has held that a party commits an “intentional trespass” by mitigating or remediating a harmful condition.

Needless to say, Nelson cites no legal authority for his curious argument that the County has intentionally trespassed on his property by operating a clean transfer station more than 700 feet away. The undisputed fact is that there has been no intentional or negligent misconduct by Skamania County relative to the adjacent property for

nearly 35 years. The statute of limitations is a bar to recovery, and the “continuing trespass” theory is inapplicable.

4. Continuing Trespass Does Not Apply to Damages Attributable to a Pre-Existing Condition.

In response to the undisputed evidence that the dumpsite has been closed for 30 years, Nelson asserts that the statute of limitations should not be a bar because, he contends, debris from the old site has “migrated” since the dump was closed in 1978. This argument is groundless, both factually and legally. First, there is no competent expert testimony supporting Nelson’s claim that any substantial debris has “migrated” onto Nelson’s property since 2009 (within the statutory limitations period). A trespass claim requires proof of “actual and substantial damages.” Bradley, supra, 104 Wn.2d at 692-93. There has been no substantial damage which arose after 2009.

Nelson relies principally on the Declaration of Greg Morris, who has no expertise or personal knowledge which would allow him to offer admissible testimony as to whether any debris has moved from the County property to the Nelson property since 2009. First, Morris is a “fisheries habitat biologist” with no apparent expertise in geology, hydrogeology or geomorphology. Further, he merely offers his observation that there is debris on Nelson’s property, some of which “appears” to have come from the old Skamania County landfill. He does not identify any debris that is

present on the Nelson property which was not there in 2009. (CP 188-189).

Nelson also sought to rely on the statements in Warren Krager's report, but that report is clearly inadmissible. CR 56(e) provides that "supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Mr. Krager's actual affidavit does not contain any substantive evidence. And the report attached to it would be inadmissible at trial, as it is neither in the form of a declaration nor offered as sworn testimony. (CP 143-144; CP 196-97). Moreover, Mr. Krager visited the site only in September 2012. He has no knowledge with respect to debris on the property prior to that date. He certainly has no firsthand knowledge that any debris currently present on Nelson's property was not there before the statutory limitations period (before 2009).

In short, there is no competent evidence of "substantial damage" from the ancient dumpsite which is present on plaintiffs' property now, but not present before the three year limitations period (before March 2009).

Plaintiffs have offered no photographs or any other evidence showing any portion of Nelson's property that was free of debris before 2009, but covered with debris now. The photos attached to Nelson's declaration show debris which is old. (CP 82-86). None of those photos

depict conditions at the boundary between the Nelson property and the County's property. Simply stated, there is no admissible evidence that "actual and substantial" damage has occurred since 2009 (much less that any such material came from the County's property). Absent proof of new and *substantial* damages which have arisen since 2009, Nelson's tort claims are barred by limitations. Wallace v. Lewis County, 134 Wn. App. 1, 137 P.2d 101 (2006).

Moreover, even if Nelson had offered competent evidence that a small amount of debris had "migrated" onto his property during the past two or three years, that would still not suffice to support a claim for continuing trespass. As the Washington Court of Appeals made clear in Wallace, a party cannot recover under a theory of continuing tort where (a) the damage arose prior to the statutory limitations period; or (b) the damage *is attributable to* problems that existed before that time:

Because the three year statute of limitations limits the time period for which Gee Cee can collect damages, Gee Cee must necessarily show that the damages it claims occurred during the three year statutory period; *its actionable damages cannot have arisen before this three year time period or be attributable to problems existing on Petty's property before then.*

134 Wn. App. at 17 (emphasis added).

Applying the Wallace test, Nelson's continuing trespass claim clearly fails. It is not seriously disputed that the damages of which Nelson complains are at least "attributable to problems existing" before the three

year statutory period. Thus, continuing trespass is not a viable theory of recovery in this case.

The suggestion that a property owner may sue in tort for waste or contamination which occurred decades earlier has been soundly rejected by the Washington courts. In Pacific Sound Resources, et. al. v. Burlington Northern, et. al., 130 Wn. App. 926, 124 P.3d 981 (2005), rev. denied, 145 P.3d 1214, the Port of Seattle sued in 2002 for contamination caused by a wood treatment plant which operated from the early 1900s until 1994. The Port sought recovery under a “continuing tort” theory but the trial court dismissed the tort claim as a matter of law and the Court of Appeals affirmed, because the Port had knowledge of substantial damage on his property more than three years prior to initiating suit. The mere fact that some contamination was still present at the time the suit was filed did not allow the plaintiffs to avoid the statute of limitations:

... the Port knew of substantial damages in 1994. . . . Under these circumstances, the common law tort claims accrued more than three years before PSR and the Port filed the lawsuit in September 25, 2002. The trial court did not err in dismissing the common law tort claims on summary judgment.

130 Wn. App. at 942.

In this case, there is not a shred of evidence that the condition of which Nelson complains arose after 2009. Indeed, Nelson admits he has known of the condition since 2007. Nor is there any evidence that Skamania County has taken any action in the past three years which has

caused debris to be discharged on Nelson's land. Therefore, even if a continuing tort theory were theoretically available in this context, there could be no recovery in this case. City of Moses Lake v. United States, 430 F. Supp. 1164, 1179 (E.D. WA. 2006).

5. Continuing Trespass Cannot be Applied Unless the Condition Can be Abated Without Unreasonable Hardship and Expense.

A final reason why the theory of continuing trespass is unavailable in this case is that such a claim is available only if the condition created by the defendant can be removed "without unreasonable hardship and expense." Pacific Sound Resources, *supra*, 130 Wn. App. at 941. Where a trespass "changes the physical conditions of the land," the fact that harm continues does not subject the actor to liability for continuing trespass. Restatement (Second) Torts, § 162 (comment e); City of Moses Lake v. United States, 451 F. Supp. 2d 1233, 1243 (E.D. WA 2005). Where a condition is not readily abatable, the doctrine of continuing trespass does not apply, and the standard limitations period (three years) bars the action:

Reasonable abatability of an intrusive condition is the primary characteristic that distinguishes a continuing trespass from a permanent trespass.

Fradkin v. Northshore Utility District, 96 Wn. App. 118, 125 (1999). As the Washington Court of Appeals held in Pacific Sound Resources v. Burlington Northern, *supra*, if a condition (such as debris buried in the soil for decades) is not reasonably abatable, the theory of continuing tort does not apply:

A tort is continuing if the intrusive condition is reasonably abatable and not permanent.

130 Wn. App. at 941. Here, the buried debris of which Nelson complains cannot be abated without destabilizing the slope and causing greater damage.

Nelson argues that there is no proof that the damage cannot be abated. This is a curious argument, in view of the fact that Nelson's attorney expressly represented to the trial court that the damage of which Nelson complains is permanent and cannot be reasonably abated:

Plaintiffs have alleged recurring damage, each instance of which is permanent in nature because the property cannot be restored.

(CP 267). Furthermore, Nelson's attorney acknowledged in a sworn declaration that he had spoken to DOE officials who advised him that "it is safer to leave the debris from the Skamania County property in place." (CP 144, ll. 15-16). These statements by plaintiffs' counsel are properly treated as admissions of a party. Nelson is in no position to now argue that the damage is readily abatable.

For all of the many reasons outlined in Section A of this brief, the trial court properly refused to apply the "continuing tort" theory, and dismissed Nelson's 30 year old trespass claim based on the statute of limitations.

B. The Takings Claim is Barred by Limitations and Absence of Standing.

In addition to pursuing a continuing trespass theory, Nelson also contends that he is entitled to recover based on a theory of a constitutional “taking,” otherwise known as inverse condemnation. The trial court properly rejected the takings claim because it was untimely, and because Nelson had no standing to assert a takings claim with reference to a condition created some 30 years before he purchased the property.

1. The Inverse Condemnation Claim is Barred by Limitations.

^s It is undisputed that The County’s landfill/burn dump operated from the 1950’s until it was closed in 1978. The County now operates a transfer station from the site, which is paved, clean and regularly inspected and approved by local officials. (CP 42-43; CP 115-126). There is no evidence that any refuse from the site has been released from the County’s transfer facility onto Nelson’s property during the past 30 years. Under these facts and settled legal principles, Nelson’s inverse condemnation claim is foreclosed as a matter of law. The statute of limitations applicable to an inverse condemnation claim is ten years. RCW 4.16.020; Skokomish Indian Tribe v. United States, 401 F.3d 979, 990-91 (9th Cir. 2005).

If there were any “taking” by Skamania County arising from discharges from the former landfill between 1950 and 1978, that taking occurred many decades ago. Thus, Nelson’s inverse condemnation claim is barred by limitations.

2. Nelson Has No Standing to Assert an Inverse Condemnation Claim.

Nelson's takings claim is barred not only by the statute of limitations but also by absence of standing, because he was not the owner of the property at the time the landfill allegedly released debris onto his property. It is settled that a property owner has no standing to sue for inverse condemnation based on a condition that was present prior to his ownership. As the Washington Court of Appeals held in Hoover v. Pierce County, 79 Wn. App. 427, 433, 903 P.2d 464 (1995), rev. denied, 129 Wn.2d 1007, "a grantee or purchaser cannot sue for a taking or injury occurring prior to his acquisition of title."

In Hoover, the plaintiff landowners filed an inverse condemnation action against Pierce County, seeking to recover damages for flooding allegedly caused by the construction of a county roadway and cross-culvert. Pierce County moved for summary judgment on the grounds that the road and culvert were constructed in 1972, before the plaintiff purchased his property. Because Hoover purchased the property after the culvert was in place, Pierce County argued that he had no standing to assert an inverse condemnation claim arising from the design, location or function of the road and drains.

Pierce County's motion for summary judgment in Hoover was granted and the Court of Appeals affirmed. The Court specifically rejected Hoover's argument that he should be able to recover for flood

damage which occurred after his purchase of the property. The court affirmed the longstanding principle that a new cause of action does not arise with each flood, absent *additional governmental action* causing new and different damages:

In the present case, the Hoovers do not claim that there was any additional government action by Pierce County since the installation of the culvert in 1972. Rather, they contend that a new taking cause of action arises with each flood, absent additional governmental action. We reject this contention.

* * *

In summary, the County has not undertaken any new action since installing the roadway culvert in 1972; thus, no new taking cause of action has arisen, and the Hoovers, as subsequent purchasers, may not recover for a taking that occurred prior to their ownership.

79 Wn. App. at 435-36. The Hoover rule has been reaffirmed in recent takings cases against local governments. See, e.g., Crystal Lotus Enterprises v. City of Shoreline, *supra*, 167 Wn. App. at 504-505 (2012) (takings claim dismissed where City's stormwater system that was causing damage was constructed before plaintiff's ownership).

In Wolfe v. Department of Transportation, ___ Wn. App. ___, 293 P.3d 1244 (2013), this Court affirmed summary judgment in favor of the Washington Department of Transportation where the plaintiff had alleged that reconstruction of a bridge and new support piers had caused gradual and ongoing erosion of the banks of the Naselle River on his property. Relying on the Hoover decision, the Court held that because Wolfe

purchased the property 18 years after the reconstruction project was completed, he had no standing to bring a takings claim:

To bypass the subsequent purchaser rule, “a new taking cause of action *requires additional governmental action* causing a measurable decline in market value.” Hoover, 79 Wn. App. at 436 (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 property in 2003 and 2004. On the contrary, they allege that the erosion has been ongoing since construction of the new piers some 17 years earlier in 1986.

293 P.3d at 1247-48.

The same analysis applies here. Mr. Nelson and his consultants have alleged that the debris “migration” has been present for several decades. (CP 189).¹ They offer no evidence of any new harmful activity by Skamania County since the time that Nelson purchased his property in 2007. (CP 58). Dismissal of Nelson’s inverse condemnation claim is mandated as a matter of law, because he did not own the property at the time of the alleged releases from the old landfill.

3. The Standing Requirement for a Takings Claim Does Not Depend on the Plaintiff’s Knowledge at the Time of Purchase.

Nelson acknowledges, as he must, settled Washington caselaw providing that a takings claim can only be pursued by the individual who owned the property when the taking occurred. Hoover v. Pierce County,

¹ Nelson tacitly acknowledges that any “taking” occurred long before his purchase, when he alleges in his Amended Complaint that the County had taken a portion

supra. He also acknowledges that he did not come into title until about 30 years after the dumping ceased at the old landfill/burn dump. But Nelson nonetheless argues that the standing requirement should not apply to him, because he did not thoroughly inspect the property and therefore paid too much for the land.² Nelson's position seems to be that a property owner who does not do a thorough inspection of his property before purchasing may be immune from legal "standing" requirements. Not surprisingly, Nelson cites no court which has ever so held.

In point of fact, there are no exceptions to the rule that a subsequent purchaser cannot bring an inverse condemnation claim based on a condition which was present before he purchased the property. As the Court of Appeals held in Hoover, the standing requirement is absolute and the new owner simply does not acquire any right to pursue inverse condemnation:

Because the right to damages for an injury to property is a personal right belonging to the property owner, the right does not pass to a subsequent purchaser unless expressly conveyed.

79 Wn. App. at 433-34; In accord, Crystal Lotus Enterprises v. City of Shoreline, supra, 167 Wn. App. at 504-505.

Nelson has admitted that he visited the property three times before he purchased it. (CP 15). Furthermore, his own photographs depict debris

of the property and therefore Frame could not pass title to the entire property. (CP 12-13).

² The more likely explanation for the purchase price is that the sale occurred in 2007, at the peak of the "real estate bubble."

that is plainly visible to the naked eye. (CP 82-90). He thus had every opportunity to discover the debris on his property, which he now concedes is in plain sight. Nelson cannot avoid the “standing” doctrine for inverse condemnation by arguing that he failed to carefully inspect his property or notice the debris before purchase. Standing is a question of law. Guardianship of Cobb, 172 Wn. App. 393, 401, 292 P.3d 772 (2012). Nelson’s argument that he paid too much for the property is irrelevant to his claim against Skamania County.

C. The Statute of Limitations is Not a Disfavored Defense.

This case is a classic example of why statutes of limitations exist, and why the courts are reluctant to find exceptions to them. The purpose of a statute of limitations is to provide finality. Atchison v. Great Western Malting Co. 1612 Wn.2d 372, 166 P.3d 662 (2007). The defense of the statute of limitations is entitled to the same consideration as any other defense. Guy F. Atkinson Co. v. State of Washington, 66 Wn.2d 670, 430 P.2d 880 (1965).

The policy reasons for applying statutes of limitations were thoroughly discussed by the Court of Appeals in Kittinger v. Boeing Co., 21 Wn. App. 484, 585 P.2d 812 (1978):

The statute of limitations effectuates two different policies [citations omitted]. First is the policy of repose, i.e., it is intended to instill a measure of certainty and finality into one’s affairs by eliminating the fears and the burdens of threatened litigation. Second, it is intended to protect one against stale claims because they are more likely to be spurious and consist of untrustworthy evidence than are

fresh claims. One is also less likely to have witnesses and relevant evidence available to defend against stale claims.

21 Wn. App. at 486-87.

The above policy considerations are clear in this case. The alleged tortious activity of which Nelson complains occurred many decades ago. There is no witness who has provided any evidence of tortious activity by the County since the late 1970s. Moreover, the County now has a pristine transfer station in place and the property which Nelson owns has gone through multiple ownerships between the 1970s and the time of his purchase. The source of the debris on his property can never be determined with confidence. Under these circumstances, it is unfair for Skamania County to have to defend claims for incidents allegedly occurring more than 30 years ago. The trial court properly applied the statute of limitations as a bar to Nelson's claims.

D. The Introduction of Evidence That Nelson's Claim Was Retaliatory is Not Germane to the Result.

Nelson argues that the trial court should not have "admitted" evidence that Nelson made no complaint about the condition of his property until he was sanctioned by Skamania County for illegal logging and damage to the riparian corridor on Canyon Creek. He cites several cases stating that irrelevant evidence is not admissible. But these cases have no application in the context of a summary judgment motion, as both the trial court and this Court are perfectly capable of according the "retaliation" evidence such weight (or no weight) as may be appropriate.

Whether or not the circumstances in which Nelson brought his claim against the County would properly be admissible before a jury is irrelevant here. Summary judgment was based not on that factual background, but rather was based on the legal defenses of the statute of limitations, the absence of standing and the absence of the required elements for a continuing trespass claim.

VI.

CONCLUSION

For all the above reasons, this Court should affirm the summary judgment order entered by the trial court.

DATED this 16th day of April, 2013.

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