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NO. 41433-3-II

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

EAMONN NOONAN, an individual

Appellants,

v.

THURSTON COUNTY, WASHINGTON, a municipal corporation,

Respondent.

BRIEF OF RESPONDENT

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I. IDENTITY OF RESPONDENT

Thurston County is the Respondent in this appeal. Thurston County is asking the Court to affirm the decision below and to dismiss the appeal of Appellant Eamonn Noonan.

II. INTRODUCTION

Thurston County respectfully asks the Court to affirm an order of summary judgment entered by the trial court, dismissing Noonan's damages claims against Thurston County. Noonan alleged in his Complaint that flood damage to his property below French Loop Road was attributable to the design and construction of the road. Thurston County responded that French Loop Road was built by private parties, and that the County played no role in its design or construction. Further, the Thurston County Board of County Commissioners (BOCC) never issued a Resolution adopting French Loop Road as part of its system.

The trial court properly held that Thurston County could not be liable for any defects or flaws in the design or construction of the road, because Thurston County did not build the road. Further, the Court held that the County could not be liable for any alleged failure to maintain French Loop Road, because the road was never adopted by Thurston County as a part of its road system through formal resolution. Therefore, under the authority of RCW 36.75.080 as well as Washington common law, Thurston County is protected from liability for flood damage allegedly attributable to French Loop Road.

In response to Thurston County's Motion for Summary Judgment, Noonan did not dispute several additional dispositive defenses warranting summary judgment, including the two year statute of limitation as a bar to the claims for nuisance and negligent injury to real property; the absence of the elements of the real property waste statute, RCW 4.24.630; and the absence of the necessary elements for intentional trespass and for an inverse condemnation claim.

The only claim which Noonan argued should remain in the case was one for "negligent trespass." But neither the Complaint nor the Amended Complaint alleged negligent trespass. Further, that claim was barred by RCW 36.75.080 and by Washington common law. Moreover, any such claim would be treated as a claim for negligent damage to real property, which is subject to the two year statute of limitations.

Finally, summary dismissal of Noonan's lawsuit was warranted because there was no allegation in the Complaint or evidence in the record that flood damage on plaintiff's property was caused by any actions by the County. Repair work in 1995 occurred entirely on Mr. Noonan's own property in 1995 (when it was owned by a Mr. Miles). There is no competent evidence that the County made any substantive changes to the design or the construction of French Loop Road in the vicinity of plaintiff's property.

Summary judgment was properly granted, based on all of the above factors. This Court should affirm.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Thurston County believes that the issues pertaining to the assignments of error may best be stated as follows:

(a) Whether RCW 36.75.080 protects the County from liability for failure to maintain a road which has never been formally adopted by County resolution as a part of the County's road system.

(b) Whether, even irrespective of the language of RCW 36.75.080, a local government is not responsible for damage caused by the design or construction of a privately built road simply because the local government undertook maintenance of the road after construction.

(c) Whether a party can be liable for "negligent trespass" where there is no evidence of any tortious action by the defendant which was a proximate cause of the plaintiff's injury, and where any such claim is barred by limitations.

IV. STATEMENT OF FACTS

In 2005, plaintiff Eamonn Noonan purchased a residential property at 3230 French Loop Road NW, which is located in unincorporated Thurston County, Washington. His home is located on the shoreline and at the toe of a natural drainage basin. Noonan's house and property lies downhill from (below) a curve on French Loop Road.

On January 29, 2006, a major storm hit the area which resulted in flooding throughout Thurston County. Mr. Noonan's property experienced flooding and erosion during that storm. On or about

January 14, 2009, Noonan submitted a claim for damages with Thurston County, in which he alleged that the design and construction of French Loop Road was defective and/or inadequate to handle stormwater, and that the design and construction of that road was a proximate cause of his flooding damages. (CP 34).

On or about March 19, 2009, Noonan filed a Summons and Complaint, seeking recovery against Thurston County. The Complaint alleged that the ditches along French Loop Road were improperly designed and constructed so as to direct flood waters towards his residence. (CP 4). Recovery was sought under theories of negligence and inverse condemnation. (CP 5). The Complaint was later amended to add claims under the real property waste statute (RCW 4.24.630), intentional trespass and nuisance. (CP 21).

The County's Answer and its responses to discovery pointed out that Thurston County neither designed nor built French Loop Road. Rather, it was designed and constructed by unknown private parties, as Noonan now admits. (See CP 43-44; Appellant's Opening Memorandum, p. 4). Further, the Thurston County Board of County Commissioners (BOCC) never adopted French Loop Road as a part of the County's road system through County resolution. (CP 45-46).

At some point in time, the County did begin to perform occasional maintenance on French Loop Road and its drainage ditches. It did not, however, make any material changes to the design or construction of the

road and ditches. (Supplemental CP 252-253). In 1994, Noonan's predecessor-in-interest Don Miles experienced flood damage on his property below French Loop Road. He asked the County to help with repairs to his property. He also asked the County to modify the design or construction of French Loop Road. In an effort to resolve the dispute with Miles, the Thurston County BOCC authorized the Department of Public Works to pay a contractor to perform repair work on Miles' private property below French Loop Road. (CP 77-78). The County did not, however, undertake any alterations to the design or construction of French Loop Road, as plaintiff has acknowledged. (CP 49; 60; Supplemental CP 252-253).

In short, the evidence produced in discovery demonstrated that Thurston County was protected from liability, both because it did not design or build French Loop Road, and also because it did not adopt French Loop Road as a part of its road system by BOCC Resolution.

On or about June 3, 2010, Thurston County moved for summary judgment. The motion sought dismissal of all claims based on a) RCW 36.75.080; (b) Washington common law; (c) the statute of limitations; and (d) the failure of plaintiff to satisfy the elements of his various causes of action.

Importantly, in response to the summary judgment motion, Noonan conceded that all claims other than a claim for "negligent trespass" were barred by limitations and/or the failure to satisfy the elements of the

alleged causes of action. Indeed, in Noonan's "Statement of Issues" pertaining to summary judgment, he focused solely on a "negligent trespass" claim, and made no assertion or argument disputing the County's arguments as to any other cause of action. (See, CP 51, 66).

Noonan argued that the County's maintenance work might have been negligent, but offered no evidence to support the claim, and made no assertion that maintenance by Thurston County or repairs to private property in 1995 had caused damage to his property.

In its Reply Brief, Thurston County again stressed the application of RCW 36.75.080, as well as the common law principle that a city or county is not liable for the design or construction of a privately built road and drainage system, simply because the county assumed maintenance after construction. The County also pointed out that the 1995 repair work on Miles' property was a red herring, as there was no evidence that the County's 1995 work or its maintenance caused any damage to the plaintiff's property.

Shortly before the summary judgment hearing, Noonan filed a "Supplemental Response Memorandum" but again offered no evidence, and presented no argument that the 1995 repair or maintenance had caused his damage. (CP 196-200).

Following oral argument, the Court granted the County's Motion for Summary Judgment. A Motion for Reconsideration by Noonan was denied. This appeal followed.

V. ARGUMENT

A. RCW 36.75.080 Protects Local Governments From Liability for Failure to Maintain Privately Built Roads Absent a Formal Declaration by the BOCC.

As explained in the Declaration of Dale Rancour, and as admitted by both parties, French Loop Road was not designed or constructed by Thurston County. (Appellant's Opening Memorandum, p. 4). Instead, it was apparently designed and built over 50 years ago by private parties. (CP 43-44). Further, the Thurston County Board of County Commissioners (BOCC) never adopted French Loop Road by resolution as part of its road system. Therefore, under the authority of RCW 36.75.080, Thurston County is protected from liability for the condition of that road:

All public highways in this state, outside incorporated cities and towns and not designated as state highways which have been used as public highways for a period of not less than 10 years are county roads: PROVIDED that no duty to maintain such public highway nor any liability for any injury or damage for failure to maintain such public highway or any road signs thereon shall attach to the county until the same has been adopted as a part of the county road system by resolution of the County Commissioners.

RCW 36.75.080. In this case, because there is no evidence that French Loop Road was designed and constructed by Thurston County, or that it was adopted by a BOCC resolution as a part of the County road system, County liability for the condition of the road and its ditches is foreclosed.

B. The Elements of Estoppel Are Not Present.

In response to the summary judgment motion, Noonan did not provide any evidence of a BOCC resolution adopting French Loop Road. Instead, Noonan asked the court to deny summary judgment as to a “negligent trespass” claim because (a) in 1995 Thurston County agreed to fund repairs to the private property of the prior owner (Miles); (b) in the county resolution authorizing the expenditure, the “whereas” clauses referred to French Loop Road as a county road; and (c) Mr. Borden, a private contractor working for Miles, suggested that changes should be made to the design of French Loop Road, but the County did not undertake such changes. (CP 49; 60; Suppl. CP 252-253).

In effect, Noonan argues that because Thurston County agreed in 1995 to pay a contractor to do work on the Miles property below French Loop Road, the County should therefore be liable for subsequent damages caused by the design or condition of French Loop Road. Not surprisingly, Noonan cites no applicable caselaw supporting his argument.

Although Noonan does not refer to his theory as grounded in equitable estoppel, he seems to be arguing that estoppel should be applied to preclude the County from denying responsibility for the design and maintenance of French Loop Road. Yet Noonan cannot establish the essential elements of estoppel including (a) an unambiguous statement of existing fact; (b) reasonable reliance on the statement by the plaintiff; and (c) damage resulting from reliance on the defendant’s statement. Tacoma

Northpark, LLC v. Northwest LLC, 123 Wn. App. 73, 83, 96 P.3d 454 (2004).

It should first be noted that there is a strong public policy against applying equitable estoppel against the government. Chemical Bank v. WPPSS, 102 Wn.2d 874, 905, 691 P.2d 524 (1984). To establish estoppel, each element must be proved by “clear, cogent and convincing evidence.” Id. Moreover, equitable estoppel can only be applied as a defense to claims against enforcement of a contract. It is not available for offensive use by a plaintiff. Mudarri v. State, 147 Wn. App. 590, 619, 147 P.3d 153 (2008).

In this case, Noonan did not show by clear, cogent and convincing evidence that the elements of estoppel have been met. First, mere recitals in a resolution are not binding promises; second, Noonan has not shown that he was even aware of the County resolution from 1995 prior to the filing of this lawsuit, much less that he relied on it; third, the County never promised that it would ensure no further flooding to Miles or Noonan. Finally, Noonan is attempting to use estoppel offensively, which is prohibited.

Noonan seeks to attach significance to the fact that the 1995 County resolution referred to French Loop Road as a “county road.” But whether it is referred to as a County road or a privately built road is beside the point. RCW 36.75.080 provides that even if a private road *becomes public* as the result of use for more than 10 years, the County has no duty

to maintain that public road and is not liable for inadequate maintenance, absent adoption of a BOCC resolution formally accepting the road. The 1995 resolution referred to by Noonan was not a resolution to adopt French Loop Road as a part of the County's road system. Instead, it was merely an authorization for expenditures to help with Mr. Miles' private property repair. (CP 77-78).

The statements in the "whereas" clauses of the 1995 County resolution cannot be used offensively by Noonan as binding promises. First, the resolution was not a contract with Miles or with Noonan, but merely a legislative authorization for work to proceed on Miles' property. Moreover, even if the recitals were in the context of a contract, they would not be binding. Recitals which supply a background for agreements do not govern or constitute a part of an agreement. They are simply available to interpret the meaning of the contract if it is unclear. Rains v. Walby, 13 Wn. App. 712, 716, 537 P.2d 833 (1975), rev. denied, 86 Wn.2d 1009. Estoppel cannot arise from a recital unless it is of the essence of an agreement. Priestly v. Peterson, 19 Wn.2d 820, 145 P.2d 253 (1994). Moreover, in the context of ordinances and legislation, general statements of legislative intent do not create enforceable duties. Murphy v. State, 115 Wn. App. 297, 315, 62 P.2d 533 (2003).

In short, the language of the recitals in the 1995 County resolution authorizing work on Miles' property cannot be used to create enforceable

duties on Thurston County. The general rule of non-liability under RCW 36.75.080 controls.

C. Thurston County Did Not Make Material Changes to the Road.

Noonan correctly notes that Thurston County agreed to pay for certain repair work on Miles' property in 1995 following a 1994 storm event. Noonan misstates the factual evidence, however, when he suggests that the County undertook material changes to French Loop Road or its ditches. (See, Brief of Appellant, pp. 4-5, 12). Thurston County respectfully asks the Court to read the portions of the record cited by Noonan, and note that there was no "design, construction or alteration" of the road itself or its drainage ditches. (CP 71-72, 81-83, 87). At most, the County's work on the road was in the nature of cleaning out ditches and culverts. This fact was made abundantly clear in the Supplemental Declaration of Dale Rancour. (Supplemental CP 252-253).

Noonan admitted that the County did not change the design or construction of French Loop Road. Indeed, in response to the summary judgment motion, Noonan complained that the County *failed* to make modifications to the road which he believed should have been undertaken. (CP 49, 60).

The reality is that the 1995 repair work funded by the County occurred entirely on Miles' property, below French Loop Road. There has never been any alteration by Thurston County to the design or construction of French Loop Road.

D. Noonan Failed to Timely Raise RCW 36.75.070 and, in Any Event, It Does Not Change the Result.

Thurston County's Motion for Summary Judgment was based in part on the language of RCW 36.75.080, which provides that failure to maintain a public highway does not give rise to liability on the part of the county unless and until the road has been formally adopted as a part of the county's road system by BOCC resolution. Significantly, the County's Motion for Summary Judgment was filed approximately three months before the hearing. Yet Noonan made no reference to RCW 36.75.070 until his Motion for Reconsideration. To the contrary, Noonan specifically argued in response to the County's motion that French Loop Road was "prescriptively acquired pursuant to RCW 36.75.080." (CP 51). His new argument was therefore untimely and not appropriately raised in a motion for reconsideration under CR 59(a)(8). Yakima Fruit Growers Ass'n v. Hall, 180 Wash. 365, 40 P.2d 123 (1935).

But even if the argument had been timely raised, the language of RCW 36.75.070 is irrelevant to the issues in this case. That statute does not address the issue of County liability for a road. Rather, 36.75.070 merely reduces the period of time for acquisition of a right-of-way by prescription from the usual 10 years to seven years, if the County has actively managed the road. Thus, in Todd v. Kitsap County, 101 Wn.2d 245, 249, 676 P.2d 484 (1984) property owners sought compensation for a taking of their property for a county road. They argued that RCW

36.75.070 unfairly shortened the statute of limitations for their inverse condemnation action. As the Court of Appeals pointed out, however, RCW 36.75.070 simply reduced the period of time for acquisition of a prescriptive right by the county. Id. at 249.

In this case, Thurston County made no effort to acquire the road by means of condemnation, or to declare ownership through prescription. The County did at some point begin to perform occasional maintenance on the road but there is no evidence that the work began within 10 years of the road's first use by the public. Therefore, the standard 10 year prescription period of 36.75.080 applies. But as noted above, the issue of ownership of the road is irrelevant to the defense raised by the County, which is based on RCW 36.75.080. That statute states that, irrespective of whether the road has become a "county road," liability cannot be imposed against a county for a road which has not been formally established by BOCC resolution.

Significantly, Noonan admitted before the summary judgment hearing that the status of French Loop Road is governed by RCW 36.75.080, rather than .070. Indeed, his recent reliance on RCW 36.75.070 is contradicted by his representation to the trial court that it is "not disputed" that the road was acquired under 36.75.080:

RCW 36.75.080 provides that a public road not designated as a state highway becomes a county road when the road has been used as a public highway for at least 10 years. French Loop Road Northwest has become a Thurston County road pursuant to this statute *which is not disputed*.

(CP 53) (Emphasis added).

In Appellant's Opening Memorandum, Noonan now makes a strained argument that .080 was "intended to protect a county only where the county was not aware of" the road. (Appellant's Opening Memorandum, p. 33). But the statute says no such thing. To the contrary, the statute unambiguously states that a county is not liable for maintenance or failure to maintain a road for which there was no formal resolution establishing the road. The statute must be construed as written, not as plaintiff's counsel wishes it were written. The Court derives intent primarily from the statutory language. State v. Gossage, 165 Wn.2d 1, 7, 195 P.3d 525 (2008). The Court may not add to or subtract from the express language of a statute. Dot Foods, Inc. v. Dept. of Revenue, 166 Wn.2d 912, 921, 215 P.3d 185 (2009).

In short, the language of RCW 36.75.080 precludes liability under these circumstances. The language of a different statute, which merely reduces the normal period for road prescription (36.75.070) does not change the result.

E. County Liability is Also Foreclosed by Settled Caselaw.

Even if RCW 36.75.080 did not exist, Thurston County would still be protected from liability in this case because it neither designed nor built French Loop Road. Indeed, 36.75.080 is simply an extension of Washington common law which provides that a local government is not

responsible for the design and construction of roads or drains simply because it undertook maintenance of the roads and drains after they were privately built. In Pepper v. J.J. Welcome Construction Co., 73 Wn. App. 523, 871 P.2d 601 (1994), rev. den., 124 Wn.2d 1029, King County approved a permit for construction of private roads and then took over maintenance of the roads and drains after completion of the subdivision:

The Welcome Wood road and drainage system were substantially complete in November 1983. The county gave final approval in April 1984, and accepted them for county maintenance in March 1985.

73 Wn. App. at 528. When a downhill property owner suffered flood damage allegedly caused by the roads and drains, he sued not only the developer but also King County, which had accepted title to the roads and drains after construction was completed. The county's motion for summary judgment was granted, however, and the Court of Appeals affirmed, holding that King County did not become liable for the design or construction of the roads and drains simply because it took over maintenance of those facilities after the road was built. Id. at 531.

In Phillips v. King County, 136 Wn.2d 936, 968 P.2d 871 (1998) the Washington Supreme Court again addressed the circumstances under which a municipal authority could be held responsible for damages arising from a road and ditch system built by a private party. The court rejected the plaintiff's argument that the approval of the project by the municipal authority could impose liability for damages caused by the design and

construction of the road. 136 Wn.2d at 960-61. The court further rejected the plaintiff's argument that the County could become liable by taking over the facilities for purposes of maintenance:

The county and amici argue that it should not be liable for a design defect in a developer's system simply because they accept the system after construction in order to provide proper maintenance in the future. We agree.

136 Wn.2d at 966. In Phillips, summary judgment in favor of the county was reversed, however, because there *was* clear evidence that King County had acted as a direct participant in the design and construction of the allegedly defective drainage system. Id. at 967-68. Here, there is no such evidence.

Noonan's reliance on Sigurdson v. Seattle, 48 Wn.2d 155, 292 P.2d 214 (1956) is misplaced. First, Sigurdson is more than 50 years old, and the controlling case authority is Phillips v. King County. Moreover, the facts in Sigurdson are inapposite. The evidence in that case showed that a public drainage system had been built with the cooperation of the federal government and the City of Seattle. Id. at 156. Indeed, the city designated the place where the drainway was to be constructed. Id. at 160. Moreover, the City of Seattle replaced the piping and made substantial repairs on numerous occasions over a period of 18 years. Id. at 157. In other words, in Sigurdson, the City of Seattle was an active participant in the original construction of the drainage, as well as substantial alterations thereto. In this case, on the other hand, Thurston County played no role in

the construction of the drainage system, and made no material changes to that system.

Pepper and Phillips confirm that merely taking over a privately built road and its drains and performing maintenance does not make a county liable for defects or flaws in the design or construction thereof. Those cases provide controlling authority in support of Thurston County's summary judgment motion.

F. Noonan Conceded Dismissal of All Claims Except Negligent Trespass.

In its Motion for Summary Judgment, Thurston County also argued that Noonan's claims for nuisance and negligent property damage were barred by the two year statute of limitations. (RCW 4.16.130; Riplet v. Spokane-Portland Cement, 41 Wn.2d 249, 248 P.2d 380 (1952); Will v. Frontier Contractors, Inc., 121 Wn. App. 119, 125, 89 P.3d 842 (2004), rev. denied, 153 Wn.2d 2008). (CP 38). The County's motion further argued that there was no evidence to support a claim for real property waste under RCW 4.24.030 or for intentional trespass. (CP 39-40). In addition, the motion also pointed out that the inverse condemnation claim could not survive because the elements of a taking were not present. (CP 40-41).

In his Response Brief, Noonan did not dispute that the claims for nuisance, negligence, waste, intentional trespass and inverse condemnation were barred. Indeed, his statement of the Issues for Review

on summary judgment makes no mention of any of those claims, and his brief does not address them. (CP 47-66).

Instead, Noonan's response to summary judgment focused entirely on a claim of "negligent trespass." (CP 51, 61). Indeed, the conclusion of Noonan's Response Memorandum states as follows:

Because negligent trespass has a three year statute of limitations, Mr. Noonan respectfully requests the court to deny the county's motion for summary judgment.

(CP 66).

In his Opening Memorandum on appeal, Noonan makes the curious argument that the Court improperly dismissed his claims for negligence, nuisance and inverse condemnation. He asserts that he never waived or conceded these issues. The argument is demonstrably false. First, as noted above, Noonan made no argument regarding negligence, nuisance or inverse condemnation (or statutory waste) in his response briefs. This, despite the fact that the County's motion for summary judgment specifically addressed those claims and set forth legal arguments why they should be dismissed. But even more telling, Noonan's attorney expressly agreed in open court to the dismissal of those claims:

I would concede that the negligence claim, the nuisance claim and the inverse condemnation claim we give up.

Verbatim Report of Hearing, p. 20. Based on that express concession, the Court dismissed those claims:

First, based on the concession here by Mr. Goldstein of you and your client of the negligence, the inverse

condemnation, and the nuisance actions do not survive, and I would make that finding, . . .

Verbatim Report of Court's Ruling, p. 2. For Noonan to now argue that the Court improperly dismissed those claims is insincere.

G. The Negligent Trespass Claim Was Barred by Numerous Defenses.

In his Response Memorandum, Noonan argued that a claim for negligent trespass should survive summary judgment. But as the County pointed out in its reply brief, there were three problems with this argument. First, a trespass claim sounds in tort, and can arise only if the defendant owed a duty to the plaintiff. Under RCW 36.75.080 and Washington common law, Thurston County owed no duty to redesign or maintain French Loop Road.

Further, Noonan did not plead a claim for negligent trespass; and even if such a claim had been asserted, it would be subsumed within the claim for negligent injury to real property, and therefore barred by the two year statute of limitations. Will v. Frontier Contractors, Inc., supra.

The Court will note that a trespass claim was first asserted in the Amended Complaint for Damages filed on or about January 19, 2010. That claim, set forth in paragraph 6.2 is expressly in the nature of intentional trespass only:

Thurston County trespassed onto Noonan's land by *intentionally* diverting stormwater from its natural flow across the land and onto the Noonan property causing an injury to Noonan's property. (Emphasis added.)

(CP 21).

After the summary judgment was filed, Noonan realized there was no basis for an intentional trespass claim, because the County had not designed or built French Loop Road. Therefore, he sought to reverse course, arguing that a “negligent trespass” claim should be recognized. But such a claim was stated in neither the Complaint nor the Amended Complaint. Therefore, it was not even properly before the court.

Moreover, even if Noonan had asserted a claim for negligent trespass, that claim would be subsumed within Noonan’s claim for negligent damage to real property. Washington courts have made it clear that where a trespass or nuisance claim arises from the same set of facts as a negligence claim, it will not be independently recognized, but rather it will be subsumed within the negligence cause of action:

A party’s characterization of the theory of recovery is not binding on the court. It is the nature of the claim that controls. [Citations omitted] . . . For purposes of CR 54(b) a single claim for relief, on one set of facts, is not converted into multiple claims by the assertion of various legal theories.

* * *

Here, the negligence, nuisance and trespass claims all stem from a single set of facts, i.e., the mud, gravel and silt being deposited on the plaintiffs’ property. Essentially, Pepper/Jaffe have a single negligence claim with multiple theories.

Pepper v. J.J. Welcome Construction Co., supra, 73 Wn. App. at 547.

Where a plaintiff has already asserted a claim for negligent damage to

property, the court will treat a “negligent trespass” claim as a part of the single negligence cause of action:

We treat claims for trespass and negligence arising from a single set of facts as a single negligence claim.

Pruitt v. Douglas County, 116 Wn. App. 547, 554, 66 P.3d 1111 (2003).

In accord, Gaines v. Pierce County, 66 Wn. App. 715, 720, 834 P.2d 631

(1992). As a practical matter, this means that in most cases a trespass will

not be recognized absent intentional wrongdoing. Thus, in Kaech v.

Lewis County PUD, 106 Wn. App. 260, 23 P.3d 329 (2001), rev. denied,

145 Wn.2d 1020, the Court of Appeals upheld the dismissal of the

plaintiff’s trespass claim, where there was no evidence of intentional

misconduct:

To establish trespass, Kaech must show that the PUD desired the consequences of its actions, or believed the consequences were substantially certain to result from the conduct.

106 Wn. App. at 282.

In this case, Noonan’s Complaint for Damages and his Amended Complaint for Damages alleged negligent injury to real property. Neither pleading asserted a negligent trespass claim. Noonan could not avoid summary judgment by seeking to recast his claim for negligent property damage in the guise of negligent trespass. This was yet another reason for dismissal of Noonan’s lawsuit.¹

¹ As noted in Section I, infra, any negligent trespass claim would also be barred by the absence of proximate causation. There is no evidence that any work by Thurston County caused or exacerbated flood damage.

H. The Elements of a Claim Under the Waste Statute Were Not Present.

In his response to the County's summary judgment motion, Noonan did not make any argument that the Washington statute for "waste to real property," RCW 4.24.630, was applicable. Nonetheless, at oral argument he attempted to revive this claim. As the trial court properly held, there is no evidentiary support for such a claim in this case.

RCW 4.24.630 provides a remedy only where the defendant has gone on to the land of the plaintiff and removed or damaged timber, personal property or improvements:

Every person who goes on to the land of another and who removes timber, crops, minerals or other similar valuable property from the land, or wrongfully causes waste or injury to the land, or wrongfully injures personal property 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 authority to so act. . . .

The statute is clearly inapplicable to the actions of Thurston County because Thurston County neither went on to Noonan's property nor intentionally and unreasonably removed or damaged personal property or improvements owned by Noonan. The Washington courts have stressed that the defendant's presence on the land, as well as deliberate removal or damaging of personal property, are required under the statute. This was

recently made clear by the Court of Appeals in Clipse v. Michels Pipeline Construction, Inc., 154 Wn. App. 573, 225 P.3d 492 (2010):

The statute establishes liability for three types of conduct occurring upon the land of another: (1) removing valuable property from the land, (2) wrongfully causing waste or injury to the land, and (3) wrongfully injuring personal property or real estate improvements upon the land. By its express terms, the statute requires wrongfulness only with respect to the latter two alternatives. Presence on the land is required by all three.

Id. at 577-78 (Emphasis added).

RCW 4.24.630 clearly does not impose liability against Thurston County in this case, because the County did not go onto Noonan's property. Moreover, recovery under the statute is foreclosed because there was no intentional misconduct by the County. Except with regard to removal of property, the statute does not allow recovery unless the defendant acted intentionally, as opposed to negligently. Borden v. City of Tacoma, 113 Wn. App. 359, 374 P.3d 2002 (2002); Colwell v. Ezzell, 119 Wn. App. 432, 441, 81 P.3d 895 (2003). Here, there is not a shred of evidence of intentional wrongdoing by Thurston County.

In short, even without the immunity of RCW 36.75.080, a claim under the real property waste statute was without foundation, and was properly dismissed.

I. Noonan's Lawsuit is Also Barred by the Absence of Proximate Causation.

The final reason for dismissal of Noonan's lawsuit was his failure to provide any evidence that actions by the County were a proximate cause

of his damage. The plaintiff admitted that French Loop Road was neither designed nor built by the County. Moreover, the County made no substantive alterations to the design or construction of the road. Noonan essentially resorted to arguing that the County should be liable for road defects because it paid for repair work *on the Miles property* in 1995, and because the County performed occasional maintenance on French Loop Road over the years. But there was not a shred of evidence that such actions by the County were a proximate cause of Noonan's damages.

Noonan's house sits below a curve in French Loop Road. In essence, Noonan contends that French Loop Road, as designed, directs water toward his residence below. But the County had nothing to do with that design. Nor was the repair work on Miles' property a cause of damage. The repair work on Miles' property in 1995 was to build a retaining wall and to improve certain drainage pipes *on that property*. (Suppl. CP 252-253). There was no allegation in the Complaint or in plaintiffs' response to summary judgment that the 1995 repair was the cause of his damage. At most, Noonan argued that the County should have done more, *i.e.*, by making changes to French Loop Road itself. (CP 49, 60). But the County's refusal to make such changes is not actionable. There is no allegation that anything done by the County made matters worse. Therefore, the issue of proximate causation is absent.

In his Motion for Reconsideration, Noonan again conceded the absence of any evidence – or indeed any claim – that the County's 1995

repairs on Miles' property were the cause of Noonan's damages. But he argued that the issue of absence of causation was not raised in the summary judgment proceeding. That assertion is simply incorrect. The absence of causation relating to the County actions was inherent in the language of the Complaint, the Amended Complaint, the Motion for Summary Judgment, the Brief in Opposition to Motion for Summary Judgment, and the County's Reply Brief.

For example, in the underlying Complaint and in the Amended Complaint, Noonan alleged that the County constructed drainage ditches which caused a diversion of surface water from its natural flow. (CP 4). In its Motion for Summary Judgment, the County clearly pointed out that the Complaint alleged damage *caused by the design and construction of French Loop Road*:

On or about January 14, 2009, Noonan submitted a claim for damages with Thurston County, in which he alleged that the design and construction of French Loop Road was defective and/or inadequate to handle stormwater, and that the design and construction of that road was a proximate cause of his flooding damages.

* * *

On or about March 19, 2009, Noonan filed the Complaint herein, seeking recovery under a variety of theories. The Complaint alleges that the ditches along French Loop Road were improperly designed and constructed so as to direct floodwaters toward his residence.

(CP 34). The motion then went on to argue that because the County neither designed nor built the road and drainage system, it could not be liable for damage caused by the road and drains.

In his response brief, Noonan argued that the County's liability was based on negligent design of the road, and its failure to alter the drainage in 1995. (CP 55). Again, however, there was no suggestion by Noonan that any work by Thurston County was a cause of Noonan's damage. Rather, the response memorandum attributed the damage to the County's *failure to reconstruct* the road:

However, the County failed to make adequate repairs to the County storm drainage system. In order to keep another storm from damaging the property again in the future, Thurston County was also to complete a study and to make the required repairs to relieve stormwater flows from the south from trespassing over and damaging the subject property.

(CP 49).

In reply to Noonan's argument regarding the 1995 repair work, the County submitted the Supplemental Declaration of Dale Rancour, refuting any suggestion that the County had changed the road itself. (Supplemental CP 252-253). The Reply Brief again pointed out that neither the Complaint, nor Noonan's response to the County's motion alleged that the County's work on Miles' property in 1995 was a proximate cause of his damage:

Furthermore, Noonan has not shown – or even alleged – that the County's 1995 repairs were a proximate cause of his damage. Rather, he argues that the County should have

redesigned or rebuilt French Loop Road, but failed to do so. (Noonan's Response, pp. 3, 9).

* * *

Because there is no evidence that the County's repair work on Miles' property was the cause of damage to the Noonan property 11 years later, Noonan's claim fails based on absence of duty, and also absence of proximate causation.

(CP 184). Noonan's Supplemental Response, filed shortly before the summary judgment hearing, did not dispute the County's causation argument. (CP 196-199).

To summarize, because neither the Complaint nor the Amended Complaint asserted any claim relating to the 1995 repair work, or alleged that damage was caused by the County's 1995 repair or maintenance, the County pointed this out to the Court as supporting summary judgment. Noonan did not contest the County's assertion – in his Response to summary judgment, in his Supplemental Response or in his Motion for Reconsideration -- because it was evident from both the Complaint and Noonan's response to summary judgment, that there was no claim or evidence that the County's 1995 repairs and maintenance was a proximate cause of Noonan's damage. If Noonan had evidence demonstrating that the County's 1995 repair to Miles' property or its routine maintenance was the cause of Noonan's damage, he was obligated to assert such a claim in his Complaint, and to offer evidence in support of the claim in response to the County's summary judgment motion.

The absence of proximate causation was yet another basis for summary judgment.

VI. CONCLUSION

For all the above reasons, the Court should affirm the trial court's Summary Judgment Order, and dismiss this appeal.

DATED this 5th day of July, 2011.

KARR TUTTLE CAMPBELL

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County

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DECLARATION OF SERVICE

Nancy Randall declares as follows:

I am a resident of the State of Washington, employed at Karr Tuttle Campbell, 1201 Third Avenue, Suite 2900, Seattle, WA 98101. I am over the age of 18 years and am not a party to this action. On July 5, 2011, a true copy of the Brief of Respondent Thurston County was served on the following via First Class mail:

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Nancy Randall
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