

66542-1

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No. 665421

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

LEE HAYNES,

Appellant,

v.

SNOHOMISH COUNTY, et al.,

Respondents.

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2011 JUN 30 PM 4:35

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I. INTRODUCTION

This case concerns the ownership, use, maintenance, and responsibility of a storm-water drainage pipe which runs beneath the Appellant, Lee Haynes', property located at 20729 14th Pl. W., Lynnwood, Washington (the "Haynes Property"). CP 2. The Respondent, Snohomish County ("the County"), currently uses the pipe to divert storm water collected from Crawford Road up stream to a storm water detention pond downstream. CP 97-99. Appendix A taken from the County's Declaration of Chris Kirkendall depicts the diversion of the water by Crawford Road.

On December 3, 2007, during a major storm, the storm-water drainage system failed causing damage to the Haynes Property. CP 31. When Lee Haynes called the County to repair the pipe, the County declined on the basis that it did not own the pipe and therefore had no responsibility to maintain or repair it. CP 32. Further, the County took the position that it would be trespassing if it even came on to the Haynes Property to repair the pipe because it did not have an easement to enter upon the property. CP 64. A review of the Skylark Plat revealed that the County does not have an easement to run storm-water across the Haynes Property. CP 7-9.

Although, the County refused to accept responsibility for maintenance or repair of the pipe because it would be a "trespass,"

Snohomish County insisted that it must continue to use the pipe to run storm-water from Crawford Road to the detention pond. CP 93, 102. In doing so, the County adopted the irreconcilable position that it did not have an easement to use the pipe (so that it had no responsibility for its maintenance or repair), but insisted that it be allowed to continue to use the pipe because it needs the pipe to drain Crawford Road.

For two years, between December 2007 and January 2010, the County continued to run storm-water through the pipe knowing that, because the pipe was broken, it was simply discharging water onto the Haynes Property and eroding it away. CP 31-32, 60-67. After exhausting all efforts to get the County to accept responsibility for the ever increasing damage to his property, on January 22, 2010, Lee Haynes filed this pending lawsuit for alternative relief asking either (1) for the Superior Court to declare a taking so that the County would be forced to take responsibility for its use of the pipe, or, in the alternative, (2) for the Superior Court to declare a trespass that if the County did not own the pipe that it should not be allowed to use the pipe to drain Crawford Road. CP 1-9. (The County had already adopted the position that it would be trespassing if it had to come on to the property to repair the pipe.) CP 64. In either circumstance, Mr. Haynes sought property damages which flowed from the County's use of the pipe. CP 4.

On September 10, 2010, the parties filed cross-motions for summary judgment. CP 149-171, 172-187. Lee Haynes moved for partial summary judgment asking the Superior Court to resolve the issue of the County's legal right to use the pipe by declaring that Snohomish County had taken the property by inverse condemnation, or in the alternative to declare that the County was committing intentional trespass by draining Crawford Road through the pipe. CP 174. The County filed a cross-motion for summary judgment asking the Superior Court to dismiss the lawsuit on various legal grounds including: (1) standing; (2) statute of limitations; (3) failure to join an indispensable party; (4) failure to state a claim for negligent trespass; (5) failure to state a claim for inverse condemnation; (6) waiver; and (7) failure to mitigate damages. CP 154-155. Some of these affirmative defenses, including the affirmative defense of standing, were not even plead in the Answer to the Complaint. CP 13-15.

On December 17, 2010, the Superior Court granted the County's motion for summary judgment and dismissed Lee Haynes complaint. CP 288-89. The Superior Court gave no basis for the decision. *Id.* The dismissal of the lawsuit put the parties back into their original quandary, and leaves the following questions the subject of continuing contention and debate:

- (1) Does Snohomish County have a right to use the property? (The County has consistently denied that it has acquired a right);
- (2) Who is responsible for maintenance and repair of the pipe? (The County denies that it is responsible);
- (3) Who is responsible for the damages associated with the County's use of the pipe? (Again, the County denies that it is responsible even though its use of the pipe cause the damage);
- (4) Can Lee Haynes prevent the County from using the pipe? (There was no adjudication that the County has any rights with respect to the pipe and fee simple title remains exclusively with Lee Haynes.¹)

The status quo persists as the County has continued to use the pipe and during the pendency of this dispute, but the County's legal right to do so remains a point of contention.

Entirely separate from the issue of use and responsibility for the pipe, in his Complaint Lee Haynes sought an award of monetary damages from the County for the damage done to his property by the County's discharging of storm-water onto his property and eroding it away. CP 4. Lee Haynes maintains that no matter who is adjudicated the owner of the pipe, the County remains liable to Lee Haynes for the damage done by

¹ At the point in time when Snohomish County took the position that it did not own the pipe or have any responsibility for maintenance, repair, or damage, Lee Haynes might have simply exercised his property rights and blocked the County's continuing use of the pipe. Instead, Lee Haynes exercised the tempered approach of maintaining the status quo and seeking judicial resolution regarding the County's right to use the pipe.

virtue of the County's use of the pipe. Neither party sought to resolve this issue in their respective summary judgment motions, but the Superior Court dismissed the entire lawsuit without addressing the property damage cause of action. Resolution of the damages issue necessarily requires the resolution of material facts preventing summary judgment, and it was an oversight of the trial Court to dismiss the damages claim of the lawsuit.

II. ASSIGNMENTS OF ERROR

- A. The Trial Court Erred In Dismissing The Plaintiff's Cause Of Action For Intentional Trespass Because Snohomish County Intentionally Collects And Diverts Water From Crawford Road Across The Haynes Property Without Legal Right.
- B. The Trial Court Erred In Dismissing The Plaintiff's Causes Of Action For Intentional Trespass and Inverse Condemnation Because Snohomish County Has Not Acquired An Easement For The Use Of The Haynes Property.
- C. The Trial Court Erred In Dismissing The Plaintiff's Cause Of Action For Inverse Condemnation Because Snohomish County Has Taken The Haynes Property Without Provided Just Compensation.
- D. The Trial Court Erred In Dismissing The Plaintiff's Cause Of Action For Property Damage Because The Issue Was Not Addressed In Snohomish County's Motion For Summary Judgment.
- E. Plaintiff Is Entitled To His Attorneys' Fees On Appeal Pursuant To RAP 18.1.

III. STATEMENT OF THE CASE

- A. Snohomish County's Storm Water Detention System
 - 1. Crawford Road.

Crawford Road is owned and maintained by the County. CP 11. The road is for public use, and contains a drainage pipe running along its length. CP 92, 97-98. The drainage pipe collects water from a variety of uphill and upstream sources. CP 97-98. These upstream sources of water come from a variety of publicly and privately held lands. CP 99. The County declared:

“Some of the rain does fall on the County right of way. Because this area of [the] County is mostly privately owned and developed, each landowner has developed a method for channeling that water into a drainway. **Some private runoff enters the upstream channel and flows into the storm drainage system which runs along Crawford road, and eventually to its resting place in the detention pond.**” [emphasis added].

Id. Crawford Road serves as a common drain for all the property that is situated upon Crawford Road. Id.

Prior to development of the Skylark Plat, Crawford Road collected the upstream water from the same variety of public and private sources, and discharged the water at the eastern edge of the Skylark plat. CP 97-98. There is no evidence in the record of the natural and historic drainage of water in the area without Crawford Road. CP 91-119.

2. Skylark Development.

When the Skylark Plat was developed, a storm-water pipe was laid from Crawford Road through two properties located in the plat. The pipe carried water collected by Crawford Road to a retention pond located on the plat. CP 97-98. The pipe first runs through lot 6, then lot 5, and then

under the road to a downstream retention pond located on the plat. CP 99. The Skylark Plat reserves an easement for the benefit of the County as to lot 6, the road, and the storm-water retention pond. CP 92, 99. However, there is no easement in favor of the County across Lot 5. Id. The map attached at Appendix B depicts the storm-water retention pipe running through the Skylark plat. CP 108.

3. Lee Haynes Property.

Lee Haynes is the owner of Lot 5 of the Skylark Development, which is commonly known as 20729 14th Pl. W., Lynnwood, Washington. CP 2, 7-9, 30, 97-98. Mr. Haynes purchased the property in 1992 from the developer of the plat, and has occupied it as his primary residence ever since. CP 30, 257. The aforementioned storm-water pipe was already in place when Mr. Haynes purchased his home, although there is little or no evidence of the drainage pipe visible on the property. CP 257-58. The pipe running from Crawford Road to the retention pond has been in continuous use ever since. CP 92, 97-98. “The County has an easement over a portion of the drainage system on lot 6, but was never granted an easement across Mr. Haynes’ property – lot 5.” CP 97, 99.

The pipe running underneath the Haynes Property does not have any open or grated “vaults.” CP 97-98. A vault is a term that is generally used to describe entry points to a storm water drainage system. CP 97. Vaults generally come in two types, those that allow water to enter, and

those that are used for service and inspection only. Id. Storm water vaults used for service and inspection have solid lids that do not allow additional water to enter the system at that point. CP 97, 115.

The pipe on the Haynes Property has a single vault, referred to as CB 1 in the Declaration of Chris Knorr Kirkendall. CP 98, 115. CB 1 has a solid lid that does not allow water to enter the system, and does not allow storm water falling on the Haynes Property to be directed into the system. Id. Consequently, no storm-water falling on Lee Haynes property enters the pipe running beneath his property.

B. December 3, 2007 Storm Incident and Damage To The Haynes' Property.

On December 3, 2007, Snohomish County, and much of Western Washington, had what has been characterized as a 100 year flood event. CP 31, 101. That night, Mr. Haynes returned home from work after dark. CP 31. When Mr. Haynes got home, he noticed that the vault cover on the County's easement on Lot 6 was removed, and the water escaping the vault was spilling out and causing damage to his property. CP 31. The record shows that at least \$5,000.00 in damage was done to the Haynes Property that evening. CP 62, 129. There is a dispute regarding how the vault cover was removed. CP 21, 101, 153. However, there is no evidence in the record of a party with personal knowledge regarding the removal of the vault cover. CP 30-37, 96-119.

During the December 3, 2007 storm, the erosion of the ground exposed the cracked storm water pipe underneath the Haynes Property. CP 31. The erosion also exposed the fresh water pipe leading to Mr. Haynes home. Id. The crack in the storm water pipe grew from December 2007, until the County repaired the pipe prior to the May 21, 2010 deadline set in the Order Granting Preliminary Injunction. CP 31, 146-48. Storm water originating on Crawford Road, CP 99, would back up in the pipe and escape through the crack causing damage to the Haynes Property. CP 31. The escape of water from the pipe would occur when it rained, and continuously eroded the Haynes Property for over 2 years. CP 135.

C. Interactions Between Lee Haynes And The County After The Storm Event.

On the morning of December 4, 2007, Lee Haynes attempted to contact the County and alert them about the problem with the damaged storm-pipe. CP 31, 99-100. Around the same time, Mr. Haynes noticed County crews were on his property inspecting the damage caused by the storm event. CP 31. Mr. Haynes spoke with Mr. Kirkendall, an Engineer for the County's Surface Water Management Division, CP 96, on the Haynes Property regarding the storm water drainage system, and the damage that occurred to his property. CP 31. Mr. Kirkendall took Mr. Haynes' contact information, and told him that he would be contacted regarding the damage. Id. No following action was taken by the County.

In the following months, Mr. Haynes attempted to contact the County, CP 32, and invited work crews performing maintenance on other drain systems near his property to fix the pipe. CP 32, 64, 129. Finally on May 15, 2008, Mr. Haynes had a meeting with a County representative named James Blankenbeckler. CP 32. In the meeting, Mr. Blankenbeckler told Mr. Haynes that the County did not have an easement across his property. Id. Mr. Blankenbeckler continued by saying that without an easement the County had no duty to repair and maintain the pipe. CP 32, 93. Mr. Blankenbeckler concluded that the County would not be repairing the pipe. CP 32.

D. Notice of Claim and Position of County Prosecutor.

On August 13, 2008, Lee Haynes prepared and filed a “Claim for Damages” with the Snohomish County Risk Management Office. CP 60-62. Hillary Evans was assigned to the matter by the Snohomish County Prosecutors office, and began a dialogue with Mr. Haynes’ attorney. CP 38-39. The dialogue lasted approximately 5 months, during which Mr. Haynes counsel requested that the County fix the pipe. CP 39. However, the County consistently refused to fix the pipe. CP 39, 64, 66-67.

During the dialogue, the County’s consistent position was that the pipe was not the County’s responsibility. CP 66. The County contended that because it did not have an easement, it had no obligation to maintain or repair the pipe. CP 66. In fact, the County claims that it would

require an easement to the Haynes Property before it could even come upon the property. CP 67. At the same time that the County claims it had no legal right to come upon the Haynes Property to repair the pipe, the County objects to removal of the pipe as it would have a negative impact on “upstream property owners.” CP 66.

E. The Lawsuit Below.

1. Complaint for Trespass to Land and Property Damage.

On January 22, 2010, Lee Haynes finally commenced a lawsuit by filing a Complaint with the King County Superior Court. CP 1-9. The Complaint alleges three causes of action: (1) Common-Law Intentional Trespass to Land²; (2) Damages to Property; and (3) Illegal Taking. CP 3-5. The Complaint alleges: (1) Crawford Road is owned and maintained by the County; (2) Crawford Road collects and diverts water to the pipe on the Haynes Property; (3) the storm water collected by Crawford Road is damaging the Haynes Property; and (4) the County does not have a legal right to use the pipe. CP 2-3.

2. Answer to the Complaint.

The County filed its Answer on February 16, 2010. CP 10-17. In its Answer the County admits: (1) the County is responsible for the

² The County briefed the issue of negligent trespass in its Motion For Summary Judgment, CP 157-63, and in Response to Plaintiff’s Motion for Partial Summary Judgment. CP 221-23. However, Lee Haynes pled and continues to maintain that the County is committing a continuing intentional trespass. Briefing regarding the negligence standard for trespass is not applicable, and cannot create a basis to dismiss plaintiff’s cause of action for trespass.

maintenance of Crawford Road; (2) it has not removed the storm pipe, and it has not been granted any easement relating to the pipe; (3) Water from Crawford Road, “along with other sources”, runs through the pipe on the Haynes Property; (4) the County had notice of the damage to the pipe on the Haynes Property; and (5) the County does not have the ability to “lawfully enter onto Plaintiff’s land.” [emphasis added] CP 11-12. The County asserted thirteen affirmative defenses. CP 14-15. Standing was not asserted as an affirmative defense. Id.

3. Preliminary Injunction.

On March 26, 2010, Lee Haynes moved for a preliminary injunction to prevent the County from using the pipe until it was repaired. CP 71-72. Lee Haynes argued the County’s continued intentional trespass onto his property was causing irreparable damage. CP 28. Specifically, the County continued to collect and divert water through the broken pipe on the Haynes Property, this collection and diversion was causing continuing damage, CP 28, and the County has shown no intention of discontinuing its use of the pipe. CP 27.

The County filed a response to the Motion for Preliminary Injunction on March 24, 2010, CP 73-90, including the Declarations of Chris Knorr Kirkendall, CP 96-118, and James Blankenbeckler, CP 91-95. The County argued that Mr. Haynes did not meet the standard for a

preliminary injunction, and, if he did, the injunction would cause undue hardship to the County and would be impracticable. CP 81-87.

On April 30, 2010, the Superior Court entered an Order For Preliminary Injunction. CP 146-48. The Court made the following findings of fact: (1) Lee Haynes has a “clear legal and equitable right to the exclusive use and enjoyment of his property”; (2) the County was violating that right by “committing a continuing trespass by diverting water from Crawford Road across his property”; (3) that Lee Haynes had an immediate fear of the invasion of his property right; (4) the collection and diversion of water was “causing actual and continual damage”; and (5) Lee Haynes had no adequate remedy at law. CP 146-47.

The Order gave the County the option of repairing the pipe on the Haynes’ Property by May 21, 2010, to avoid being enjoined from using the pipe. CP 147. Because the County continued to insist that it could come upon the Haynes Property without an easement, the Order granted the County a temporary easement for the purpose of fixing the pipe. CP 147.

Prior to the May 21, 2010 deadline, the County repaired the storm-water pipe. CP 154, 173. However, the County made no effort to repair the damages caused by its use of the pipe, failing to even back-fill the hole in the ground. Id.

4. Cross Motions For Summary Judgment.

On September 10, 2010, the parties filed cross-motions for summary judgment. CP 149-171, 172-187. Lee Haynes' motion sought partial summary judgment resolving whether the County had no right to use the pipe without an easement by declaring either an illegal taking by the County or, in the alternative, intentional trespass by the County. CP 172-187. The County's cross-motion for summary judgment sought the dismissal of Mr. Haynes' claims for trespass and inverse condemnation on the following theories: (1) plaintiff lacked standing; (2) a claim for trespass is barred by the statute of limitations; (3) the County had not committed a negligent trespass³; (4) there had been no illegal taking; (5) plaintiff failed to name an indispensable third party; and (6) waiver. CP 149-150. Lee Haynes' cause of action for property damage was not briefed or addressed at the trial court level. CP 149-171, 272-278.

On October 8, 2010, Judge Canova heard oral argument from the parties on the cross-motions for summary judgment. CP 286, CP 288. During oral argument, the County stated that it did not have an easement by prescription. RP 7:4-7. During the proceeding, the County's only solution to resolve its use of the property, other than dismissing the case entirely, was to have Lee Haynes grant the County an easement for the County's commitment to fix the pipe with no other consideration. CP 26:13-25.

³ See Footnote 2. Negligent trespass was not pled by Lee Haynes, and is not a basis for relief in this case.

On December 17, 2010, Judge Canova granted the County's Motion for Summary Judgment in the matter, CP 288-89, and denied Lee Haynes Motion for Partial Summary Judgment. CP 286-87. The Superior Court provided no reasoning for its decision.

The orders entered in this case offer no guidance to Lee Haynes, or the County regarding their continuing relationship, and specifically whether the County has a legal right to direct storm-water from Crawford Road through the Haynes Property to the County's retention pond without any corresponding responsibility for maintenance, repair, or damage. In addition, the Orders dismiss the lawsuit entirely despite the fact that Lee Haynes' claim for property damage was not even addressed at summary judgment. Lee Haynes timely appealed. CP 290-96. The issues in this case have not been resolved, and Lee Haynes hopes that a ruling by the Court of Appeals will do so.

F. The Current Status Quo.

Despite the fact that this case was dismissed without adjudicating any right whatsoever for the County to use the Haynes Property, during the pendency of this appeal Lee Haynes continues to allow the County to run storm-water through the pipe. However, in the absence of an easement or a condemnation with just compensation, Lee Haynes maintains all of his property rights including the sacred right to exclude all others therefrom. In addition, although the pipe itself has now been

repaired, the Haynes Property remains in a state of erosion and disrepair associated with the County discharge of water onto his property for more than 2 years.

IV. ARGUMENT

The standard of review for an order of summary judgment is de novo, and the appellate court performs the same inquiry as the trial court. Jones v. Allstate Ins. Co., 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). “Summary judgment is appropriate only if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact and that the moving party is entitled to judgment as a matter of law.” Sheehan v. Central Puget Sound Regional Transit Authority, 155 Wn.2d 790, 797, 123 P.3d 88 (2005) see also CR 56(c). A party is entitled to summary judgment “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).

The appellate court may consider all materials that were brought to the attention of the trial court, whether or not the trial court relied on those materials. Riojas v. Grant County PUD, 117 Wn. App. 694, 696 n.1, 72 P.3d 1093 (2003). In addition, the appellate court is entitled to consult the

law in its review of the case, whether or not a party has cited that law.

Ellis v. City of Seattle, 142 Wn.2d 450, 460 n.3, 13 P.3d 1065 (2000).

A. The Trial Court Erred In Dismissing The Plaintiff's Cause Of Action For Intentional Trespass Because Snohomish County Intentionally Collects And Diverts Water From Crawford Road Across The Haynes Property Without A Legal Right To Do So.

By virtue of his fee simple title ownership, Lee Haynes has the right of exclusive use and possession of his property, both above and below ground. The County's continuing use of storm-water pipe running beneath the Haynes Property, without any corresponding legal right to do so, constitutes an intentional trespass under the laws of the State of Washington.

A party is liable for the intentional tort of trespass if they enter the land of another, or cause a thing or third person to enter the land of another. Bradley v. American Smelting And Refining Company, 104 Wn.2d 677, 682, 709 P.2d 782 (1985). To establish the intentional tort of trespass, "a plaintiff must show (1) an invasion of property affecting an interest in exclusive possession; (2) an intentional act; (3) reasonable foreseeability that the act would disturb the plaintiff's possessory interest; and (4) actual and substantial damages." Wallace v. Lewis County, 134 Wn. App. 1, 15, 137 P.3d 101 (2006) citing Bradley v. American Smelting 104 Wn.2d at 692-693 (1985). "Modern trespass doctrine protects the landowner's interest in exclusive possession." Highline School District No. 401 v. Port of Seattle, 87 Wn.2d 6, 18, 548 P.2d 1085 (1976).

An intentional act is described under Bradley as “to denote that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it.” Citing Bradley, at 682 citing Restatement (Second) of Torts § 8A. 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 County v. Boeing Co., 62 Wn.2d 545, 550-51, 384 P.2d 122 (1963). A public entity is “not permitted to concentrate and gather such water into artificial drains or channels and throw it on the land of an individual owner.” Buxel v. King County, 60 Wn.2d 404, 409, 374 P.2d 250 (1962) citing 18 McQuillin, Municipal Corporations, § 53.144 at p. 556-558 (3rd Ed. 1950). A public entity will be held liable for the trespass of the water that is collected and diverted onto the land of a private individual. Buxel v. King County, *supra*, 60 Wn.2d at 409.

In this case there is no dispute that Lee Haynes has fee simple ownership of his property, and all of the rights and responsibilities appurtenant thereto. There is further no dispute that the County has never acquired a legal right to use any portion of Lee Haynes property by express easement, by prescriptive easement, or by condemnation. In fact, throughout the course of this matter, the County has specifically denied that it has acquired a legal right to use the pipe, including:

- “Defendants admit they have not removed the storm pipe, and admit they have not been granted any easement relating to the pipe.” CP 12.
- “The County has an easement over a portion of the drainage system on lot 6, but was never granted an easement across Mr. Haynes’ property – lot 5.” CP 77.
- “The County has an easement over the portion of the drainage system on lot 6, but was never granted an easement across Mr. Haynes’ property – lot 5.” CP 99.
- “There is no financial benefit to the County obtaining an easement to drainage systems.” CP 121.
- “There was no easement dedicated to the County across Mr. Haynes property for the stormwater system.” CP 152.
- “The County has an easement over a portion of the drainage system on lot 6, but was never explicitly granted an easement across lot 5, Mr. Haynes’ property.” CP 152.
- “So if a developer fails to grants us an easement, we don’t actively seek it. And that’s exactly what happened in this case.” RP 6:7-9.
- “The County doesn’t have a position that an easement has occurred because, if that were the case, any pipe 10 years old in the county would, therefore, be the County’s problem.” RP 7:4-7.
- We’re not going to say that our - - the County’s use of this pipe was hostile, open, notorious, what have you.” RP 24:21-23.

- In the County's First Requests for Admissions: "Admit that Snohomish County does not have an easement related to the drainage pipe on or under the Plaintiff's property." CP 265.

The County has a specific reason for its denial of the property right: it does not want to assume the responsibility for repair and/or maintenance associated with its use of the Haynes Property. CP 66.

Despite the fact that it does not have a property right to use the pipe, the County knowingly and intentionally continues to divert storm-water through the pipe to the storm-water detention pond below. CP 97-99. This water does not originate on Lee Haynes' property, but rather collected by Crawford Road from "countless" upland sources, CP 99, and channeled to the pipe running underneath the Haynes Property. CP 97-98. The County declares the water collected is substantial enough to cause a public safety hazard should it be denied use of the pipe. CP 93, 102.

Considering the four part test for intentional trespass articulated in Wallace v. Lewis County, there is no genuine issue of material fact that the County's actions constitute an intentional trespass:

(1) *An invasion of property affecting an interest in exclusive possession.* The County's diversion of water from "countless" upland sources through the pipe on the Haynes' Property is an invasion of property affecting Lee Haynes' exclusive right of possession.

(2) *An intentional act.* The County's does not deny that Crawford Road knowingly and intentionally collects and diverts water from "countless" upland sources through the pipe on the Haynes' Property.

(3) *Reasonable foreseeability that the act would disturb the plaintiff's possessory interest.* The County's channeling and diversion of water through the pipe would disturb the plaintiff's possessory interest is not just foreseeable, it with acute awareness of that fact.

(4) *Actual and substantial damages.* Even with the pipe broken, for two years the County continued to divert water through the pipe knowing that it was discharging onto Lee Haynes' property and eroding the property. CP 31-32. Despite that fact, the County refused to even repair the pipe.

Unless and until the County obtains an easement by prescription or condemns the pipe for public use, the County is committing the intentional tort of trespass without compunction. This court should find that the County is intentionally trespassing on the Haynes Property, and remand to the trial court for the determination of damages.

1. The Use Of The Drainage System Prevents The County From Claiming This Is The Natural And Historic Drainway.

In its motion for summary judgment, the County attempted to assert the common enemy doctrine as a defense to trespass. Specifically, the County claims that because the pipe running underneath the Haynes

Property mimics the path of water being collected and discharged by Crawford Road prior to the development of the Skylark plat, the County cannot be liable for intentional trespass. CP 165-66. However, Washington case law has already established that a drainage system is not a natural drainway for purposes of the common enemy doctrine.

A natural drain is that course, formed by nature, which waters naturally and normally follow in draining from higher to lower lands. King County v. Boeing Co., *supra*, at 550. Further, in Rothwieler v. Clark County, the Division 2 held:

“The County’s drainage system involved surface water flowing through a system of catch basins and drainage pipes, not a drain formed by nature. Although the water in the drainage pipes and catch basins generally followed the path that surface water would have naturally flowed above ground, the County’s system was not a natural drainway or watercourse.”

Rothwieler v. Clark County, 108 Wn. App. 91, 99, 29 P.3d 758 (2001). In Rothweiler, the plaintiff asserted that Clark County had inhibited the flow of a natural drainway, and was liable for the damage caused by the blockage. Id. at 98. However, the Court held that a drainage system is not a natural drainway for purposes of the common enemy doctrine, and did not attached liability. Id.

The County’s contention that it is protected by the common enemy doctrine does not square with common sense or the law. First, prior to the development of the Skylark Plat, the County collected and diverted water from a multitude of upstream sources, and discharged it at a location north

east of the Haynes Property. This does not make Crawford Road the natural and historic course of drainage pursuant to Rothweiler. Second, as the Rothweiler court explained, a drainage system involving surface water flowing through a system of catch basins and drainage pipes is not a drain formed by nature. Even if, as the County claims, the Haynes Pipe generally follows the path that surface water naturally would have flowed (a question of fact which is not properly resolved on summary judgment) it is not the natural and historic course of drainage.

B. Snohomish County Has Not Acquired An Easement To Use Lee Haynes Property.

If the County wishes to continue to use the Haynes Property, it must obtain a legal right to do so. “A corporation possessing the right of eminent domain may acquire property in one of three ways only: (a) by purchase; (b) by condemning and paying for the property in the manner provided by law; and (c) by adverse possession for the statutory period.” Aylemore v. Seattle, 100 Wn. 515, 518, 171 P. 659 (1918).

1. The County Has Not Purchased An Express Easement.

There is no debate that the County has not purchased an easement to use the Haynes Property. In fact the County specifically denies the existence of an easement, and has used this lack of an easement as its basis for refusing to come onto the Haynes Property to remedy the damaged storm-water pipe. CP 66-67.

2. The County Has Not Acquired A Prescriptive Easement.

There is also no debate that the County has not acquired a prescriptive easement to use the Haynes Property. Again the County has consistently denied the existence of an easement and used this lack of an easement as its basis for refusing to come onto the Haynes Property to remedy the damaged storm-water pipe. CP 12, 77, 92-93, 99, 121, 152; RP 6:7-9, 7:4-7, 24:21-23.

Even if the County had claimed the acquisition of a prescriptive easement, that claim would fail. In order for a claim for prescription to arise the use of the Haynes Property must be open, notorious, and hostile for a period of 10 years. However, use of a property, at its inception, is presumed permissive. See Petersen v. Port of Seattle, 94 Wn.2d 47, 618 P.2d 67 (1980) citing Gray v. McDonald, 46 Wn.2d 574, 283 P.2d 135 (1955) If the use is initiated by permission, it does not ripen into a prescriptive right until there has been a distinct and positive assertion by the dominant owner of a right hostile to the servient estate. Gray v. McDonald, 46 Wn.2d at 578 (1955).

The presumption is that Snohomish County's use of the Haynes Property was at all times permissive, and the does not even challenge the permissive nature of its use:

- “The County doesn’t have a position that an easement has occurred because, if that were the case, any pipe 10 years old in the county would, therefore, be the County’s problem.” RP 7:4-7.
- “We’re not going to say that our - - the County’s use of this pipe was hostile, open, notorious, what have you.” RP 24:21-23.
- In the County’s First Requests for Admissions: “Admit that Snohomish County does not have an easement related to the drainage pipe on or under the Plaintiff’s property.” CP 265.

Consequently, even if the County claimed a prescriptive easement, that claim would fail.

3. The County’s Argument For Dismissal of Claims Based on the Statute of Limitations is Misplaced And Not Applicable.

In the County’s response to Lee Haynes’ motion for summary judgment, the County argued to the Superior Court that Lee Haynes’ claim for illegal taking was barred by the statute of limitations. CP 220-21. However, that argument is misplaced because a cause of action for illegal taking cannot be barred by the passage of time. A claim for illegal taking is only barred when the government has acquired a prescriptive easement on the property in question. See Petersen, 94 Wn.2d 47, 618 P.2d 67 (1980) citing Aylmore v. Seattle, 100 Wash. 515, 171 P.659 (1918); State v. Stockdale, 34 Wn.2d 857, 210 P.2d 686 (1949)(If a right in property is acquired by a governmental entity by adverse possession, the owner’s

right to compensation is lost). The claim is bared by the fundamental premise that, if the dominant estate holder has already acquired the property by prescriptive easement, the property rights have already been lost and there is nothing to take.

The case of Petersen v. Port of Seattle, 94 Wn.2d 479, 483, 618 P.2d 67, 69 (1980) involved avigation easements surrounding the Seattle Tacoma Airport. Id. In explaining the relationship between inverse condemnation and prescriptive easements, the Petersen Court explained that a party can bring an inverse condemnation action any time before a prescriptive easement is acquired:

“A 10-year period of time, however, together with the requisite elements of adverse possession would, in a case such as this, have vested the Port with a prescriptive avigation right in plaintiffs' property. That avigation easement, if prescriptively acquired, would not be compensable.”

Petersen v. Port of Seattle, 94 Wn.2d 479, 483, 618 P.2d 67 (1980). The court further explained:

“The Port, however, may avoid the remedy, or a portion thereof, only if it affirmatively establishes its acquisition of a prescriptive avigation right in the Petersens' property. Proof of such prescriptive right necessarily includes a showing of uninterrupted hostile use for 10 years which has been open and notorious.”

Petersen, 94 Wn.2d at 484-85 citing Krona v. Brett, 72 Wn.2d 535, 433 P.2d 858 (1967) Court affirmed that the trial court's finding that the Port of Seattle had not obtained a prescriptive easement, because it had not

proven that its use of the plaintiff's property was hostile. Id., at 485-486 citing Gray v. McDonald, 46 Wn.2d 574, 578, 283 P.2d 135 (1955) (A use of property, at its inception, is presumed permissive under Washington law.)

In this case, the 10-year statute of limitations applicable to prescriptive easements is not implicated because the County does not claim to have acquired a prescriptive easement. In fact, the County has gone out of its way to prove it does not have a prescriptive right over the Haynes Property. CP 12, 77, 92-93, 99, 121, 152; RP 6:7-9, 7:4-7, 24:21-23.

C. The Only Way The County Can Acquire The Right To Use The Haynes Property Is By Condemnation Requiring Just Compensation.

In the absence of an acquired right to use the Haynes Property by easement (either express or prescriptive), the County can only acquire the right to use the Haynes Property by condemning an easement and paying just compensation. The County's continued use of the Haynes Property without just compensation is an illegal taking (or a trespass⁴), and if the County desires to continue using the property it must be compelled to pay Lee Haynes just compensation.

⁴ The County adamantly denies that it has taken an ownership right in Lee Haynes property and even filed a motion for summary judgment asking the Superior Court to declare that no taking occurred. If the County is correct that it has not taken the property then it has no property right to use the Haynes Property, and this case is resolved under the trespass analysis provided above.

An inverse condemnation occurs when a governmental entity takes or damages property for the public use without first providing just compensation. Const. Art I. § 16. When private property rights are taken from the individual and are conferred upon the public for public use, eminent domain principles are applicable. Ackerman v. Port of Seattle, 55 Wn.2d 400, 408, 348 P.2d 664 (1960).

Under Washington state law, there are two types of illegal takings. The first is a “per se” taking effectuated by a government action that creates a permanent physical invasion upon private property. This type of taking *categorically* requires just compensation. The second type of taking is a taking or damaging of private property for public use without just compensation. The second type of taking requires a public use of the property, such as to drain a public roadway or prevent a public safety hazard, that has damaged the property rights of the owner.

1. The County Has Committed A ‘Per Se’ Taking Of The Haynes Property.

“A per se taking occurs whenever government causes its agents or the public to regularly use or permanently occupy property known to be in private ownership.” Orion Corp v. State, 109 Wn.2d 621, 627, 747 P.2d 1062 (1987). An invasion of property that is a “chronic and unreasonable pattern of behavior” by the government entity is a taking by physical invasion. Bodin v. City of Stanwood, 79 Wn.App. 313, 321, 901 P.2d 1065 (1995). Permanent physical occupation “is a government action of

such a unique character that it is a taking without regard to other factors that a court might ordinarily examine’, and as a per se taking will categorically require the payment of compensation.” In re 14255 53rd Ave S., 120 Wn. App. 737, 743, 86 P.3d 222 (2004) citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. (1982). “The permanence and absolute exclusivity of a physical occupation distinguish it from temporary limitations on the right to exclude.” Id. at 744, citing Loretto, 458 U.S. at 428, n. 12. A permanent invasion of the property destroys the property owner's ability to possess, use, and dispose of such property. Loretto, 458 U.S. at 435.

In Loretto, the U.S. Supreme Court held that a state statute was a per se taking, because it created a permanent physical invasion of the property. Id. at 438. Loretto was a class action lawsuit initiated by apartment building owners in New York City challenging a statute that prevented the owners from excluding cable T.V. boxes and wires from their property. Id. at 423-24. Many of the cables and boxes in question had existed prior to the ownership of the building and the statute. Id. at 423. The court held “the cable installation on appellant’s building constitutes a taking under the traditional test. The installation involved the direct physical attachment of plates, boxes, wires, bolts, and screws to the building.” Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. (1982) at 438.

The Loretto Court analyzed the “bundle” of property rights held by a property owner to determine whether the physical invasion was a taking. Id. at 435. These rights include the right to “possess, use, and dispose” of the property, and the Court ruled that a permanent physical invasion harms each of these property rights. Id.

First, the property right to “possess” incorporates the owner’s right to exclude, and is considered “the most treasured strands in an owner’s bundle of property rights.” Id. By rendered the property owner incapable of excluding others, the physical invasion destroys this fundamental property right. Id. The United States Supreme Court has gone on to opine that:

“we hold that the “right to exclude,” so universally held to be a fundamental element of the property right, falls within this category of interests that the Government *cannot take without compensation.*” [emphasis added.]

Kaiser Aetna v. U. S., 444 U.S. 164, 179-80, 100 S. Ct. 383, 393, 62 L. Ed. 2d 332 (1979).

Second, the right to “use” property is also damaged, because the owner loses the power to control his property when that property has been appropriated by another. Loretto, 458 U.S. at 21-22 Finally, the right to “dispose” is destroyed because the owner cannot transfer the full bundle of property rights, including the right to possess and exclude. Id.

By destroying parts of each piece of the bundle property rights, the County has fundamentally altered Lee Haynes ownership interest in his

property. This fundamental alteration is a taking in all circumstances. This rule is well suited for analyzing government interference associated with smaller pieces of property, such as the cables in Loretto, or the pipe in this case.

As discussed above, the County engaged in permissive use of the pipe until May 15, 2008. When the storm-water pipe initially broke, Lee Haynes asked the County to come out and repair the pipe. The County refused on the basis that it did not own the pipe and did not otherwise have any legal right to come upon the Haynes Property. At that point Lee Haynes attempted to exercise his property rights by telling the County that if it did not intend to repair the pipe then it needed to stop using the pipe because the pipe was broken and storm-water was discharging onto and eroding away his property.

When Lee Haynes sought to exclude the County, the County had two choices: 1) discontinue using the property; or 2) take the pipe for public use of draining Crawford Road. Option 2 creates a permanent physical invasion that is hostile to Lee Haynes property right to exclude. This action categorically requires just compensation. The County's official action was to inform Lee Haynes that it would not repair the pipe, but would continue to use the Property, even over his objection.⁵ CP 32.

⁵ The County's refusal to remove itself from the Haynes Property is analogous to the wires in Loretto that pre-existed the state action but could no longer be removed. 458 U.S. at 421-22. The permissive use of the property turned hostile only when the state

The refusal to discontinue using the storm-water pipe constitutes a per se illegal taking that categorically requires just compensation. This Court should find the County has committed a per se taking, and remand for a trial on the issue of just compensation.

2. The County Has Taken The Haynes Property For Public Use Without Just Compensation.

The taking of private property for public use without just compensation is an illegal taking. Dickgieser v. State, 153 Wn.2d 530, 540, 105 P.3d 26 (2005). To prove this second type of inverse condemnation the party must establish: 1) a taking or damaging; 2) of private property; 3) for public use; 4) without just compensation; 5) by a governmental entity that has not instituted formal proceedings. Phillips, 136 Wn.2d 946, 957, 968 P.2d 871 (1998). Use of private property that is reasonably necessary for the proper maintenance of another property already devoted to public use is sufficient to establish a taking. Id.

A government entity can be held liable for the intentional collection and diversion of surface water across a private party's land. Id. The government must first conduct formal proceedings and providing just compensation to the party whose land will be flooded. Id. In cases of surface water being diverted, the party must show that the County "artificially collected and discharged on surrounding properties in a

adopted a statute which prevented removal of the wires, and that was the point in time when the taking occurred.

manner different from the natural flow of water onto those properties.” Id. at 958. The county exceeds its ability to increase the “natural flow” of water onto private property when it gathers and concentrates water by artificial means and discharges the water onto the land of a private party in such a manner as to damage the property. Buxel, 60 Wn.2d at 409.

In Boitano v. Snohomish County, the Court addressed the issue of the County draining water from its gravel pit onto the Boitano’s land. Boitano v. Snohomish County, 11 Wn.2d 664, 665-66, 120 P.2d 490 (1941). In digging the gravel pit the County had uncovered a large natural spring, and the water originating from the spring needed to be drained to operate the gravel pit. Id. To drain the water, the County dug a drainage ditch diverting the water into the Boitano’s garden. Id. The Court held “the construction of the channel and disposition of the water constituted . . . a necessary part of the county’s operation of its gravel pit, for the inference is irresistible that the water would otherwise have accumulated there and thus would have interfered with the operation of the pit.” Id. at 671. The court held further: “in using [Boitano’s] land for the disposal of the water from its own premises the county was devoting that land to a public use incidental to its operation of the gravel pit.” Id.

In Boitano, the Court had to make the inference that the water would interfere with the County’s maintenance of the gravel pit. Id. In the instant case, the County has declared that Crawford Road will become

a “public safety hazard” should the County be enjoined from using the Haynes Property. CP 93, 102.

Crawford Road is dedicated to the public use. CP 11. The Declarations submitted by the County affirmatively assert the necessity of the Haynes Property for the maintenance of Crawford Road. CP 93, 102. The County’s collection and diversion of water across the Haynes Property is necessary for the use of Crawford Road, and constitutes a taking of private property for public use. It does not matter whether the water runs underneath the Haynes Property, or the water escapes due to the County’s failure to maintain its easement on Lot 6. In the alternative of a continuing trespass, this Court should find the County has committed an illegal taking by dedicating the Haynes Property to public use without just compensation, and remand for a trial on the issue of damages.

3. Lee Haynes Has Standing To Sue For Inverse Condemnation.

In its motion for summary judgment the County raised for the first time the affirmative defense of standing. CP 154-56. Specifically, the County argued Lee Haynes did not have standing to pursue a claim for illegal taking, because he was not the owner of the property when the storm-water pipe was installed during the development of the Skylark Plat. CP 155-56. However, this affirmative defense is not applicable for four reasons. First, as has been explained throughout the course of this brief, the County has denied that it has taken any portion of the Haynes Property

and refused to accept any responsibility for use of the Property, including refusing to repair the damaged storm-pipe. Second, the County cannot overcome the presumption that its initial use of the storm-pipe was permissive. Third, even if there was some form of taking before 1992, a subsequent taking occurred in 2007 and 2008 when the nature the County's use of the property damaged the Haynes Property. Finally, the County waived the affirmative defense by failing to raise it in its Answer to the Complaint. CP 10-17.

a. The County Is Estopped From Asserting A Prior Taking By Asserting It Has No Property Right In the Pipe.

The idea that the County condemned a portion of the Haynes Property prior to Lee Haynes ownership is belied by the fact that the County adamantly denies the existence of an easement. CP 12, 77, 92-93, 99, 121, 152; RP 6:7-9, 7:4-7, 24:21-23. Further, the County refuses to accept the responsibility for the repair and maintenance of the pipe which would accompany a prior acquisition of an easement. CP 66-67. If the County believed it had previously "taken" a portion of the Haynes Property for the benefit of running storm water, they would have acknowledged the responsibility of their ownership, but instead they declined to do so.

b. A Cause of Action for Inverse Condemnation Does Not Accrue When Use Is Permissive.

It is axiomatic that a taking cannot occur when use of the Property is permissive, because with permissive use no property right is conferred.

The law permits the permissive use by government of private property. See Scheller v. Pierce County, 55 Wash. 298, 104 P. 277 (1909). In fact, the government's permission is presumed unless an act of hostility is shown. See Petersen v. Port of Seattle, 94 Wn.2d 479, 618 P.2d 67, citing Gray v. McDonald, 46 Wn.2d 574, 283 P.2d 135 (1955.) A lapse of time alone cannot change the character of the permissive use. Scheller v. Pierce County, 55 Wash. 298, 104 P. 277 (1909).

The Scheller decision is instructive. In that case W.M. Albert Whyte and his wife (the predecessor owners of Scheller) granted Pierce County the temporary use of a portion of their private property for a public road for a period of five years. Scheller, 55 Wash. at 278. The road was used for 18 years. Id. At different times during the 18 years of public use, the County refused to expend public money on that portion of the road across the private property because it had no right of way for the road. Id. The property owners paid all taxes and maintained the Property. Id. After 18 years of public use, Scheller, the successor in interest to the private property, filed an action to restrain the county from interfering with fences built across the road. Id. The County defended on the ground that it had acquired a highway by prescription, and the lower court agreed. Id.

The Supreme Court of Washington reversed because the County had failed to show that its use of the Property was hostile. Scheller, 55 Wash. at 301. The Court explained:

“If the use of a way over one’s land is shown to be permissive only, no right to use it is conferred, though the use may have continued for a century or any length of time.

...

If permissive at its inception, then such permissive character being stamped on the use at the outset, will continue of the same nature, and no adverse user can arise until a distinct and positive assertion of a right hostile to the owner, and brought home to him, can transform a subordinate and friendly holding into one of an opposite nature, and exclusive and independent in its character.”

Scheller at 301-302 (emphasis added.)

In this case, the County does not even claim that its use of Haynes Property was hostile explaining to the Superior Court: “We’re not going to say that our - - the County’s use of this pipe was hostile, open, notorious, what have you.” RP 24:21-23. Consequently, permissive presumption must prevail, and during permissive use no legal right was conferred to the County. It was only at the time that the character of the use changes from permissive to hostile that a cause of action for condemnation accrues.

The hostility element in illegal takings is consistent with Washington case law defining when a cause of action accrues for inverse condemnation. See Petersen v. Port of Seattle, 94 Wn.2d at 484-85. Specifically, Washington Courts have stated that “[A] new cause of action thus accrues with each measureable or provable decline in the market value.” Highline School District No. 401 v. Port of Seattle, 87 Wn.2d 6, 15, 548 P.2d 1085 (1976). If plaintiffs show a governmental interference with their land and a resultant decline in its market value, they are entitled

to the remedy of just compensation. Petersen, 94 Wn.2d at 482. However, there can be no “decline in market value” if the governments use is permissive and the property owner retains all rights to his exclusive use and enjoyment of the property. A “decline in market value” can only occur when a property right (a stick in the bundle) is taken away.

The case of Hoover v. Pierce County, 79 Wn. App. 427, 903 P.2d 464 (1995) is distinguished from this pending case. In Hoover, the Court of Appeals dismissed a claim filed for inverse condemnation on the basis that the taking had occurred prior to the Hoover’s purchase of the property and that the right to bring a suit for damages was personal to the predecessor landowner. Hoover, 79 Wn. App. at 433-34. Of paramount significance, the Hoover Court found that Hoover’s “purchase price of the property . . . either did reflect or should have reflected the diminished value of the land caused by the propensity to flood.” 79 Wn. App. at 434. The Court held that, because the owners purchased the property at a price commensurate with a diminished value, the subsequent purchasers lacked standing to assert the cause of action for inverse condemnation. Id. at 436.

In this case there is no evidence that Lee Haynes purchased this property at a diminished price commensurate with having to maintain a storm-water drainage system dedicated to a public roadway. In fact, the County’s use of the property was not even known by Lee Haynes when he purchased the Property as the storm-water pipe runs below ground. CP

257-58. Even if he had known of the existence and use of the storm-water pipe running beneath his Property, there was certainly no knowledge that the County's use would extend beyond use of the pipe itself and allow the County to flood and damage his Property and then not accept the responsibility for either the flooding or the repair.

The taking of the property right to use Lee Haynes property occurred, if at all, only when the County's use of the property became hostile to Lee Haynes. That did not occur until 2008, when Lee Haynes asked the County to stop using the pipe after it was damaged, but the County refused to do so and instead continued to divert water to Lee Haynes Property knowing that the water would discharge on the Property where the pipe was broken. At this time, the County took from Lee Haynes the right of exclusive enjoyment and also took a right to damage the Property. From this point forward, Lee Haynes will be forced to disclose the County's uninhibited right to use and damage his property which will necessarily diminish the value of his Property. Lee Haynes has the right to recover that which has been taken from him by the County.

Highline, *supra*, 87 Wn.2d at 15.

- c. The County's Act Of Discharging Storm-water Onto And Damaging The Haynes Property Constitutes A Further Taking.

Even if the County could prevail on its claim that a condemnation of the Hayens Property took place prior to 1992, that taking would be

limited to that original use by the County: running storm-water through the pipe. A substantially different use or new damage to the property constitutes an additional taking and requires further compensation. See Petersen v. Port of Seattle, 94 Wn.2d 479.

The Petersen case concerns an inverse condemnation action by property owners who sought just compensation for the diminished value of their property due to the Port's operation of Sea-Tac airport. Id. at 481. The Port defended on the basis that it had acquired a prescriptive easement to use the property, but the Washington Supreme Court held the Port had failed to prove its use of the Property was hostile. Id. at 486. However, the Court further explained that even if there had previously been a prescriptive easement, the Port's change in use of the easement in the last 10 years created new liability to the Port:

In any event, in early years the airport was used exclusively by propeller-driven aircraft. The testimony was that this usage, while annoying at times, was not appreciably damaging. When jet-powered aircraft began to be used, an entirely new noise environment was presented.

Ever increasing usage of Sea-Tac airport by jet aircraft began in the 1960's and continues to this day. Year by year, from 1964 to 1974 when the instant action was filed, larger and noisier aircraft and more of them utilized the airport. The Port's own records demonstrates this. Thus, even if the trial court had found some kind of pre-1964 prescriptive easement, it would not have been for the type and number of aircraft which used the airport after that date and, consequently, it would not have decreased the Petersens' damage in 1974.

Accordingly, while we agree with the trial court's determination of nonhostile use on the part of the Port, we are also of the view that had there been a pre-1964 prescriptive easement acquired, it would not have availed the Port a defense under the circumstances of this case. We hold that the Port has not demonstrated it acquired a prescriptive right to an avigation easement over the Petersen property.

See Petersen 94 Wn.2d at 486. The change in use of the property constituted a new taking and required just compensation.

This case presents a far more extreme circumstance than Petersen. The Petersen court found that a change in the type and number of aircraft alone was sufficient to be considered a new and distinct taking. In this case, assuming for the sake of argument that a taking of use of Lee Haynes property occurred prior to 1992, the extent of that hidden use would only have been to run water through the storm-water pipe located on the Haynes Property. However, the County's use of the Haynes Property in 2007 changed to that of discharging water onto the surface of the Haynes Property, eroding it away. Furthermore Lee Haynes pleaded with the County to come out and repair the pipe, but the County simply shrugged its shoulders and informed Mr. Haynes that the County was not responsible for its use of this Property. The County's change in use of the Property by flooding the Haynes Property, and physically damaging the property is an entirely new and different taking, and requires just compensation to Lee Haynes.

d. The County Has Waived The Affirmative Defense Of Standing.

The County did not raise the affirmative defense of standing in (1) answering the complaint, (2) defending the motion for preliminary injunction, or (3) conducting discovery. The very first time the County raised the issue of standing was in its motion for summary judgment. However, this assertion was based on no new facts discovered through discovery, and relied on declarations submitted with the County's response to the motion for preliminary injunction. CP 155-56. The County's failure to timely raise the affirmative defense of standing is a waiver of the defense.

A party to assert an affirmative defense that is known will waive the affirmative defense. See Bickford v. City of Seattle, 104 Wn. App. 809, 813, 17 P.3d 1240 (2001). "Generally, affirmative defenses are waived unless they are (1) affirmatively pleaded, (2) asserted in a motion under CR 12(b), or (3) tried by the express or implied consent of the parties." Id.

Here, the County waited until its motion for summary judgment to assert that Lee Haynes lacked standing to sue. This was done despite asserting thirteen affirmative defenses in the County's answer. CP 13-15. The County did not seek to amend its answer prior to filing the motion for summary judgment. The County had conducted discovery, CP 154, and did not assert any new facts discovered in arguing standing. CP 155-56.

The County by its failure to properly assert the affirmative defense of standing waived the defense, and Lee Haynes cause of action should not be dismissed on that ground.

D. Lee Haynes' Cause Of Action For Property Damage Was Not Before The Court On Summary Judgment, And Its Dismissal Was Improper.

Entirely separate from resolution of the property rights in this case, the Superior Court erred in dismissing this pending lawsuit without adjudicating Lee Haynes' claim for property damage and waste associated with the County's continuing discharge of storm-water onto his Property. In his lawsuit against Snohomish County, Lee Haynes stated three causes of action in his complaint: 1) Intentional Trespass; 2) Property Damage; and 3) Inverse Condemnation. CP 3-5. Resolution of Lee Haynes claim for property damage associated with the County's use of the pipe was not even addressed in summary judgment. CP 149-155. However, the trial court dismissed Lee Haynes complaint in its entirety, including his claim for property damage. CP 288-89. This was in error.

“It is the responsibility of the moving party to raise in its summary judgment motion all of the issues on which it believes it is entitled to summary judgment.” White v. Kent Med. Ctr., Inc., PS, 61 Wn. App. 163, 168, 810 P.2d 4 (1991). “It is incumbent upon the moving party to determine what issues are susceptible to resolution by summary judgment, and to clearly state in its opening papers those issues upon which summary

judgment is sought.” Id. at 169; see also Davidson Serles & Associates v. City of Kirkland, 159 Wn. App. 616, 637, 246 P.3d 822 (2011).

In Davidson, the moving party requested an order dismissing all claims, and the trial court entered the order. Davidson, *supra*, 159 Wn. App. at 638. However, the appellate court held that the neither the order nor the motion addressed the issue of “spot zoning” that was plead, and reversed the grant of summary judgment concern the sport zoning claim. Id.

This case is similar to the Davidson Serles case. Lee Haynes plead damage to property as a separate cause of action. The Motion for Summary Judgment filed by the County stated the following issues:

- “A. Whether Plaintiff has standing to bring this lawsuit?
- B. Whether Plaintiff’s claims for nuisance and trespass are barred by the statute of limitations?
- C. Whether a trespass has occurred?
- D. Whether inverse condemnation of a constitutional taking has occurred?
- E. Whether Plaintiff failed to name an indispensable third party?
- F. Whether Plaintiff has waived his right to recovery?
- G. Whether Plaintiff has failed to mitigate his damages?

H. Whether attorneys' fees are available to Plaintiff should he prevail?"

CP 154-55. None of these issues address the damage to Lee Haynes property, and the amount of recompense. The only issue raised that even remotely deals with damages is "G.", regarding mitigation of damages. However, the doctrine of mitigation of damages would only apply to those damages occurring after the original intentional tort and damage. Cobb v. Snohomish County, 86 Wn. App. 223, 232, 935 P.2d 1384 (1997).

Because the issue of property damage was not addressed on summary judgment, the trial court could not dismiss the Plaintiff's Complaint in its entirety. As such, the dismissal of the 2nd cause of action for property damage was inappropriate and the dismissal must be reversed and remanded for trial.

E. Request For Costs and Fees Pursuant To RAP 18.1

Pursuant to RAP Title 14 and RAP 18.1, the appellate court is authorized to award statutory attorney fees and certain costs (i.e. reasonable expenses actually incurred and reasonably necessary for review) to the substantially prevailing party on review. RAP 14.3.

In addition, attorney fees are awarded on appeal, if allowed by applicable law, e.g., by statute, contract, or a recognized ground of equity. RAP 18.1 (a); Leingang v. Pierce Cty. Medical Bureau, 131 Wn.2d 133,

143, 930 P.2d 288 (1997); Eugster v. City of Spokane, 121 Wn. App. 799, 91 P.3d 117 (2004)

1. Lee Haynes Is Entitled To His Attorneys' Fees On Appeal Pursuant To RCW 8.25.070.

In an action for inverse condemnation, the prevailing condemnee is entitled to his attorneys' fees on appeal pursuant to RCW 8.25.070. City of Renton v. Scott Pac. Terminal, Inc., 9 Wn. App. 364, 377-78, 512 P.2d 1137 (1973). A party entitled to compensation for inverse condemnation will also be entitled to attorneys' fees on appeal. See Showalter v. City of Cheney, 118 Wash. App. 543, 551-52, 76 P.3d 782 (2003). "RCW 8.25.075 clearly manifests a legislative intent that if a condemnor chooses to take property without instituting condemnation proceedings, the owner shall be reimbursed for his costs of litigation in obtaining his constitutionally guaranteed just compensation." City of Snohomish v. Joslin, 9 Wn. App. 495, 499-500, 513 P.2d 293 (1973).

If this Court finds the County has committed an illegal taking an award of attorneys' fees is appropriate pursuant to RCW 8.25.075. The compensation awarded after a trial on the matter should include attorneys' fees for Lee Haynes successful appeal.

2. Lee Haynes Is Entitled To Attorneys' Fees For Waste Under RCW 4.24.630.

Further, the County is liable for waste to Lee Haynes property pursuant to RCW 4.24.630. The statute states at the relevant part:

“Every person who goes onto the land of another . . . wrongfully causes waste or injury to the land, or wrongfully injures personal property or improvements to real estate on the land, is liable to the injured party for treble the amount of the damages caused by the removal, waste, or injury. For purposes of this section, a person acts "wrongfully" if the person intentionally and unreasonably commits the act or acts while knowing, or having reason to know, that he or she lacks authorization to so act. . . . In addition, the person is liable for reimbursing the injured party for the party's reasonable costs, including but not limited to investigative costs and reasonable attorneys' fees and other litigation-related costs.”

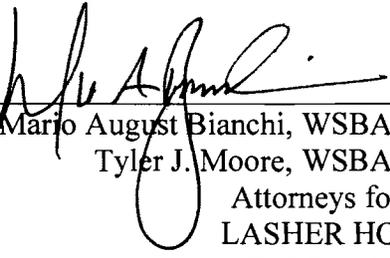
RCW 4.24.630(1). An award of attorneys’ fees under 4.24.630 requires an intentional act, and that the party knew or had reason to know, that it lacked authorization. Clipse v. Michels Pipeline Const., Inc., 154 Wn. App. 573, 580, 225 P.3d 492 (2010).

The facts show that a County owned and maintained road intentionally collects and diverts water towards the Haynes Property. CP 97-99. The purpose of collecting and diverting the water is to keep Crawford Road from flooding, and to deposit the water in a county maintained retention pond. CP 93, 98, 102. Further, the County admits that it lacked authorization to use the Haynes Property. CP 12, 77, 92-93, 99, 121, 152; RP 6:7-9, 7:4-7, 24:21-23. The collection and diversion of water damaged the Haynes Property, and has damaged Lee Haynes property rights. Whether the Court finds that there has been an illegal or not, the County is liable for attorneys’ pursuant to RCW 4.24.630, including all fees on appeal.

V. CONCLUSION

For the reasons stated herein, the Appellant respectfully requests that the Court reverse and remand the Order Dismissing Plaintiff's Complaint, and instruct the Trial Court to enter an Order Granting Summary Judgment on either the Appellant's Claim for Intentional trespass or in the alternative illegal taking. Irrespective of resolution of the property rights issue, this Court should remand for further proceedings regarding Lee Haynes' second cause of action for property damage.

Respectfully submitted this 30 day of June, 2011



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CERTIFICATE OF SERVICE

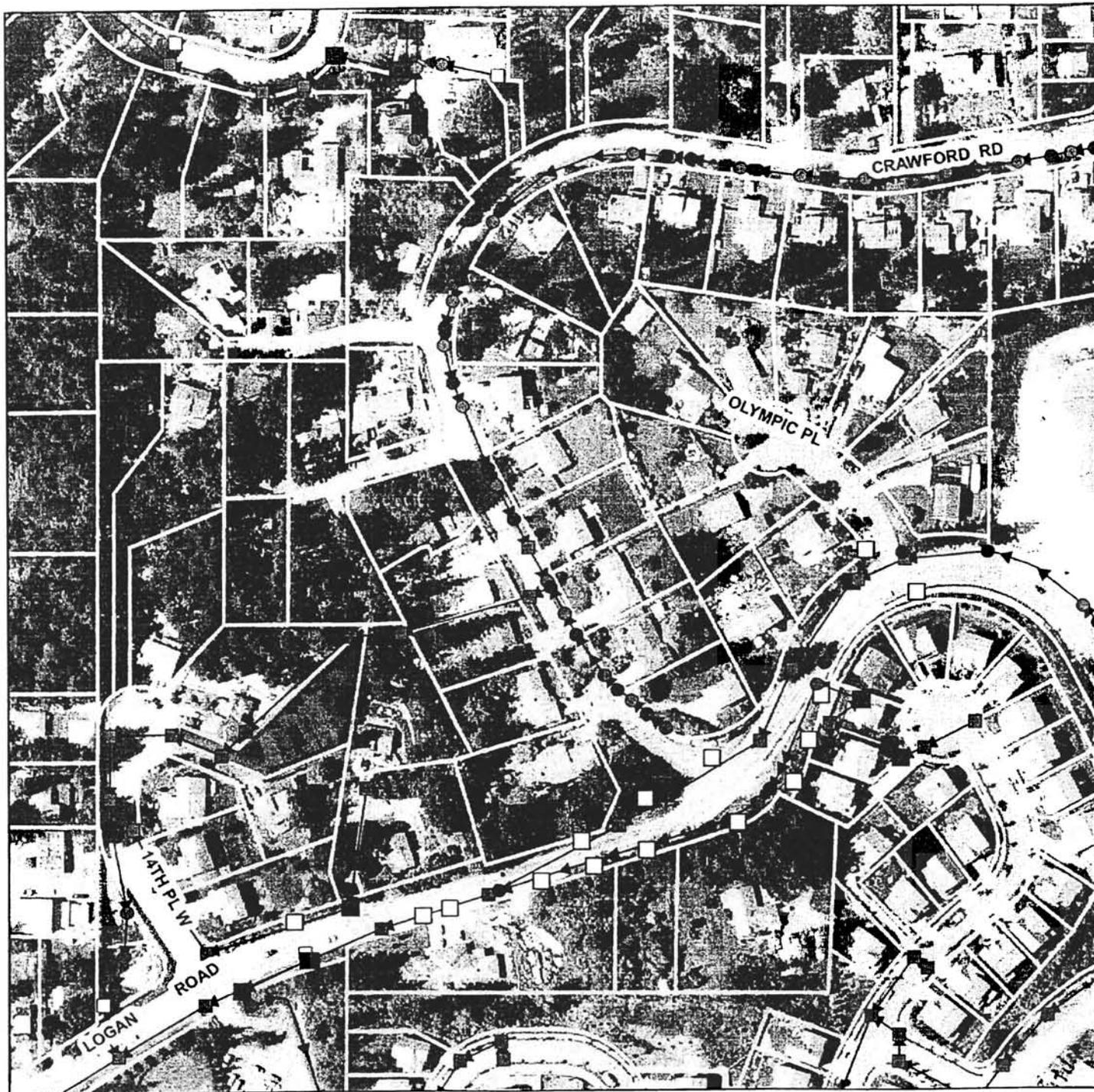
I certify that on June 30, 2011, I caused a copy of the foregoing document to be served via legal messenger/mailed via first class U.S. mail, postage prepaid, to the following counsel of record for respondent:

Hillary J. Evans
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Snohomish County Prosecuting Attorney, Civil Division
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Everett, Washington 98201-4046



Cheryl A. Knudsen
Legal Assistant

APPENDIX A



Legend

Drain Points

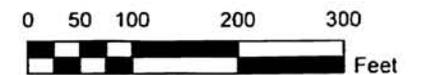
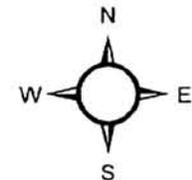
TYPE

- Pipe In
- ⊙ Pipe Out
- Pipe Invert
- ⊙ Other Drainage Features

Catch Basins

TYPE

- CB Yard Drain
- CB Type 1 Inlet
- ▣ CB Type 1
- CB Type 2
- CB Type 2 Flow Restr/Poll Cntrl
- Other CBs
- Vault Access: CB Type 3 WQ Vault; Filters
- ⊙ Detention Pipe Access
- network



Snohomish County

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APPENDIX B

A PORTION OF THE SE 1/4, SECTION 23, TOWNSHIP 27 N, RANGE 4 E. W.M.

STATION	COORDINATES
1	820.00' N, 112.00' E
2	122.00' N, 212.00' E
3	172.00' N, 312.00' E
4	222.00' N, 412.00' E
5	272.00' N, 512.00' E
6	322.00' N, 612.00' E
7	372.00' N, 712.00' E
8	422.00' N, 812.00' E
9	472.00' N, 912.00' E
10	522.00' N, 1012.00' E
11	572.00' N, 1112.00' E
12	622.00' N, 1212.00' E
13	672.00' N, 1312.00' E
14	722.00' N, 1412.00' E
15	772.00' N, 1512.00' E
16	822.00' N, 1612.00' E
17	872.00' N, 1712.00' E
18	922.00' N, 1812.00' E
19	972.00' N, 1912.00' E
20	1022.00' N, 2012.00' E

FIXED C.B.
 RE = 578.5
 L = 576.0

