

No. 42636-6-II

COURT OF APPEALS
DIVISION II

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

WASHINGTON STATE DEPARTMENT OF TRANSPORTATION,

Respondent,

v.

CHARLES and JANICE WOLFE, and JOHN and DEE ANTONEN,

Appellants.

BRIEF OF APPELLANTS

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I. INTRODUCTION

This case involves the negligence of the Washington State Department of Transportation (WSDOT) for its replacement of a bridge on the Naselle River, with a bridge design approved for another location which caused damage to the Plaintiffs' properties along the southern bank of the Naselle River immediately downstream of the new bridge.

WSDOT constructed the first bridge at the SR-4 location on the river in 1925-1926. The piers of the original bridge had been placed parallel to the flow of the river and the banks of the Naselle River were stable until 1986.

In 1986 the WSDOT built the SR-4 replacement bridge. The design of the replacement bridge piers were at a 15 degree angle so the flow of the river was directed at the Wolfe/Anttonen properties which has caused severe erosion of the banks along the properties. The Plaintiffs have lost at least 32,000 cubic yards of soil. The remedy recommended by the geomorphologist, Russell Lawrence, is the installation of weirs in order to prevent further erosion and the restoration of the river bank along the properties.

II. ASSIGNMENT OF ERROR

1. The trial court erred in entering the order of August 29, 2011 granting Defendant Department of Transportation's Motion for Summary Judgment. (CP 390-391).

III. ISSUES PERTAINING TO THE ASSIGNMENT OF ERROR

1. Did genuine issues of material fact exist that precluded Summary Judgment on Plaintiffs' claims of Inverse Condemnation? (Assignment of Error 1.)

2. Did genuine issues of material fact exist that precluded Summary Judgment on Plaintiffs' claims of Nuisance and Negligence as time barred ? (Assignment of Error 1.)

3. Did genuine issues of material fact exist that precluded Summary Judgment on Plaintiffs' claims based upon the state Hydraulic Code, Ch. 77.55 RCW? (Assignment of Error 1.)

4.. Did genuine issues of material fact exist that precluded Summary Judgment on Plaintiffs' claims based upon the Legislative Intent exception of the Public Duty Doctrine? (Assignment of Error 1.)

5. Did genuine issues of material fact exist that precluded Summary Judgment on Plaintiffs' claims based upon Failure to Enforce exception of the Public Duty Doctrine? (Assignment of Error 1.)

6. Did the Summary Judgment Order fail to comply with CR 56 (h) by failing to set forth all of the documents and evidence presented to the court? (Assignment of Error 1.)

IV. STATEMENT OF THE CASE

In 2003, Mr. and Mrs. Wolfe purchased two adjacent properties in Naselle, which included the waterfront property along the southern bank of the Naselle River, immediately downstream of the State Highway 4 (SR-4) bridge . In 2007, the Wolfe's transferred one parcel to their daughter and son-in-law, the Anttonens. The river frontage of the two properties extends approximately 600 feet from the SR-4 bridge to the mouth of Salmon Creek. (CP 164, 170-73, 175.)

The Washington State Department of Transportation (WSDOT) constructed the first SR-4 Naselle River Bridge in 1925-1926. The piers of the original bridge were placed parallel to the flow of the river. (CP 212-213, 275-282, 297, 303-304.)

In 1986 WSDOT built a new SR-4 Bridge over the Naselle River. Rather than building the support piers of the new bridge parallel to the old piers, the replacement bridge piers were built at a 15 degree angle so the flow of the river was directed at the plaintiffs' properties. (CP 164-165, 185-192, 210.)

After repeated reviews of Public Records, the Plaintiffs eventually determined that the new SR-4 Bridge did not match the plans, specifications, and SEPA compliance that were approved by local and state agencies prior to the construction of the bridge. The approved bridge plans, specifications, and SEPA compliance were actually those of another bridge designed and built for

a location on another part of the Naselle River at a location downstream of Plaintiffs' properties. The new SR-4 Bridge was never approved for construction. (CP 165-168, 211-220, 222-232.)

V. SUMMARY OF ARGUMENT

This case was decided on Summary Judgment despite the conflicting evidence presented by the declarations of Russell A. Lawrence, the Plaintiffs' expert geomorphologist witness which was not contradicted on Summary Judgment. (CP 390-391, CP 255-317.)

Given the record before the trial court, genuine issues of material fact existed that should have prevented Summary Judgment on all of Plaintiffs' claims in this matter. In order to prevail on their Motion for Summary Judgment the Defendant had meet the following standard by showing:

“(c) The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”
CR 56 (c).

The moving party has the burden of showing that there is no genuine issue of fact. *Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 70, 170 P.3d 10 (2007). All reasonable inferences are to be

considered in the light most favorable to the non-moving party. *Enterprise Leasing Inc. v. Tacoma*, 139 Wn.2d 546, 551, 988 P.2d 961 (1999).

Defendant Department of Transportation's Motion for Summary Judgment challenged Plaintiffs' claims of Inverse Condemnation, Nuisance, violations of the state Hydraulic Code, Ch. 77.55 RCW, and negligence. (CP 123-146, 21-24, 25-122, 328-339, 340-352.) The Declarations of geomorphologist Russell A. Lawrence (CP 255-317), plaintiff Charles Wolfe (CP 164-234), and plaintiff John Anttonen (CP 235-254) set forth genuine issues of material fact in this matter. Genuine issues of material fact precluded Summary Judgment on these claims.

VI. ARGUMENT

In a nutshell, the Defendant, Washington State Department of Transportation (WSDOT), failed to meet the standard of care and created a nuisance by failing to comply with all applicable law in constructing the replacement SR4 Bridge over the Naselle River in 1986 with a 15 degree angle placement of the piers which forced the water flow onto the Wolfe/Anttonen properties which has resulted in damage to their property. Plaintiffs' claims should not have been dismissed on Summary Judgment based on the conflicting evidence which raised genuine issues of material fact.

A. Issues of fact exist regarding Inverse Condemnation:

The Declarations and reports submitted by Plaintiffs show that the design changes and construction of the 1986 SR-4 Bridge caused a redirection of the river and subsequent on-going continuous erosion of the banks of the Plaintiffs' property. (CP 164-234, 235-254, 255-317.) The factual circumstances in the case at bar constitute inverse condemnation under *Fitzpatrick v. Okanogan County*, 169 Wn.2d 598; 238 P.3d 1129 (2010), which is directly on point.

In *Fitzpatrick*, joint owners of riverfront property brought a claim for inverse condemnation from the county and state after a significant portion of their land was swept away by the Methow River. In *Fitzpatrick*, the county engaged in road and dike construction that changed the direction of river resulting in damage to the landowners. The court reversed dismissal of the case on summary judgment since there were genuine issues of fact on the inverse taking of the Plaintiffs' property. The state cannot be relieved from liability to downstream owners when the government alters the waterway, causing the course of the river's current to shift and erode the downstream landowners' property. *Conger v. Pierce County*, 116 Wn. 27, 42, 198 P. 377 (1921); *Marshland Flood Control District v. Great Northern Railway*, 71 Wn.2d 365, 428 P.2d 531(1967).

In this case, the State breached its standard of care by constructing the replacement Highway 4 bridge in 1986 in a manner that forced the water to be diverted towards the Plaintiffs' properties and has caused 32,000 cubic yards of

erosion and continues to cause erosion of the Plaintiffs' properties at the rate of 1,500 cubic feet per year. (CP 175, 210, 211-220, 221-232, 255-256, 275-282, 283-287, 288-317.)

Inverse condemnation is an action "brought to recover the value of property which has been appropriated by the government but with no formal exercise of governmental power." *Citoli v. City of Seattle*, 115 Wn.App 459, 61 P.3d 1165 (2002) (quoting *Bodin v. City of Stanwood*, 79 Wn.App 313, 320, 901 P.2d 1065 (1995); *Warner/Electra/Atlantic Corporation and Fireman's Fund Insurance Co. v. County of Dupage Illinois*, 771 F.Supp. 911 (1991); *Akins v. State of California*, 48 Cal.App.4th, 50 Cal.Rptr 2d 531 (1996).

Defendant is incorrect to argue that plaintiffs are seeking damages for a taking that occurred prior to Plaintiffs establishing their ownership interest in the property. (CP 123-146, CP 21-24.) The offending replacement bridge was constructed in 1986. Plaintiffs' purchased their properties in 2003 and 2007 respectively. (CP 164-168, 235-239.) From the moment Plaintiffs' established their ownership interest, the recurring erosion has continued. (CP 209-220, 221-232, 288-317.) A taking is a permanent or *recurring* (emphasis added) invasion of private property that is likely to reoccur in the future. *Hoover v. Pierce County*, 79 Wn. App. 427, 432, 903 P.2d 464 (1995); *Millender, Millender. and Millender &*

Sons Seafood Co., Inc. 774 So.2d 767 (2000); *Tomasek v. Oregon State Highway Commission*, 196 Ore. 120, 248 P.2d 703 (1952).

The taking of Plaintiffs' property by the ongoing erosion constitutes a continuing course of action that is a recurring invasion and is reoccurring due to the redirection of the river by the bridge supports and the resulting erosion of Plaintiffs' properties. The damage to Plaintiffs' property is permanent, recurring, and chronic such that the ongoing nature of the erosion is "perpetual, habitual, constant, continuing for a long time, recurring" and causes damage. *Bodin v. City of Stanwood*, 79 Wn.App. 313, 320-322, 901 P.2d 464 (1995). The ongoing nature of the erosion to Plaintiffs' properties constitutes inverse condemnation and that inverse condemnation is within the applicable statute of limitations and during Plaintiffs' ownership of the properties. *Wallace v. Lewis County*, 134 Wn.App. 1, 22, 137 P.3d 101 (2006). Further, in addition to monetary damages, Plaintiffs' are asking the court for an equitable remedy to stop the ongoing and continuing damage to Plaintiffs' property. (CP 1-10, 255-317.)

B. Issues of fact exist regarding the State's Negligence and Nuisance:

Plaintiffs' nuisance and negligence claims are not time barred. The damage occurring to Plaintiffs' properties is not a one-time static incident. The situation is ongoing, continuing, recurring, and chronic. (CP 209, 220, 221-230, 275-281, 283-287, 288-317.) In the case of a continuing nuisance, the two-year statute

restricts the period for which damages may be recovered but does not bar the action. *RCW 4.16.130*; *Wallace v. Lewis County*, 134 Wn.App. 1, 137 P.3d 101 (2006). In this case, the Plaintiffs are seeking primarily injunctive relief to have the state implement a remedy to address the past erosion and prevent future erosion. (CP 1-10, 288-317.)

The Washington Supreme Court has not ruled on the period of time for which damages from a continuing nuisance may be claimed. The Court did rule in a continuing trespass case allowing the recovery of damages from the limitation period preceding the filing of suit (for trespass, three years) until the time of trial. The Supreme Court has held that the theories of trespass and nuisance are (1) not inconsistent, (2) the theories may apply concurrently, and (3) the injured party may proceed under both theories when the elements of both actions are present. *Woldson v. Woodhead*, 159 Wn.2d 215, 149 P.3d 361 (2006); *Bradley v. American Smelting and Refining Co.*, 104 Wn.2d 677, 709 P.2d 782 (1985). See *Johnson and Johnson v. The Board of County Commissioners of Pratt County and Kansas Department of Transportation*, 259 Kan. 305, 913 P.2d 119 (1996); *Mills County v. Hammack*, 200 Iowa 251; 202 N.W. 521 (1925); *Owen v. United States*, 851 F.2d 1404 (1988); *Warner/Elektra/Atlantic Corporation and Fireman's Fund Insurance Co. v. County of Dupage Illinois*, 771 F.Supp. 911 (1991). In the instant case, the diversion of river water onto Plaintiffs' properties

and resulting erosion is a continuing trespass for the purposes of the statute of limitations.

Defendant argues that the nuisance in this case is “unabatable” and therefore does not qualify as a continuing nuisance. However, Plaintiffs’ are not asking Defendant to demolish and reconstruct the bridge. Plaintiffs have proposed a remedial action that would restore the bank and prevent further erosion caused by the offending angle of the mis-aligned piers. Plaintiffs are also asking Defendants to restore the river bank by application of protective devices. (CP 8-10, 288-317.)

The requested remedies are not an unreasonable hardship or an unreasonable expense. (CP 275-282, 283-287, 316-317.) The offending condition created by the mis-aligned bridge piers is definitely abatable. *Fradkin v. Northshore Utility Dist.*, 96 Wn.App. 118, 977 P.2d 1265 (1999) quoting *Mangini v. Aerojet-General Corp.*, 12 Cal.4th 1087, 912 P.2d 1220 (1999). The court should have denied summary judgment in order to allow the jury to determine these issues of fact.

C. Issues of fact exist regarding the State’s violation of the State Hydraulic Code, Ch. 77.55 RCW:

Plaintiffs have claimed negligence in their civil complaint. (CP 1-10.). Proof of negligence is established by showing: (1) that the defendant had a duty or obligation to conform to a certain standard of conduct for the protection of others

against unreasonable risks; (2.) that the defendant breached that duty; (3) that the breach was the proximate cause of the plaintiff's injury; and (4) that the plaintiff suffered legally compensable damages. *Restatement Second of Torts section 282; Laymon v. Washington State Department of Natural Resources*, 99 Wn.App. 518, 529, 994 P.2d 232 (2000.) A duty is an "obligation" to which the law will give recognition and effect to conform to a particular standard of conduct toward another. *Transamerica Title Ins. Co., v. Johnson*, 103 Wn.2d 409, 413, 693 P.2d 697 (1985).

In this matter, RCW 77.55.021, Construction Projects in State Waters, the state hydraulics code, mandates a HPA, and requires action to correct a violation pursuant to WAC 220-110-070(h) which states that

(h) Abutments, piers, piling, sills, approach frills . . . shall not constrict the flow so as to cause any appreciable increase (not to exceed .2 feet) in backwater elevation (calculated at the 100-year flood) or channel wide scour and shall be aligned to cause the least effect on the hydraulics of the watercourse

The state's hydraulic code, Ch. 77.55 RCW, defines the duty Defendant's owed to the Plaintiffs. RCW 77.55 and WAC 220-110-070(h) establish the duty or obligation to conform to certain standards of conduct. Defendants have breached that standard of conduct by failing to properly design and install the replacement bridge.

D. Issues of fact exist regarding the Legislative Intent Exception to Public Duty Doctrine.

The public duty doctrine was adopted by the Washington Supreme Court for application in most negligence cases against state entities.

The public duty doctrine provides that if the duty breached by the governmental entity was merely a breach of an obligation owed to the public in general, then a cause of action would not lie for any individual injured by the state's breach of that duty. Put another way, "a duty to all is a duty to no one." *Osborn v. Mason County*, 157 Wn.2d 18, 27, 134 P.3d 197 (2006) quoting *Taylor v. Stevens County* 111 Wn.2d 159, 164, 759 P.2d 447 (1988). The public duty doctrine is essentially a "focusing tool" used to determine whether the state owes a specific duty to an individual, the breach of which is actionable, or merely a duty to the "nebulous public," the breach of which is not actionable. *Osborne v. Mason County* 157 Wn.2d 18, 27, 134 P.3d 197 (2006.)

In *Pierce v. Yakima County*, 161 Wn.App. 791, 251 P.3d 270 (2011) the court noted the four circumstances, referred to as "exceptions," that exist to the public duty doctrine:

- 1.) where there is a "legislative intent" to impose such a duty;
- 2.) where the state is guilty of "failure to enforce" a mandatory statutory duty,
- 3.) where the government has engaged in "volunteer rescue" efforts, and

4.) where a “special relationship” exists between the plaintiff and the State.

Plaintiffs’ Declarations provide sufficient facts to meet the legislative intent exception. (CP164-234, 235-254.) This exception applies where a regulatory statute contains a clear intent to identify and protect a particular and circumscribed class of persons. *Halleran v. Nu West, Inc.*, 123 Wn.App. 701, 98 P.3d 52 (2004).

Each statute and regulation cited specifically express the legislative purpose of the law in a preamble or in other language in the statute. The language describes a specific purpose for the law and identifies the circumstances and/or persons to be protected.

For example, the State Environmental Protection Act, at RCW 43.21C.020(1) states

(1) The legislature . . . recognizing the profound impact of a human being’s activity on the interrelations of all components of the natural environment . . . declares that it is the continuing policy of the State of Washington, in cooperation with federal and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to . . .create and maintain conditions under which human beings and nature can exist in productive harmony

. . . .
(c) Attain the widest range of beneficial uses of the environment Without degradation, risk to health or safety of other undesirable And unintended consequences;

Likewise, the Shoreline Management Act, RCW 90.58.020 states:

The legislature finds that the shorelines of the state are amount the most valuable and fragile of its natural resources and that there is great concern throughout the state relating to their utilization, protection, restoration, and preservation. In addition it finds that ever increasing pressures of additional uses are being placed on the shorelines necessitating increased coordination in the management and development of the shorelines of the state . . . There is, therefore, a clear and urgent demand for a planned, rational, and concerted effort, jointly performed by the federal, state and local governments, to prevent the inherent harm in an uncoordinated . . . development of the state shorelines

Accordingly, the Construction Projects in State Waters statute, RCW 77.55.021 states:

(1) Except as provided in RCW 77.55.031, 77.55.051, and 77.55.041, in the event that any person or government agency desires to undertake a hydraulic project, the person or government agency shall, before commencing work thereon, secure that approval of the department in the form of a permit as to the adequacy of the means proposed for the protection of fish life. . . .

Clearly, the articulated goals of the statutes and the language in the statutes establish mandatory duties and are not permissive or discretionary. In this matter, defendant WSDOT simply failed to obtain the proper permits when it replaced the SR-4 Bridge.

The legislative intent exception applies to Plaintiffs' claims.

E. Issues of fact exist regarding the Failure to Enforce exception to the Public Duty Doctrine:

Plaintiffs have sufficient facts to show the application of the “failure to enforce” exception. The “failure to enforce” exception applies when (1.) government agents responsible for enforcing statutory requirements possess actual knowledge of a statutory violation, (2) a statutory duty exists to take corrective action, (3.) the agents fail to take corrective action, and (4) the plaintiff is within the class the statute is intended to protect. *Halleran v. Nu West Inc.*, 123 Wn. App. 701, 714, 98 P.3d 52 (2004) ; *Smith v. State* 59 Wn.App. 808, 814, 802 P.2d 133 (1990); *Honcoop v. State* 111 Wash.2d 182, 190, 759 P.2d 1188 (1988).

The exception is applicable when the relevant statute mandates specific action to correct a violation. The action must be required by language within the statute. Such a mandate does not exist if the government agent has broad discretion regarding whether and how to act. *Donohoe v. State* 135 Wn.App. 824, 849, 142 P.3d 654 (2006). The exception is narrowly construed. *Halleran v. Nu West. Inc.* 123 Wn. App. 701, 714, 98 P.3d 52 (2004).

The facts here show that the hydraulics of the river have been changed by the new bridge, WSDOT did not disclose the plans to WDFW in the application for the HPA, and the HPA was issued by WDFW according to the plans for the Highway 101 Bridge, not the SR-4 bridge. (CP 211-220, CP 221-232.)

The Declaration of Mr. Wolfe, shows that there are numerous other failures by the state to enforce applicable law on the part of Defendants. (CP 164-234.) (WAC 220-110-070(1)(h), RCW 77.55.021(2), RCW 90.58, RCW 43.21C, WAC 197-11.)

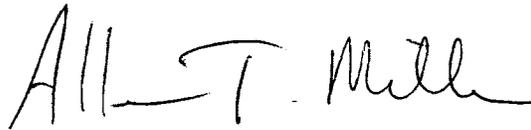
The Declaration of Mr. Wolfe shows that various employees of Defendant WSDOT knowingly and intentionally violated the specific mandates of applicable state environmental statutes and state waterway construction statutes. (WAC 220-110-070(1)(h), RCW77.55.021(2), RCW 90.58, RCW 43.21C, WAC 197-11). (CP 164-234.)

The Plaintiffs have raised issues of fact as to whether mandatory documents existed or are missing, or were an “after the fact” submission of documents. (CP 209-220, 221-232.) It is an issue of fact as to whether the SR-4 bridge was built without any design plans except for the design plans applicable to another bridge in another location for another time. These issues of fact should have prevented the court from ruling that the public duty doctrine applies as a matter of law. *Vergeson v. Kitsap County*, 145 Wn.App. 526, 186 P.3d 1140 (2008).

VII. CONCLUSION

The Court of Appeals should find that there are genuine issues of material fact and reverse the trial court's order on Summary Judgment and remand this case for trial.

DATED this 12th day of December, 2011.

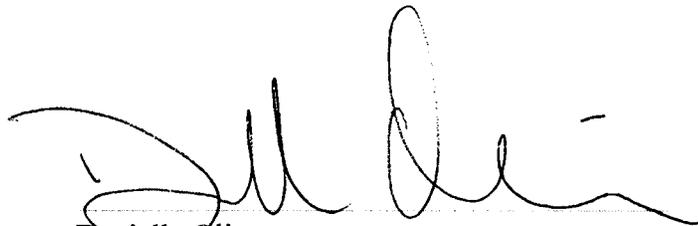
A handwritten signature in black ink that reads "Allen T. Miller". The signature is written in a cursive style with a horizontal line underneath the name.

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I also caused a copy to be served to, Douglas Shaftel, Assistant Attorney General,
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I declare under penalty of perjury under the laws of the State of
Washington that the foregoing is true and correct.

DATED this 12th day of December, 2011.

A handwritten signature in black ink, appearing to read 'Danielle Oliver', written over a horizontal dotted line.

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