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DIVISION II
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STATE OF WASHINGTON
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No. 50458-8

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

RUTH 2, LLC

Appellant

vs.

SOUND TRANSIT AND CITY OF TACOMA

Respondents

Appellant's Opening Brief

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STATEMENT OF THE CASE

This was an action of plaintiff corporation for damages for flooding of a lot contiguous to the Sound Transit rails in the City of Tacoma. The plaintiff LLC and its owner Don Ruth had owned the lot for in excess of twenty-five years.

As part of a joint operation between the City of Tacoma and Sound Transit a sidewalk was installed and the storm sewer was moved to a different location. Mr. Ruth filed claims against Sound Transit on behalf of his LLC and against the City of Tacoma. The claims were not filed within the three year tort claim statute of limitations, however, they were filed and rejected by both entities.

On April 21, 207, the defendants moved for a summary judgment (clerk's papers pages 23 - 49). The summary judgment was granted without specific findings. (clerk's papers pages 275 - 277

ASSIGNMENT OF ERRORS

1. The trial court erred in ruling that the Statute of Limitations precluded plaintiff's claim under RCW 4.16.130.

2. That the complaint against the City of Tacoma should not be dismissed for failure to wait sixty days to file after rejection.

3. That the claim that the claim should be dismissed because the actions of the defendants were proper under the Common Enemy Doctrine.

4. That the plaintiff established by his expert testimony, being an engineer, that there was flooding caused by the alteration of the premises putting in a sidewalk by the defendants.

ISSUES PRESENTED ON SUMMARY JUDGMENT

Issue 1: That plaintiff's amended complaint for damages against Sound Transit should be dismissed with prejudice in its entirety where the plaintiff's claim for damages to real property are time barred RCW 4.16.130.

Issue 2: That the City of Tacoma should be dismissed as the defendant did not wait for time period after receiving the rejection of the claim to start his litigation.

Issue 3: That plaintiff's action should be dismissed under the Common Enemy Rule.

Depositions were taken, affidavits filed and the trial Judge granted the motion for summary judgment on May 19, 2017 based on the record filed in the court without particular specific findings, but just a general granting of summary judgment of defendants claims with prejudice, although the caption of the pleading refers to granting the City of Tacoma's motion for summary judgment (clerk's papers pages 275 - 277). The plaintiff

has appealed this case to the Court of Appeals.

ISSUES

1. Statute of Limitations

Defendants claim that the three year Statute of Limitation period applies. It has long been held that the Statute of Limitations for inverse condemnation is ten years.

In Highline School District v. Port of Seattle, 87 Wn.2d 6 (1976), the court held at page 12:

> By virtue of the doctrine of prescription, as the trial court reasoned, a 10-year statute of limitations applies to the school districts's inverse condemnation action.

Walla Walla v. Conkey, 6 Wn.App. 6 (1971), the court held at page 17:

> Consequently, the jury should have been allowed to make that factual determination under instructions to the effect that, to recover, appellants must establish by a preponderance of the evidence that the damage to their property had, within 10 years prior to the commencement of the action, differed substantially in kind or was substantially great in degree than it had been prior to the commencement of that period. *See Ackerman v Port of Seattle, supra; Anderson v. Port of Seattle,* 66 Wn.2d 457 403, P.2d 368 (1965).

2. The claim against the City of Tacoma is not barred by Mr. Ruth's failure to wait sixty days:

RCW 4.96.010 provides:

> (1) All local governmental entities, whether action in governmental or proprietary capacity, shall be liable for damages arising out of their tortious conduct, or the tortious conduct of their past or present or present officers, employees, or volunteers while performing or in good faith purporting to perform their official duties, to the extent as if they were a private person or corporation. Filing a claim for damages within the time allowed by law

shall be a condition precedent to the commencement of any action claiming damages. The laws specifying the content for such claims shall be liberally constructed so that substantial compliance therewith will be deemed satisfactory.

3. The common enemy doctrine does not apply:

Defendants put great weight on Rothweiler v. Clark County, 108 Wn.App 91 (2001). Rothweiler is very limited on its facts. It refers to a storm on June 4, 1997 that overwhelmed the County's draining system. The court found at page 94:

> . . . Because there is no evidence that the Court (1) inhibited he flow of a waterway or natural drain, (2) artificially collected and discharged water on the Rothweilers' property, or (3) altered the flow of water such that it needed to use due care to avoid unnecessary damage to the Rothweilers' property, it had no duty to prevent the flooding damage to the Rothweilers' property.

The Rothweiler decision involves a unique flooding.

In Gaines v. Pierce County, 66 Wn.App. 715 (1992), the court held at 71:

> . . . However, if government chooses to provide drainage by channeling surface water into a watercourse or drainway, it must exercise reasonable care not to substantially increase the volume or the velocity of water in a way that causes damage to adjacent land.

In Colella v. King County, 72 Wn.2d 386 (1967), the court held at page 390-391:

> (2) 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. *King Cy v. Boeing Co.*, 62 Wn.2d 454, 559051, 384 P.2d 122 (1963), and authorities cited . The county breached this duty when it transferred the surface water of Thompson Road across the acquired easement by culvert and into the ravine; thence to plaintiff's property.

(3) As to the second facet-the duty of the county to maintain its culverts and its ditch on the north side of Burns Street-we find the question answered many years ago in *Rankosky v. Tacoma*, 71 Wash. 148, 138 Pac. 2 (1912). The court said:

> Where a street is improved across such natural water course, it is incumbent upon the municipality not only to make an adequate bridge culvert, or passage for the water in the first instance, but to keep it in such condition that it shall not obstruct the stream thereafter. (Citing authorities).

Later the court stated:

> In the second place, the city while under no primary obligation to furnish drainage for surface water, even if this stream could be considered surface water, had a discretionary power so to do. Having constructed this drain and undertaken the performance of this discretionary duty, the obligation to maintain the drain in a safe and suitable condition was no longer a matter of mere discretion. . . . *there arose the positive duty to exercise reasonable care to maintain its original efficiency.* (Italics ours.)

The Declaration of Don Ruth (clerk's papers pages 50-79), shows that Mr. Ruth has an engineering degree, and has supervised large engineering projects over the years. That over the years his property never flooded until after the rail project. He testified that the alley was of sufficient height the water would go into the drain. There is a survey on file that shows the new catch basin is 1.4 feet higher than the old one. (clerk's papers 50-79.

The trial court decision should be set aside. In Sand & Gravel v. Thurston County, 198 Wn.App. 560 (2017), the court ruled at page 577:

I. STANDARD OF REVIEW

The County seeks review of the trial court's denial of multiple different motions throughout the pretrial, trial, and posttrial proceedings. We review an order for summary judgment de novo, engaging in the same inquiry as the trial court. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). We also review a trail court's denial of a CR 50 motion for judgment as a matter of law de novo, engaging in the same inquiry as the trial court, *Schmidt v. Coogan*, 162 Wn.2d 488, 491, 173 P.3d 273 (2007). "Granting a motion for judgment as a matter of was is appropriate when, viewing the evidence most favorable to the nonmoving party, the court can say, as a matter of law there is no substantial evidence or reasonable inference to sustain a verdict for the nonmoving party." *Sing v. John L. Scott, Inc.*, 134 Wn.2d 24, 29, 948 P.2d 816 (1997). "'Substantial evidence' is evidence sufficient to persuade a faire-minded, rational person that the premise is true." *Hawkins v. Diel*, 166 Wn.App. 1, 13, 269 P.3d 1049 (2011). Finally, we review a denial of a new trial based on CR 59, an issue of law, de novo, *Mears v. Bethel Sch. Dist. No. 403*, 182 Wn.App. 919, 927, 332 P.3d 1077 (2014), *review denied*, 182 Wn.2d 1021 (2015).

CONCLUSION

Plaintiff has established good cause for a case of inverse condemnation that is not barred by the three year Statute of Limitation. The City had denied his claim when he commenced the amended complaint against the City. There is clearly a factual basis of dispute as to the historical drainage of the property and how it was affected by the improvements made by the defendants. The trial court should not have summarily dismissed this case.

The property owner has testified (clerk's papers pages 50-79) that the raising of the drain and reconfiguration of the alley and sidewalk has caused flooding. The flooding did not

start occurring until after the defendants completed their project which put in a sidewalk and changed the location of the storm drain. All this happened in the past ten years. He is well qualified as being an engineer and is an expert to testify his opinions, and the flooding has been documented by photographs attached as Exhibit E to his Declaration of Don Ruth in Opposition to Motion for Summary Judgment (clerk's papers pages 50-79).

Respectfully submitted this 2nd day of October, 2017.

Geoffrey Cross, WSBA 3089
Attorney for Appellant

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RUTH 2, LLC, Appellant, vs SOUND TRANSIT AND CITY OF TACOMA, Respondents	)	NO. 50458-8 DECLARATION OF DELIVERY

The undersigned that on the 2nd day of October, 2017, your declarant deposited with ABC/Legal Messengers a true and correct copy of the Appellant's Opening Brief dated October 2, 2017 in the above entitled matter to be delivered to:

Susan K. McIntosh
A. Grant Lingg
Forsberg & Umlauf, P.S.
901 Fifth Avenue, Ste 1400,
Seattle, WA. 98401

Pursuant to RCW 9A.72.085, I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 2nd day of October, 2017, at Tacoma, WA

Diane Tylen

Diane Tylen