

FILED

APR 19 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

No. 283160

COURT OF APPEALS, DIVISION III

STATE OF WASHINGTON

LLOYD A. HERMAN and LINDA J. HERMAN, husband and wife,
individually and the marital community composed thereof,

Appellants,

v.

THE STATE OF WASHINGTON by and through the DEPARTMENT
OF ECOLOGY and the DEPARTMENT OF FISH & WILDLIFE, et al.,

Respondents.

FROM THE SUPERIOR COURT OF SPOKANE COUNTY

THE HONORABLE
KATHLEEN M. O'CONNOR

BRIEF OF APPELLANTS LLOYD A. HERMAN AND LINDA
HERMAN

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I.

ASSIGNMENTS OF ERROR

A. The trial court erred and abused its discretion by granting the Respondents' motions for summary judgment for dismissal on asserted grounds the Appellants' action for violations of federal and state civil rights, RCW Chapter 64.40, tort, and breach of contract were barred by the running of the applicable statute of limitations set forth in RCW 4.16.080(2).

B. The trial court erred and abused its discretion by denying the Appellant's motion for reconsideration, or in the alternative, new trial.

C. The trial court erred in finding that the Appellants filed their Summons and Complaint after the applicable statute of limitations set forth in RCW 4.16.080(2) for bringing an action for violations of federal and state civil rights, RCW Chapter 64.40, tort, and breach of contract had expired.

II.

**ISSUES PERTAINING TO
ASSIGNMENTS OF ERROR**

A. Whether the trial court erred and abused its discretion by granting the Respondents' motions for summary judgment for dismissal on grounds the Appellants' actions for violations of federal and state civil

rights, RCW Chapter 64.40, tort, and breach of contract were barred by the running of the applicable statute of limitations set forth in RCW 4.16.080(2). (Assignment of Error I.A.)

B. Whether the trial court erred and abused its discretion by denying the Appellant's motion for reconsideration, or in the alternative, new trial. (Assignment of Error I.B.)

C. Whether the trial court erred in finding that the Appellants filed their Summons and Complaint after the statute of limitations set forth in RCW 4.16.080(2) for bringing an action for violations of federal and state civil rights, RCW Chapter 64.40, tort, and breach of contract had expired. (Assignment of Error I.C.)

III.

STATEMENT OF THE CASE

A. BACKGROUND

This case involves a land use decision by the Respondent State of Washington ("the State") attempting to enforce what it thought were land use code violations by land owner Herman and required a review process similar to a permitting process.

Appellants Lloyd Herman and Linda Herman claim the State restricted the manner of use, enjoyment, and development of their property by the alleged code violation enforcement. A process to determine

whether there were code violations was an appeal of the State's order to the Shoreline Hearings Board (SHB) to determine what uses, enjoyment, and development the Appellants were available to them as property owners. Until these uses are so determined, the actions for violation of civil rights under 42 USC Sec. 1983 pertaining to the unreasonable restrictions placed on the Appellants and their use by the State are not yet ripe.

As a part of the review process, the Appellants appealed to the Spokane County Superior Court which, in response, determined the code enforcement imposed by the State to be improper and determined what proper use the Appellants could place on their property.

At that point, Appellants' cause of action accrued because they finally knew the restrictions imposed by the State were determined to be unlawful in the State's over zealous code enforcement. Until the review process was completed, the unlawfulness of the code enforcement restricting the Appellants' use had not yet been determined.

The Superior Court, per Judge Austin, completed the review process and determined that the use and development that the Appellants had placed upon their property was allowed under the relevant statutes and regulations. The injury to the Appellants did not occur until the Superior Court rendered its decision.

The Appellant Lloyd A. Herman (hereinafter "Herman") has resided on the property located at 24603 East Tum Tum Drive along the shoreline of Liberty Lake in one form or another, since about 1953 as both a child and an adult owner of the property. (CP 237) The property was purchased by his father, Fred W. Herman sometime in 1953 and the Herman family has resided there ever since. (CP237-238) Herman purchased the property from his father in 1970 and has resided there since that date. (CP 238)

In the early 1990s, Herman began performing what he considered to be routine maintenance and repair to the existing facilities on his property. (CP 238) In 1993, among other things, Herman replaced the original deck with a slightly larger deck, with dimensions of approximately 22 feet by 22 feet, and constructed a roof cover over the deck. (CP 238) Herman also replaced the steps on the end of the preexisting platform to the floating dock for reasons of safety which including the generating of cement steps on each side of the structure. (CP 238) This resulted in the stairway to the dock being safer than the old stairway. (CP 238) At the same time, Herman assisted his neighbor, Dennis Halsey ("Halsey") in building a bulkhead from rocks on the beach in front of Halsey's property and poured a concrete bulkhead and stairway to be used for the attachment of Halsey's dock (which was similar to the

one on Herman's property). (CP 238-239) In December 1992, a public agency of the State -- the Department of Fish and Wildlife ("DFW") --- notified Herman that the work he had begun by adding steps to the pier, his beginning to rebuild the retaining walls, and the redoing of the deck and deck building was in violation of the Hydraulic Act. (CP 239) At or about the same time, another public agency of the State --- the Department of Ecology ("DOE") --- alleged that Herman had violated the states' Shoreline Management Act ("SMA") and the Spokane County Shoreline Master Program ("SCSMP") by engaging in the above described work. (CP 239) Ultimately, DFW cited both Herman and Halsey with gross misdemeanors. (CP 239) On September 23, 1993, DFW ticketed Herman and Halsey asserting violations of RCW 75.20.100, and they received a complaint alleging the above violation on February 3, 1994 and a summons on February 7, 1994. (CP 239-240)

The tickets were dismissed by a trial court in 1995. (CP 239) Undaunted, in October 1993, the DOE issued Notices of Order and Penalty to Herman and Halsey which alleged they had performed work in violation of the SMA and the SCSMP. (CP 239-240) The DOE fined them \$1,000 each for these alleged violations. (CP 240) These notices were issued despite the fact that, according to Respondent James Anest, the Enforcement coordinator for the DOE's Shorelines Program during the

early 1990's, the DOE considered Herman's alleged pre-1993 violations to be "relatively minor" compared with others. (CP 240)

In response to this Notice, both Herman and Halsey immediately stopped further work on their respective decks and/or other structures and appealed the \$1,000 penalty and order to the Shorelines Hearings Board ("SHB"). (CP 240) Herman and Halsey contested all allegations of the Order and Penalty and then reached a settlement with the DOE. (CP 240) As part of the settlement, the DOE rescinded the \$1,000 penalty and Herman and Halsey dismissed their appeals. (CP 240) The settlement was memorialized in a 1995 "Stipulation and Agreed Order of Dismissal," in which the parties to Herman's 1994 appeal agreed to the following conditions:

- (1) The concrete steps and platform shall remain. The Appellant [Herman] shall entirely remove the historic lift and crane to create shallow water fish habitat. If required, the Appellant will obtain an HPA prior to beginning work for the removal of the crane and lift and that portion of the bulkhead described in section 2. The Appellant also shall remove the fill and stacked rocks under the newly constructed portion of the deck.
- (2) Appellant shall remove the retaining wall or bulkhead twelve feet from the maple tree located next to the north property line.
- (3) Appellants shall remove the eastern half of the deck cover and the two eastern supporting poles shall be cut off flush with the decking. Appellants may

construct a storage shed with a height no more than eight feet, a width no more than the width of the deck, and a depth no more than eleven feet, four inches. Appellant will paint or stain the deck in nontoxic, earth tones.

- (4) Appellant shall plant native vegetation consistent with the pedestrian trail for stabilization of the bank. Vegetation may include shrubs, trees, and low growing vegetation.

(CP 240-241)

Halsey agreed to the following condition:

The Appellant [Halsey] will remove the retaining wall or bulkhead. The concrete steps and platform may remain. If required, the Appellant must obtain an HPA prior to beginning work for removal of the retaining wall.

(CP 241)

Still, before the dismissal of the complaint, Herman and Halsey had applied for hydraulics permits, which were turned down and they appealed to the board. (CP 241-242) Once the complaint was dismissed for failing to get a hydraulics permit, the project was judicially determined to not need hydraulics permits. (CP 242) Herman and Halsey continued the appeal of the hydraulics permit out of an abundance of caution, but the issues really became moot. (CP 242)

Pursuant to the 1995 settlement order, Herman removed the historic lift and crane. (CP 242) However, he did not remove the foundation pier (including the concrete cap) because DFW Enforcement Officer Brooks Carmichael opposed the issuance of the hydraulic project approval, the issuance of which would have allowed Herman to remove the foundation pier. (CP 242) In addition, Herman undertook several

other 1995 order-related several construction project to comply with the order's provisions as he understood them. (CP 242) Herman constructed an enclosed storage structure on the deck of approximately 129 square feet in area (18 feet wide by 18 feet deep), less than half the size in total square footage as the 283 square feet in area (25 feet wide by 11.33 feet deep) allowed by the 1995 Order. (CP 242-243) This structure had a ceiling height of approximately 7.5 feet. (CP 243) Also, Herman and his stepson, Robert Crowley, undertook the repair and maintenance of several sections of the single-family bulkhead along the beachfront of the property. (CP 243) The bulkhead repair of the north section consisted of cementing the rocks in the bulkhead together, and placing a cement cap on the top of the bulkhead. (CP 243) The footprint, configuration, height, and width of the bulkhead walls remained the same with the exception that the north section was about six inches higher because it was capped with concrete. (CP 243)

The north bulkhead was built on the exact rock foundation which existed at the time of its original construction, which predates adoption of the SMA and the SCSMP. (CP 243) In order to comply with the agreed order on the south side of the property, the rock was removed from beneath the deck and pushed back three to four feet and the retaining wall, located on the south side of the property, was removed and pushed back five to six feet, increasing the beach shoreline by almost 300 feet. (CP 243-244) The work was done entirely with manual labor and hand tools. (CP 244)

Also, in accordance with Paragraph 4 of the 1995 order, Herman undertook the stabilization of his hillside. (CP 244) The Herman's home was located 60 feet above the lake and sat back 54 feet from the shore. (CP 244) The access to the lake consisted of traversing a railroad tie path down a rock cliff to the beach. (CP 244) Herman hired a contractor who designed a stabilization plan which included the construction of a stairway, retaining walls, and storm-water swales. (CP 244) All of these were constructed put into place to facilitate water runoff and seepage from the hillside and to stabilize the hillside by preventing and/or minimizing gravitational movement downward toward Liberty Lake which would cause damage to the Herman home and possibly injuries to land occupants. (CP 244) The stairway and retaining walls permitted planting of vegetation to be placed on the slope to help stabilize it as was required in the 1995 order. (CP 245) In addition, Herman poured a concrete cap on the bulkhead to consolidate it and make it a substantial tow against the unstable hillside. (CP 245) A new patio cover was constructed and designed to allow run-off into a newly constructed storm-water swale that also served as a swale for the stairway. (CP 245) The results of this construction prevented debris laden water from running directly into Liberty Lake without first being filtered by a storm-water swale. (CP 245) The net result of the work accomplished the needed stabilization of the bank to eliminate the danger of bank failure, damage to the Herman's home, and risk of injury to land occupants. (CP 245)

Herman's neighbor Halsey, however, did not comply with provisions of the 1995 Order as the terms of the same applied to him. (CP 245-246) Rather than removing the retaining wall or bulkhead, Halsey added an extension to it and, by 2005, had placed a keystone retaining wall above the bulkhead along the entire waterfront and build and 10.5 foot storage building on the bulkhead he was ordered to remove. (CP 246) Additionally, Halsey remodeled his dock by using 17 feet of Herman's dock which was also being remodeled. (CP 246) Halsey applied for and received an after-the-fact permit for the building and was further notified that the remodeling and construction of his dock was exempt from a substantial development permit pursuant to the applicable sections of the WAC and the Spokane County Shoreline Program. (CP 246)

B. RELATED ADMINISTRATIVE PROCEDURE AND LITIGATION

On May 21, 2004, the DOE issued to Herman Shoreline Violation Order No. 1038 (dated May 17, 2004). (CP 137-141; CP 246) The Order and Penalty alleged that Herman had undertaken the following development in violation of the SMA, the SCSMP and the 1995 Agreed Order:

- (1) Substantial amounts of fill and bulkheading were placed waterward of the ordinary high water mark;
- (2) The storage structure was modified and expanded by increasing the size and adding plumbing and wiring, and:

- (3) The boat lift and crane that he had agreed to remove in the 1995 stipulation was, in fact, encased in a concrete and rock bulkhead, with the effect of permanently fixing its [sic] location waterward of the ordinary high water mark of Liberty Lake.

(CP 137-141)

As a consequence of these alleged violations, the DOE assessed Herman a civil penalty in the amount of \$30,000. (CP 247) Additionally, Herman was ordered to "immediately cease and desist from all further filling and construction activities within 200 feet of the ordinary high water mark of Liberty Lake, or within associated wetlands on the above referenced parcel, unless and only to the extent such work is specifically authorized by a currently valid shoreline permit issued by Spokane County or authorized by an enforcement order from both the Department of Ecology and Spokane County for the purpose of restoring the site." (CP 137-141; CP 247) Herman was further required to "submit a plan within thirty (30) days of his receipt" on the Order in which he was to describe in detail "his plans to restore to the maximum extent feasible, the shoreline of Liberty Lake." (CP 140-141) This plan had to be sent to Michael Maher of the Shorelands and Environmental Assistance Program. (CP 140-141) The Order and Penalty contained no mention of Halsey's activities nor was Halsey issued any such similar order or directive. (CP 248) Herman immediately ceased all work and timely appealed the Notice of Order and Penalty to the Shorelines Hearings Board, Case No. SHB 04-019. (CP 248)

On June 11, 2004, Herman applied in writing to the DOE for remission and/or mitigation of his penalty. (CP 248) In the documentation filed with the appeal, an engineering report by Ernest L. Corp, Ph.D., was included which explained the mitigation that had taken place since the 1995 Order and everything that had been done to comply with its terms. (CP 248) However, there was no response or comment until Herman received the DOE's Notice of Disposition Upon Application for Relief from Penalty Docket No. 1038 dated August 23, 2004 which denied his application for remission and/or mitigation of his penalty without significant commentary. (CP 142-143; CP 249)

On January 24, 2005, the DOE and DFW, while filing responses to Herman's discovery requests, expanded several of their accusations by addressing activity landward of the ordinary high water mark of Liberty Lake. (CP 145-148) In their responses, DOE and DFW stated that the May 17, 2004 Notice of Order and Penalty was based on the following alleged violations of the 1995 Stipulation and Agreed Order of Dismissal, as well as the Shoreline Management Act and the Spokane County Shoreline Master Program:

Constructing hillside stabilization measures "described in the engineering report submitted by Mr. Herman dated June 10, 2004."

Deck and dock improvements "described in the engineering report."

Reconstruction and improvement of the "pavilion structure" located on the deck.

Bulkhead improvements and fill described in the engineering report.

Failure to remove the bulkhead and crane.

Failure to comply with the "other requirements of the stipulation including the planting of native vegetation and removal of the fill and rock under the newly constructed portion of the deck."

(CP 146 and CP 153)

Again, there was no mention of Halsey's activities by the DOE and DFW nor was Halsey given similar notice despite the fact that a commonality existed between the adjoining properties. (CP 250)

The SHB held a three-day hearing on May 12, 13 and 16, 2005. (CP 250) At the hearing, the SHB heard testimony from Herman and his expert witnesses that the concrete cap poured on top of the existing single-family bulkhead served an integral purpose in the stabilization of the steep slope on the Herman's property and that the concrete cap on the top of the bulkhead served as a buttress to the toe of the slope, increasing slope stability. (CP 250) Without the bulkheading system as a whole, the safety factor of the slope would have been dangerously low and unacceptable. (CP 250) Further testimony was provided to the effect that removal of the foundation pier would not open up fish habitat even if the existing concrete cap was removed because its foundation is set on the solid rock of the naturally-occurring talus slope. (CP 250) In fact, as the testimony established, the structure provided a net benefit to the Liberty Lake aquatic environment since the structure created by Herman had a lot of phytoplankton and an ecological environment had been developed. (CP 250-251) Moreover, by moving portions of the south beach bulkhead landward rather than removing the foundation pier, Herman created

approximately 295 square feet of new habitat. (CP 251) (When this project was discussed during the June 6, 2004 meeting between Herman and respondent Maher of the DOE and respondent Moser of the DBP, respondent Maher stated that this substitution would probably meet the requirements of the 1995 Order.) (CP 251)

Indeed, in response to the favorable testimony toward Herman's development adduced at the hearing, the DOE and DFW presented no opposing evidence or counter-arguments. (CP 251) Despite the evidence Herman presented and the failure of the DOE and DFW submit any counter-evidence or refute Herman's claims, the SHB's "Findings of Fact, Conclusions of Law" and Order" affirmed the \$30,000 civil penalty assessed by the DOE but suspended \$10,000 of the \$30,000 making the sum payable within one year from its date if Herman fully complied with the conditions specified in the Board's Order. (CP 251-252) Among other things, these new impositions included:

- (1) That Herman reduce the size of his deck structure, to a maximum height of eight feet, and an enclosed area of 22 feet in width and 11 feet four inches in depth;
- (2) That Herman remove two flights of steps on the sides of the main steps that go down to the beach;
- (3) That Herman remove the concrete cap on the bulkhead, and all other concrete north of the iron railing, an area about 42 feet long and four to nine feet in width; and

- (4) That Herman remove the concrete pier where the historic boat lift and crane were formerly situated.

(CP 252)

In support of its decision, the SHB entered findings and conclusions that Herman both violated the terms and conditions of the previous 1995 Agreed Order, and undertook "new development" after 1995 without securing required shoreline permits in violation of the SMA and the SCSMP. (CP 252) The SHB rejected Herman's contention that all his development activities, including those outlined above, were allowed by the 1995 Agreed Order and/or constituted exempt repair and maintenance of preexisting legal nonconforming structures or uses. (CP 252-253) However, the SHB did permit 90% of the structures on the shoreline to remain, ordered post hearing expert evaluation and correlative report to be produced regarding the hillside stabilization structures and directed Herman to present a restoration plan in accordance with the experts' opinions regarding the hillside stabilization. (CP 253)

On August 23, 2005, Herman timely filed an administrative appeal of the Board's Order in the Spokane County Superior Court. (CP 253) Among other things, he assigned error to certain of the Board's Findings of Fact and, Conclusions of Law, several procedural errors by the Board, and a number of substantive legal errors by the Board. (CP 253)

The Superior Court, the Honorable Robert Austin presiding, decided on August 23, 2007, inter alia, that no further permits were needed and that the structures complained about should remain on the

property, thereby affirming the SHB's order permitting the shoreline structures. (CP 189-203; CP 253-254) Furthermore, Judge Austin allowed the hillside stabilization recommendations following the examination by the experts who were ordered to conduct the examination and report by the SHB. (CP 189-203; CP 253-254)

The net result of Judge Austin's ruling was that the Court allowed all the structures created by Herman from 1995 forward with the exception of two small stairways which the SHB had authorized Herman to place in a different location. (CP 189-203; CP 253-254)

Thereafter, Judge Austin ordered the case to be remanded back to the SHB so that it could determine the amount of the civil penalty to be paid and whether the penalty could be used for on-site restoration. (CP 254) The DOE and DFW appealed the trial court's decision. P 254) On February 5, 2009, Division III of the Washington State Court of Appeals reversed the lower court's decision "insofar as it [was] inconsistent with the decision of" the SHB and affirmed the Board's order. *Lloyd A. Herman v. State of Washington Shorelines Board, et al.*, No. 26459-9-III (Feb. 5, 2009), Slip Op. at pg. 2. (CP 641-657) The case was remanded to Spokane County Superior Court where it was back to the SHB for final determination. To date, the SHB has not made its final decision.

C. ACTION BEFORE THE COURT

On January 23, 2008, Herman filed suit against the Respondents in Spokane County Superior Court for violations of federal and state civil

rights, and RCW Chapter 64.40. (CP 1-28) Herman amended his complaint on March 25, 2008 to add claims for tort of outrage, negligent infliction of emotional distress, abuse of process, malicious prosecution, violations of CR 11, subordination of perjury, failure to train and supervise, tortious interference with use of property, and negligent inspection of property. (CP 28-79) Herman was given permission to and filed a second amended complaint on January 23, 2009 that added a breach of contract claim. (CP 619-621)

The Respondents State of Washington (“State”) by and through the Department of Ecology (“DOE”) and the Department of Fish & Wildlife (“DFW”), Michael and Jane Doe Maher, James and Jane Doe Anest, and Karin A. Divens and John Doe Divens filed a motion for summary judgment on August 15, 2008. (CP 100-113) The Respondents Spokane County (“the County”) by and through the Department of Building and Planning (“DBP”), William and Jane Doe Moser, Thomas Moser and Jane Doe Moser joined the State’s motion for summary judgment filed on August 27, 2008. (CP 204-205) The trial court heard and granted the Respondents’ motions for summary judgment on February 26, 2009. (CP 661-663) Herman filed Motions for Reconsideration of the decision dismissing the State on March 5, 2009 and the decision dismissing the County on March 30, 2009. (CP 685-686 and CP 729-730) The trial

court denied both Motions for Reconsideration on July 17, 2009. (CP 784-785) Herman filed his Notice of Appeal on July 31, 2009. (CP 786-809)

IV.

SUMMARY OF ARGUMENT

The trial court committed reversible error by failing to assume facts and inferences most favorable to the Appellant Herman, failing to review the evidence in a light most favorable to him, and failing to resolve all doubts in his favor when it granted of the Respondents' motions for dismissal on grounds Herman did not file his action within the applicable three-year statute of limitations set forth in RCW 4.16.080(2).

The trial court abused its discretion by failing to consider the facts and law in its denial of Herman's motion for reconsideration.

The trial court erred in its finding that Herman failed to bring his action for violations of federal and state civil rights, RCW Chapter 64.40, tort, and breach of contract against the Respondents within the applicable three-year statute of limitations set forth in RCW 4.16.080(2).

The Appellant Herman respectfully requests that this court reverse the trial court's decision and remand this case back to Spokane County Superior Court.

V.

ARGUMENT

A. STANDARD OF REVIEW ON APPEAL

1. Appeal of summary judgment: de novo review

On appeal of summary judgment, the standard of review is de novo, and the appellate court performs the same inquiry as the trial court. *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). The trial court's entry of summary judgment is subject to complete and independent review and this Court is free to evaluate de novo the evidence proffered by both parties to determine whether there are actual issues to be tried and whether the law was applied correctly. *Marincovich v. Tarabochia*, 114 Wn.2d 271, 274, 787 P.2d 562 (1990). Before granting a summary judgment, this Court must assume facts and inferences most favorable to the non-moving party. *Ruff v. County of King*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995); CR 56. When the pleadings, affidavits, and other documents before the court establish that no such material issue of fact exists, the moving party is entitled to judgment as a matter of law. *Id.* Nevertheless, the court cannot grant a motion of summary judgment "if reasonable minds could draw different conclusions from undisputed facts or if all the facts necessary to determine the issues are not present." *Schwindt v. Lloyd's of London*, 81 Wn.App. 293, 295, 914 P.2d 119 (1996).

Here, the trial court's granting of the Respondents' motions for summary judgment was inappropriate since the decision failed to assume facts and inferences most favorable to the Appellant Herman. Unlike the trial court, this Court must review the evidence in a light most favorable to Herman and resolve all doubts in his favor.

2. Appeal of denial of motion for reconsideration.

The grounds upon which a motion for new trial or reconsideration may be granted are based on C.R. 59(a) (7), (8), and (9) which states as follows:

(a) Grounds for New Trial or Reconsideration. The verdict or other decision may be vacated and a new trial granted to all or any of the parties and on all or part of the issues when such issues are clearly and fairly separable and distinct, on the motion of the party aggrieved for any one of the following causes materially affecting the substantial rights of such parties:

...

(7) That there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law;

(8) Error in law occurring at the trial and objected to at the time the party was making the application;

(9) That substantial justice has not been done.

The Court of Appeals reviews a trial court's denial of a motion for reconsideration for abuse of discretion. *Estate of Peterson, In re*, 102 Wn.App. 456, 463, 9 P.3d 845 (2000). Abuse of discretion occurs when

the trial court's decision rests on untenable grounds or untenable reasons.

Id.

In this case, the trial court denied the Appellant Herman's motion for reconsideration. This was an error. This Court must review it according to the abuse of discretion standard.

B. STATUTE OF LIMITATIONS: RESPONDENTS ARE INCORRECT REGARDING THE ACCRUAL DATE OF THE CAUSES OF ACTION

1. Statute of limitations: relevant statutory and case law

The Respondents' Motions for Summary Judgment were premised on the assumption that the relevant statutes of limitation bar all of Herman's causes of action – in particular, the three-year statute of limitations set forth in RCW 4.16.080(2). Herman's complaint was filed on January 23, 2008 and the Respondents claim this is more than three years after the action allegedly accrued on May 21, 2004 - the date Herman received Shoreline Violation Order No. 1038 from the DOE. Respondents maintain that this is the date wherein the Hermans have to maintain that they were harmed and, ergo, the following claims against the Respondents should be time-barred:

- (1) Deprivation of their rights (including rights to procedural and substantive due process and equal protection) under the United States Constitution;
- (2) Violation of 42 USC Sec. 1983;

- (3) Deprivation of rights afforded within the Washington State Constitution;
- (4) Damages caused by the State's "arbitrary, capricious," and "unlawful" actions in excess of its authority as provided within RCW 64.40;
- (5) Injury and damages caused by negligent infliction of emotional distress; and
- (6) Injury and damages caused by acts of malicious prosecution.¹

The Respondents' presumptions are based upon a misguided and false understanding of the facts and, concomitantly, the relevant law to be applied to the facts that control this case. When the statutes of limitation for Sec. 1983 actions are discussed, federal law controls the question of when a cause of action accrues. *Robinson v. City of Seattle*, 119 Wn.2d 34, 86, 830 P.2d 318 (1992). In determining when an act occurs for statute of limitation purposes, the court looks to when the operative decision occurred and separates from the operative decisions those inevitable consequences that are not separately actionable. *RK Ventures, Inc. v. City of Seattle*, 307 F.3d 1045 (9th Cir. 2002). An action accrues when a plaintiff knows or should know the factual basis for the claim

¹ The Appellants dismissed their other claims of injury and damages caused by abuse of process, injury and damages caused by knowingly allowing agents to engage in deliberate and false testimony, injury and damages caused by failure to train and supervise employees, injury and damages caused by tortious interference with use and enjoyment of property, and injury and damages caused by negligent and spurious inspection and enforcement

against him or her. *See Gausvik v. Perez*, 392 F.3d 1006, 1009 (9th Cir. 2004).

2. Equitable estoppel to assert running of statute of limitations.

The Respondents state that the statute of limitations for actions brought under RCW 49.60 is three years. However, the court in *Douchette v. Bethel School District*, 117 Wn.2d 805, 818 P.2d 1362 (1991), also established as a general rule that the statute of limitations in discrimination cases may be tolled where equitable grounds exist.

While equitable grounds do not exist in the present case, we do not rule out the possibility there may be cases in which the filing deadline for discrimination action may be equitably tolled. The United States Court of Appeals for the Third Circuit has stated: "the ADEA is remedial and humanitarian legislation which should be liberally interpreted to effectuate the congressional purpose of ending age discrimination in employment." *Bonham v. Dresser Indus. Inc.*, 569 F.2d 187, 193 (3d Cir. 1987).

While this case does not involve filing requirements under the ADEA, the federal cases provide helpful analysis. *In Perazzo v. Top Value Enters. Inc.*, 590 F.Supp. 428 (S. D. Ohio 1984), the court set forth several factors which should be considered in determining whether a filing deadline (with the EEOC) is equitably tolled: (1) Lack of notice of the filing requirement; (2) Lack of constructive notice of the filing requirement; (3) Diligence in pursuing one's rights; (4) Absence of prejudice to defendants; and (5) Plaintiff's reasonableness in remaining ignorant of the notice requirement. 590 F.Supp. at 433. To this list, we add two more factors: Claimant's reliance on deception or false assurances on the part of the employer against whom the claim is made; and claimant's reliance on authoritative statements made by the administrative agency that misled the claimant about the nature of her rights. *See Copeland v.*

Desert Inn Hotel, 99 Nev. 823, 826, 623 P.2d 490 (1983) (court allowed equitable tolling of statute of limitation because claimant was misled by the Nevada Equal Rights Commission).

Douchette, 117 Wn.2d at 811.

In a footnote at page 812, the *Douchette* court further states:

If the EEOC had actively been pursuing some type of nonjudicial resolution of the complaint, there might be a valid reason to toll the statute of limitation. Thus, we do not rule out the possibility for future cases that equitable grounds might exist which justify a tolling of the statute of limitation in a discrimination case.

C. 42 U.S.C. SEC. 1983 AND RCW 64.40 CLAIMS.

One of the fundamental underpinnings of our society is that members of our society have specific rights guaranteed by state and federal law and that if any of these rights are violated, the aggrieved individual is entitled to compensation. It is provided in the Civil Rights Act of 1871, codified as 42 USC Sec. 1983, that:

(e)very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

The court in *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989), set forth the vital function of 42 U.S.C. Sec. 1983 when it provided:

As we have said many times, Sec. 1983 "is not itself a source of substantive rights," but merely provides "a method for vindicating federal rights elsewhere conferred." *Baker v. McCollan*, 443 U.S. 137, 144, n.3 (1979). *Graham*, at 393-94.

The main elements of a Sec. 1983 action that a plaintiff must demonstrate are: (1) a person or entity has deprived the plaintiff of a federal, constitutional or statutory right, and (2) that offense was undertaken under color of state law. *Robinson v. City of Seattle*, 119 Wn.2d at 58. In a substantive due process claim, the plaintiff does not require proof that all use of one's property has been denied but rather show that the interference with property rights was irrational or arbitrary. *Id.* at 61. It is also no defense to a Sec. 1983 action that defendant had no "specific intent" to cause deprivation of civil rights. *Id.* at 65. Substantive due process is violated at the moment harm occurs. *Id.* at 88.

Actions by property owners under RCW 64.40 concern acts of an agency that are "arbitrary, capricious, unlawful or exceed lawful authority," or constitute "a failure to act within time limits established by law." RCW 64.40.020(1). The Respondent State contends Herman's RCW 64.40 claim is improper because he did not apply for a permit. Yet,

this ignores the fact that twice in 2004, Herman did apply for after-the-fact permits. One application sought a building permit for construction on Herman's house which was submitted to the Spokane County Department of Building and Planning on July 22, 2004. (CP 230-234) The Respondent Spokane County through its Department of Building and Planning (DBP) accepted the application as to the house but rejected the permit on any work which had been done within 50 feet landward of the ordinary high water mark. The other, for work Herman was going to perform on his dock, was submitted to DFW on March 24, 2004 but rejected May 6, 2004 on grounds that the agency did not issue after-the-fact permits and that "the SEPA had not been completed." (CP 235-236) Herman did not let these rejections lie but instead included them into his appeal of the DOE's order. This matter having to do with Herman's rejected permits has not yet been finally determined and, as such, the relevant 30-day statute of limitations set forth in RCW 46.64.030 has not yet run. Therefore, it is actually more likely that Herman's Sec. 1983 and RCW 64.40 claims are not yet ripe rather than stale.² Consequently, the trial court's decisions on summary judgment were premature.

D. DECISION MAKES INCORRECT ASSUMPTION ABOUT SHB

² Regarding the RCW 64.40 claim, the Respondent State in its brief for summary judgment did in fact mention that Herman might have not yet exhausted his administrative remedies. (See CP 108)

The trial court's decision was based upon its determination that the Shoreline Hearings Board ("SHB") was a quasi-judicial body rather than an administrative agency. Because of this, the trial court decided that the requirement that administrative remedies had to be exhausted before the relevant statute of limitations began running, as set forth in *Norco Construction, Inc. v. King County*, 801 F.2d 1143 (9th Cir. 1986) and *Hayes v. City of Seattle*, 131 Wn.2d 706, 934 P.2d 1179 (1997), was inapplicable. However, while it is true that the enabling act creating the SHB provides that it is a "quasi-judicial body," case law provides that the scope of review defines whether or not an administrative judge or body is, according to the nature of appellate review, in fact a "quasi-judicial body" or not. According to the Administrative Procedure Act, appeals to superior court from administrative decisions are limited to the record and can only be overturned for abuse of discretion, i.e., they are not de novo appeals. In determining the scope of review, the reviewing superior court looks to the nature of the administrative agency's action itself and not the administrative agency. See *Francisco v. Board of Directors*, 85 Wn.2d 575, 578-579, 537 P.2d 789 (1975). There are four factors used to determine whether an action of an administrative agency was performed in its judicial or administrative capacity: (1) whether the court could have

been charged in the first instance with the responsibility of making a decision; (2) whether the function of the agency is one the courts have historically performed; (3) whether agency performs judicial functions of inquiry, investigation, declaration, and enforcement of liabilities as they stand on present or past facts under the existing laws; and (4) whether the agency's action is comparable to the ordinary business of the courts. *Yaw v. Walla Walla School Dist.*, 40 Wn.App. 36, 38, 696 P.2d 1250 (1985). Using this analysis, the court looks at and determines how the decision from that body is to be reviewed. *Id.* If the court's review is de novo, then the pre-appellate body is determined to be quasi-judicial. *Id.* If the judicial body's review is limited to consideration of whether the agency acted arbitrarily, capriciously, or contrary to law, then the pre-appellate body is determined to be an administrative agency. *Id.*

Here, Spokane County Superior Court reviewed the SHB's decision against Herman using the standard of arbitrary and capricious rather than de novo thereby defining the SHB as an administrative agency. In light of this fact, the trial court's disregarding as irrelevant and inapplicable the rulings of the *Norco* and *Hayes* cases was incorrect. The statute of limitations in this case was not really been triggered since there was no final decision by the administrative agency (i.e., the SHB) that exhausted

Herman's available non-judicial remedies. Since that has not yet happened, Herman's claims are not time barred.

E. DUE PROCESS NOT MET BY IMPROPER SERVICE OF HERMAN

Still, even if one assumes for the sake of argument that Herman did not have to wait for the SHB's final decision in order for the statute of limitations to start running, the trial court still erred when it granted the Respondents' motions for summary judgment and later denied Herman's motion for reconsideration.

1. Proper Notice and Due Process

It is basic that proper notice and meaningful opportunity to be heard are fundamental to procedural due process. *See Deering v. City of Seattle*, 10 Wn.App. 832, 835-836 (1974); *see also Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 206, 314 (1950) ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their obligations.") Due process must allow a party to present a defense. *Duskin v. Carlson*, 136 Wn.2d 550, 557 (1998). Its purpose is to "fairly and sufficiently apprise those who may be affected by the proposed action or the nature and character of

the amendment so that they may intelligently prepare for a hearing.” *Barrie v. Kitsap County*, 84 Wn.2d 579, 584-585, 527 P.2d 1377 (1975). The essence of sufficient notice is to provide the “objective consequence upon the one who receives it, not the subjective attitude of the one who gives it.” *See Glaspey & Sons, Inc. v. Conrad*, 83 Wn.2d 707, 712 (1974) (quoting *Knutzen v. Truck Ins. Exch.*, 199 Wn. 1, 8 (1939)). Furthermore, at the state level, the “Notice of Hearing” section of the Washington Administrative Procedure Act at RCW 34.05.434 (2)(g) and (h) states that the agency notice “shall include” the following:

- (g) A reference to the particular sections of the statutes and rules involved:
- (h) A short and plain statement of the matters asserted by the agency.

If the “agency is unable to state the matters required by subsection (2)(h)” at the time notice is served, the “initial notice may be limited to a statement of the issues involved.” *See* RCW 34.05.434(3).

2. Trial Court’s Decision Unsupported by Relevant Facts and Law

In spite of the requirements mandated by procedural due process, the trial court’s decision granting the State’s motion for summary judgment ignored the facts and law when it determined Herman received proper notice of the State’s claims against him on May 17, 2004 in the DOE Shoreline Violation Order No. 1038 thereby determining that his

date was the triggering event for purposes of calculating the running of the statute of limitations. First, the trial court ignored the fact that this notice did not operate to apprise Herman of all the matters which were ultimately adjudicated before the SHB. In fact, Herman was only provided requisite notice that the hearing was to address violation for: (1) placing substantial amounts of fill and bulkheading waterward of the ordinary high water mark; (2) expanding the storage structure; and (3) failing to remove the boat lift and crane. (*See* CP 669-670) The DOE notice did not meet the requirements of RCW 34.05.434 and actually violated RCW 34.05.570(3)(c) by failing to provide notice regarding landward hillside stabilization in any manner, shape, or form.

Second (and more significantly), the trial court said nothing about the fact that the DOE and DFW brought forth entirely new set of claims before the SHB in the answers to Herman's interrogatories that were received from the DOE and DFW on January 24, 2005. (CP 127-128 and CP 145-147) The DOE and DFW had added allegations that Herman's work *landward* of the ordinary high water mark work on the dock and work the hillside (including the extensive hillside stabilization measures done in response to the 1995 Order) were in violation of the Shoreline Management Act (SMA) and the Spokane County Shoreline Master Plan (SCSMP). (*See* CP 669-670) None of these additional and different

matters were mentioned—let alone specifically identified—in the DOE Shoreline Violation Order No. 1038 dated May 17, 2004. Thus, if one assumes for the sake of argument that the State and the trial court are correct about the statute of limitations beginning to run on May 17, 2004, it would seem that would only apply to the allegations set forth in Order No. 1038. (*See* CP 137-141; CP 669-670) Being separate and affecting a different portion of Herman’s property, the portion of Herman’s action that concerns the DOE’s and DFW’s claims pertaining to the work done landward of the ordinary high water mark should have a different day of accrual, that being January 24, 2005, the date any semblance of notice was provided to Herman through his receipt of Answers to Appellants’ Interrogatories having the effect of amending the original notice which had been provided to Herman. (*See* CP 145-147 and CP 669-670) The amended notice increased the allegations of alleged unpermitted development by Herman by a factor of approximately four (4) times of what was set forth in the original notice. At the very least, this is a material issue of fact. However, the trial court’s oral opinion granting summary judgment failed to discuss (let alone consider) any of this. Moreover, without citing legal authority, the trial court “piggy backs” the separate claims from the January 24, 2005 interrogatory answers onto the

claims disclosed in Order No. 1038 on May 17, 2004 for statute of limitation purposes.

As such, the DOE Shoreline Violation Order No. 1038 dated May 17, 2004 failed to “fairly and sufficiently” apprise Herman of the nature of his violation so that he could “intelligently prepare for a hearing.” This lack of proper notice was even admitted by the defendant Michael Maher of the DOE. When asked during the SHB’s hearing on Herman’s case on May 12, 2005 about there being no mention in the Order dated May 17, 2004 about “any bulkheading or other work above the ordinary high water mark,” Deputy of Ecology enforcement officer Maher said, “I see no reference to work above the ordinary high water mark.” (CP 215) In response to the inquiry about whether Order No. 1038 “mentioned in any way the hillside bank stabilization and storm water detention work,” Maher stated it did not. (CP 215) Maher also said that Order No. 1038 did not present an opportunity to Herman to receive an after the fact permit. (CP 215) Maher acknowledged that had this been done in Order No. 1038 so that Herman had been notified that “the bank stabilization measures on the storm water detention system was a concern,” Herman could have sought an after the fact shoreline permit for the work. (CP 215-216)

The failure of the State through the DOE to provide proper notice in its Order No. 1038 was also testified to during the SHB hearing by Herman. Regarding the property applied to, he said “it was quite clear by the order, that they were only talking about the beach front” and that he “didn’t know it had anything to do with the hillside” since “the order itself was quite specific” and did “not refer to anything” there. (CP 217) [Emphasis added.] The lack of information contained in Order No. 1038 also was mentioned by Herman when he said, “I thought that this argument was over the beach and not the hillside.” (CP 217; CP 218; *see also* CP 225-226 and CP 229) [Emphasis added.] There were three things he understood to be of concerns that were at issue when he received the order: that the DOE said he “went waterward” and “filled waterward of the lake, that he “didn’t take out the sailboat pier,” and “that the building was bigger than they [the DOE] thought they approved.” (CP 219) Herman was “surprised that all of a sudden this hillside was part of it because” he thought it was “always a fight over the beach” and that the hillside was added because the DOE’s \$30,000 fine “was so outrageous for these small things on the beach.” (CP 219) In fact, Herman assumed that the reason why the hillside was not mentioned in Order No. 1038 was that the DOE decided to abandon the concern after investigating it in November 2003. (CP 219; CP 220) In his view, the DOE had “morphed”

the \$30,000 penalty set forth in Order No. 1038 for his beach activities into a “fine for the hillside.” (CP 223-224) As a consequence of the failure of the DOE to provide Herman with an appropriate due process notice, Herman’s mitigation plan was rejected by the DOE since it “addressed just the beach because I didn’t know the hillside was part of it, and they wouldn’t talk to me.” (CP 227 and CP 228)

The SHB agreed with Herman as to his failure to receive proper notice in Order No. 1038. The SHB’s decision emphasized that the entire hearing was unusual insofar as inadequate notice had been provided to Herman relative to those particular areas that the DOE sought to have restored including but not limited to hillside stabilization issues where no evidence was introduced by the DOE save post-hearing reports through experts selected by Herman and approved by the DOE. The SHB said, “This case is unique because Ecology’s order did not prescribe what structures had to be removed or modified in order for a restoration plan to be approved and this information was not provided until closing argument.” (*See* CP 181) The SHB went on to say that while “the requirement for the restoration plan” was valid, it could “only determine the scope of the restoration plan, including the fate of specific shoreline structures identified in legal issues.” (*See* CP 181) The Spokane County Superior Court’s decision on August 24, 2007 concurred with the SHB in

finding that Herman did not receive proper notice when, in its Conclusions of Law, it stated “the Petitioner’s case” was “unique because Ecology’s Regulatory Order did not proscribe which structures had to be removed or modified for the restoration plan to be approved.” (*See* CP 199)

F. WASHINGTON STATE CONSTITUTION CLAIM

The Respondents mischaracterize as an action for tort the Hermans' claim they were deprived of their Washington State Constitutional Rights, including, but not limited to, rights to procedural and substantive due process and equal protection under the Washington State Constitution. However, the Washington State Constitution provides, in pertinent part, the following:

SECTION 1: POLITICAL POWER

All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights.

SECTION 2: SUPREME LAW OF THE LAND

The Constitution of the United States is the supreme law of the land.

SECTION 3: PERSONAL RIGHTS

No person shall be deprived of life, liberty, or property, without due process of law.

SECTION 7: INVASION OF PRIVATE AFFAIRS OR HOME PROHIBITED

No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

SECTION 12: SPECIAL PRIVILEGES AND IMMUNITIES PROHIBITED

No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.

SECTION 29: CONSTITUTION MANDATORY

The provisions of this Constitution are mandatory, unless by express words they are declared to be otherwise.

SECTION 30: RIGHTS RESERVED

The enumeration in this Constitution of certain rights shall not be construed to deny others retained by the people.

SECTION 32: FUNDAMENTAL PRINCIPLES

A frequent recurrence to fundamental principles is essential to the security of individual right and the perpetuity of free government.

The parallels between the Washington State Constitution and the United States Constitution are obvious. One need not assert a tortious wrong to seek the protective hand afforded by the State of Washington, as is represented by the Respondents in their briefing supporting their motions for summary judgment. The Respondents did not cite authority for the position they advanced and the Appellant Herman was not required to respond to that which has not been presented. The trial court erred when it unquestioningly accepted this argument and used as part of the

basis of its decision granting the Respondents' motions for summary judgment.

G. RESPONDENT SPOKANE COUNTY WAS AN ACTIVELY INVOLVED PARTY

The trial court incorrectly found that the legal and factual record seemed to be devoid of any activity that implicated Respondent Spokane County relative to any of the causes of action asserted by Herman. Legally, Spokane County's involvement in this matter and others like it is prescribed by statute according to the SMA. RCW 90.58. The law "establishes a cooperative program of shoreline management between local government and the state." RCW 90.58.050. Local governments "have the primary responsibility" for "administering the regulatory program consistent with the policy and provisions" of the SMA. *Id.* Finally, Spokane County—like other local governments in the state—has to "develop or amend a master program for regulation of uses of the shorelines of the state." RCW 90.58.080(2)(a)(v).

Factually, the record provides a plethora of documentation pertaining to Spokane County's involvement. This was evident, for example, in Order No. 1038 dated May 17, 2004 which, in addition to being signed by the DOE, is signed by Spokane County and the Notice of Disposition Upon Application for Relief from Penalty Docket No. 1038

dated August 24, 2004. (See CP 127-128, CP 137-141, and CP 142-143) Spokane County's interrogatory answers dated February 2004, which added new claims against Herman identical to the DOE's earlier answers on January 24, 2004, are further proof of its involvement. (See CP 145-151 and CP 152-158) Further, Spokane County employee Bill Moser testified before the SHB in support of the County and State's decision. He stated the "pavilion type" building, retaining wall, and access stairs violated the SCSMP because they were located within 50 feet of the shoreline even though the DOE had approved of a structure in the 1995 Order. (See CP 630-634)

These factual incidents of Spokane County's involvement in this enforcement action represent examples of how a county or municipality acts through its officials. Not only is there direct personal participation in Herman's alleged deprivation of the use of his property but the Spokane County officials also set in motion a series of acts by others that the actor knew or reasonably should have known would cause others to inflict the alleged constitutional injury. See *Mission Springs Inc., v. City of Spokane*, 134 Wn.2d 947, 967, 954 P.2d 250 (1998). Those alleged acts were not only that of the individuals; they were the acts of Spokane County as well. See *id.* at 968. Municipal liability under 42 USC Sec. 1983 attaches when

the municipality acts through official policy. *Id.* Municipalities enjoy no qualified immunity from these types of suits. *Id.*

H. BREACH OF CONTRACT

The trial court erred when it determined there was no breach of contract because the Respondent State (through the DOE) supposedly complied with the terms of the 1995 Order and rescinded the \$1000 fine against Herman. This is based upon a misunderstanding of the facts. The breach is actually based upon Herman's claim that the right to stabilize his hillside was negotiated and agreed upon and appears in the form of the 1995 mutually negotiated Order which required him to so engage in the process of hill stabilization without needing or applying for permits.

The State's allegations that Herman failed to obtain the necessary permits to construct the concrete stairway, bank stabilization, and retaining walls, swales and storm water control measures on the hillside is contradicted as a material fact in controversy which is asserted repeatedly by Herman throughout the record, wherein Herman established that the hillside stabilization he agreed to perform was the product of the mutually negotiated 1995 Agreed Order. One need not obtain a shoreline permit or exemption for actions taken pursuant to a regulatory order issued by the DOE pursuant to its jurisdiction under the SMA, intended to mitigate alleged impacts to the shoreline environment. The Order itself served as

the approval. The 1995 Order explicitly stated Herman “*shall* plant native vegetation consistent with the pedestrian trail for stabilization of the bank” and that “(v)egétation may include shrubs, trees, and low-growing vegetation.” (See CP 240-241) All parties knew a rock cliff bank could not hold or support vegetation without some stabilization structure to hold soil. Both the language of the Order and the history and circumstances surrounding Herman’s property show that the Order was intended to require him to undertake measures that would provide for stabilization of the steep bank leading from Liberty Lake to his home. In this regard, the Order explicitly mentions securing a HPA for some work, but not shoreline permits or approvals. (See CP 241)

Herman’s work with respect to the hillside was performed in a professional and responsible manner, in full compliance with the terms of the 1995 Order. (See CP 244) The hillside in question is a steep bank with rock outcroppings that rises abruptly from Liberty Lake to the Herman home and appurtenant structures on the property. In its natural state, there was very little soil or vegetation on the hillside, and the saturation of the bank soils caused the loss of numerous trees and other vegetation over the years. (See CP 244) Further, stormwater run-off from developed portions of the property could not be controlled and simply flowed into Liberty Lake. (See CP 244)

In recognition of this, and in compliance with the 1995 Order, Herman undertook proper and responsible hillside stabilization measures. This included not only the extensive planting of native plants and vegetation on the hillside, but also the construction of a system of retaining walls, rock terraces, and grass lined swales that prevented further erosion of the steep bank and control of stormwater run-off effectively. (See CP 244-245) Herman created a vegetated buffer where none existed in the natural situation. (See CP 245) Moreover, without such additional measures, it is quite clear plants or vegetation would be unable to survive, and would simply be washed away with the first substantial rains. (See CP 245-246)

Indeed, the State took a somewhat schizophrenic position with respect to Herman's efforts at hillside stabilization and the planting of native vegetation. While it faulted Herman for "failing to comply with the other requirements of the stipulation including planting native vegetation," they simultaneously alleged that he violated the SMA and SCSMP by failing to obtain proper permits for the "hillside stabilization measures." (See CP 127-128 and CP 145-151) In other words, the State explicitly required such stabilization measures in the 1995 Order and then imposed civil penalties when Herman *complied* with these stabilization measures. This is where the breach of contract lies. However, the State, through its

summary judgment briefing, neglected to point out the other elements of the 1995 Order and misled the trial court into believing the only consideration central to the contract was the relinquishment of the \$1000 fine assessed against Herman. In truth and in fact, the State contractually agreed to allow Herman to stabilize the rock-cliff hillside that was the basis to the contract's formation (to wit the 1995 Order).

I. MALICIOUS PROSECUTION

The trial court erred when it accepted the Respondents' explanation on why the DOE's claim against Herman cannot be considered malicious prosecution even though they cited no direct legal authority their summary judgment briefing. There was nothing indicating this in the case the Respondents cited (i.e., *Loeffelholz v. C.L.E.A.N.*, 119 Wn.App. 665, 82 P.3d 1199 (2004). The right to bring a claim for malicious prosecution accrues when proceedings are either terminated on the merits in favor of the plaintiff or when they are abandoned. *Lee Bender v. City of Seattle*, 99 Wn.2d 582, 593, 664 P.2d 492 (1983). A malicious prosecution claim under Sec. 1983 accrues when charges are dismissed or overturned. *Womack v. County of Amador*, 551 F. Supp.2d 1017, 1025 (E.D. Calif. 2008). An action for malicious prosecution lies when there is either (1) an arrest, or (in the alternative) attachment of property, or (2) special injury sustained (i.e., an injury which would not necessarily result in similar suits. *Gem Trading Company, Inc. v. Cudahy Corporation*, 92 Wn.2d 956, 963, 603 P.2d 828 (1979). The seizure of property

requirement in malicious prosecution is met if there is an "interference" with the property "by a provisional remedy" such as arrest, injunction, or attachment as an incident to the maintenance of an action. *Fenner v. Lindsay*, 28 Wn.App. 626, 629, 625 P.2d 180 (1981).

In this case, the seizure of property requirement is clearly met. The State through the DOE imposed a cease and desist order on how Herman could use his property. It also levied a \$30,000 fine on Herman as a penalty. As a result, Herman incurred a large amount of legal expenses that are still mounting. Finally, with regard to the statute of limitations, the earliest date that can be claimed was August 23, 2007 (i.e., when the Spokane County Superior Court made its decision) and definitely not May 21, 2004 when charges were allegedly first imposed.

J. TRIAL COURT SHOULD NOT HAVE STRUCK EVIDENCE

In its decision denying Herman's Motion for Reconsideration, the trial court also struck the Affidavit of Lloyd A. Herman Supporting Motion for Reconsideration and its attached two exhibits on grounds it did not constitute newly discovered evidence and could not be admitted after entry of the formal order granting summary judgment. (CP 667-670; CP 808) This decision, however, was based upon a misunderstanding of what the exhibits were supposed to be. For one thing, they were both admissible under ER 402. Photographs and drawings can be used to amplify and illustrate relevant testimony before the court. *See State v.*

Smith, 196 Wn. 534, 83 P.2d 749 (1939). In this case, it was necessary for Herman to provide for the trial court visual aids to show the locations on Herman's property that were cited by the State in the May 17, 2004 and the January 24, 2005 interrogatory answers. (CP 669-670) Normally, these exhibits would have been introduced and used as displays during a hearing but, since Motions for Reconsideration are frequently determined without a hearing, the marked-up copies of the aerial photograph and the illustrated drainage survey had be to submitted with Lloyd Herman's affidavit. They were entirely provided for the convenience of the trial court and opposing parties. There was no reason to strike them.

VI

CONCLUSION

The trial court erred and abused its discretion by granting summary judgment of dismissal in favor of the Respondents on grounds the Appellants Lloyd and Linda Herman did not timely bring this action against them within the applicable statute of limitations and by denying their motions for reconsideration. The Hermans respectfully request that this court reverse the trial court's decisions and remand the case back to Spokane County Superior Court.

RESPECTFULLY SUBMITTED this 19TH day of APRIL 2010.

John A. Bardelli

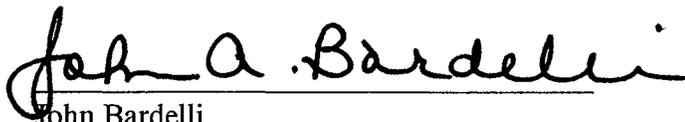
John A. Bardelli
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WSBA #05498

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of April, 2010, pursuant to RAP 5.4(b), I caused to be served true and correct copies of the foregoing document to counsel for the Defendants as follows:

PARTY/COUNSEL	DELIVERY INSTRUCTIONS
<p><u>Respondent State of WA, et al.,</u> Mark C. Jobson Assistant Attorney General Attorney General of Washington Tort Claims Division 7141 Cleanwater Dr., S.W. P.O. Box 40126 Olympia, WA 98504-0126</p>	<p><input checked="" type="checkbox"/> Via U.S. Mail <input type="checkbox"/> Via Legal Messenger <input type="checkbox"/> Via E-Mail <input type="checkbox"/> Via Facsimile <input type="checkbox"/> Via Overnight Mail</p>
<p><u>Respondent Spokane Co., et al.,</u> Patrick Risken Attorney at Law Evans, Craven & Lackie, P.S. 818 W. Riverside, Suite 250 Spokane, WA 99201-0910</p>	<p><input type="checkbox"/> Via U.S. Mail <input checked="" type="checkbox"/> Via Legal Messenger <input type="checkbox"/> Via E-Mail <input type="checkbox"/> Via Facsimile <input type="checkbox"/> Via Overnight Mail</p>

DATED this 19th day of April, 2010, in Spokane Valley, Washington.



John Bardelli
 Attorney for Plaintiffs/Appellants
 WSBA #05498