

NO. 42636-6

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

CHARLES and JANICE WOLFE, husband and wife; JOHN and DEE
ANTTONEN, husband and wife,

Appellants,

v.

STATE OF WASHINGTON DEPARTMENT OF TRANSPORTATION,

Respondent.

AMENDED BRIEF OF RESPONDENT

ROBERT M. MCKENNA
Attorney General

DOUGLAS D. SHAFTEL
WSBA #32906
Assistant Attorney General
P.O. Box 40113
7141 Cleanwater Drive SW
Olympia, WA 98504-0113
(360) 753-1614; Fax (360) 586-6847
Attorney for Respondent

TABLE OF CONTENTS

| | | |
|------|--|----|
| I. | INTRODUCTION..... | 1 |
| II. | STATEMENT OF THE CASE..... | 2 |
| III. | ISSUES PRESENTED..... | 9 |
| IV. | STANDARD OF REVIEW..... | 9 |
| V. | ARGUMENT..... | 10 |
| | A. The Owners' Inverse Condemnation and Nuisance Claims Fail Under the <i>Hoover</i> Subsequent Purchaser Rule..... | 10 |
| | B. Owners' Inverse and Nuisance Claims Fail Because the State Acquired a Prescriptive Right to Erode their Property by 1996..... | 14 |
| | C. Owners' Negligence and Nuisance Claims are Barred by a Two Year Statute of Limitations..... | 18 |
| | D. The Owners' Miscellaneous Issues Have Been Abandoned or Need Not be Reviewed..... | 20 |
| VI. | CONCLUSION..... | 22 |

TABLE OF AUTHORITIES

Cases

| | |
|--|-------------------|
| <i>Anderson v. Port of Seattle</i> 66 Wn.2d 457, 403 P.2d 368 (1965)..... | 17 |
| <i>Bradley v. American Smelter and Refining Co.</i> 104 Wn.2d 677, 709 P.2d 782 (1985)..... | 18 |
| <i>Building Industry Ass'n of Washington v. McCarthy</i> 152 Wn. App. 720, 218 P.3d 196 (2009)..... | 21 |
| <i>Buxel v. King County</i> 60 Wn.2d 404, 374 P.2d 250 (1962)..... | 19 |
| <i>Charlton v. Day Island Marina, Inc.</i> 46 Wn. App. 784, 732 P.2d 1008 (1987)..... | 9 |
| <i>City of Seattle v. Shepherd</i> 93 Wn.2d 861, 613 P.2d 1158 (1980)..... | 10 |
| <i>Hartley v. State,</i> 103 Wn.2d 768, 698 P.2d 77 (1985)..... | 9 |
| <i>Hatfield v. Wray</i> 140 Ohio App.3d 623, 748 N.E.2d 612 (2000)..... | 15 |
| <i>Highline School Dist. No. 401, King County v. Port of Seattle</i> 87 Wn.2d 6, 548 P.2d 1085 (1976)..... | 15 |
| <i>Hoover v. Pierce County,</i> 79 Wn. App. 427, 903 P.2d 464 (1995)..... | 1, 10, 11, 12, 13 |
| <i>Kitsap County v. Allstate Ins. Co.</i> 136 Wn.2d 567, 964 P.2d 1173 (1998)..... | 16 |
| <i>Lucas Flour Co. v. Local 174, Teamsters, Chauffeurs and Helpers of America</i> 57 Wn.2d 95, 356 P.2d 1 (1960)..... | 14 |

| | |
|---|------------|
| <i>Mayer v. City of Seattle</i> 102 Wn. App. 66, 75, 10 P.3d 408 (2000) review denied, 152 Wn.2d 1029 (2004)..... | 18 |
| <i>Peterson v. Port of Seattle</i> 94 Wn.2d 479, 618 P.2d 67 (1980)..... | 11 |
| <i>Phillips v. King County</i> 136 Wn.2d 946, 968 P.2d 871 (1998)..... | 10 |
| <i>Powell v. Superior Portland Cement</i> 15 Wn.2d 14, 129 P.2d 536 (1942)..... | 14 |
| <i>Riblet v. Spokane-Portland Cement Co.</i> 41 Wn.2d 249, 248 P.2d 380 (1952)..... | 18 |
| <i>Steele v. Organon, Inc.</i> 43 Wn. App. 230, 716 P.2d 920 (1986)..... | 18 |
| <i>Streifel v. Hansch</i> 40 Wn. App. 233, 698 P.2d 570 (1985)..... | 19 |
| <i>Tom v. State</i> 164 Wn. App. 609, 267 P.3d 361 (2011)..... | 11 |
| <i>Vern J. Oja & Assoc. v. Washington Park Towers, Inc.</i> 89 Wn.2d 72, 569 P.2d 1141 (1977)..... | 19 |
| <i>Wallace v. Lewis County</i> 134 Wn. App. 1, 137 P.3d 101 (2006)..... | 15, 16, 17 |

Statutes

| | |
|--------------------|-------|
| RCW 4.16.130 | 18 |
| RCW 7.48.020 | 14 |
| RCW 77.55 | 8, 20 |
| RCW 8.04.120 | 17 |

I. INTRODUCTION

Before purchasing riverfront property, Appellants Charles and Janice Wolfe and John and Dee Anttonen (collectively, "Owners") were well-aware that it suffered from erosion and they believed that the piers of the State Route 4 Naselle River Bridge (SR 4 bridge), located just upstream, were the cause. The Wolfes initially chose not to buy the eroding property because they were concerned about the erosion. When they eventually purchased it in 2004 the purchase price did reflect, or should have reflected, the property's eroding condition. The same is true for the price the Anttonens paid their parents, the Wolfes, when they bought the property in 2007. Under this court's decision in *Hoover v. Pierce County*, 79 Wn. App. 427, 433-34, 903 P.2d 464 (1995), they cannot now reasonably complain of lost property value due to the fact that the property continues to erode. They have experienced no loss.

Moreover, the Washington State Department of Transportation (WSDOT) built the bridge piers at issue in 1986. That same year, the current owner of the property, Gil Erickson, complained to WSDOT that he believed that the new piers were redirecting the river towards his property. Nonetheless, no one filed a complaint for damages arising from such erosion until the Wolfes and Anttonens did in 2010. By that time, to the degree the bridge was, in fact, causing erosion, WSDOT had already

acquired a prescriptive property right that permitted it to do so. This prescriptive right extinguishes the Owners' claims for resulting damages. The nuisance and negligence claims are also time-barred under the two-year statute of limitations.

On summary judgment, the trial court correctly dismissed the Wolfes' and Anttonens' claims. This court should affirm the trial court's order.

II. STATEMENT OF THE CASE

The bridge that is the subject of this case -- the SR 4 bridge -- was originally constructed in 1926. Primarily to address sight line issues on the original bridge, which was built at an elevation lower than the rest of SR 4, WSDOT rebuilt it in 1986. CP 000041. The new bridge was built in approximately the same location, but the number of piers within the river banks were reduced to two. However, the angle of the face of the piers shifted by 15 degrees towards Appellants' properties. *See* Appendix 1, photographs of the 1926 and 1986 bridges.

During a 1986 public meeting held after the bridge was built, then owner of the property immediately downstream of the bridge, Gil Erickson, complained to WSDOT that the new piers were diverting the river into his property. CP 000046. There is no evidence in the record

that WSDOT made any changes to the bridge subsequent to completing construction in 1986.

Nineteen years later, in 2003, Appellants Charles and Janice Wolfe decided to purchase property in the vicinity of the bridge. At the time, they considered purchasing the 8.5-acre property immediately south of the SR 4 bridge, which had approximately 400 feet of river frontage (Parcel 1). However, as he explained in his deposition, upon inspection Mr. Wolfe noticed that Parcel 1 was suffering from erosion and that fact discouraged him from buying it:

[State's attorney] Q: Were there discussions about erosion to any of the riverfront properties at the time that you purchased the Wolfe property?

[Mr. Wolfe] A: Whenever we brought [sic] our property, we were considering whether the buy our property or the 8 1/2 acres or, actually, the third one we were considering is another lot in the division. Whenever we were taking with Lori – she was the broker and, actually, Annie Scott or Annie Strange is also a real estate salesman – I talked with Lori about the erosion. That was one of the detriments for not buying it because there was erosion that was occurring. You could see it. I mean, it was obvious.

Q: So as of December 2003, you were aware that erosion was occurring on the Anttonen parcel?

A: Yes.

CP 000344. By December 2003, before he bought any property in the area, Mr. Wolfe was also certain that the SR 4 bridge was the cause of the erosion:

[State's attorney] Q: In this report, you [Mr. Wolfe] conclude that SR 4 bridge that goes over the Naselle River is causing the erosion to your property, correct?

[Mr. Wolfe] A: Yes.

Q: When did you first, I guess, arrive at that conclusion?

A: I think the first time I saw the property and I saw the river going through the piers.

Q: So prior to your purchase of the property in December of 2004?

A: The very first time I saw the property, when I saw the bridge. You can see the river going right in line with the piers.

Q: Just based on that observation, you thought the bridge was contributing to the erosion?

A: Yeah.

Q: Is that a yes?

A: Yes. That it was redirecting the river – it was directing the river into the property.

Q: And so that was as early as 2003, 2004 timeframe when you first saw the property?

A: Yes, December of '03. Because we looked at the property then and decided not to buy it, buying our other property instead.

Q: So as of December of 2003, you already suspected that the DOT's bridge was causing the erosion on the Anttonen parcel?

A: Yes, it was obvious to me that it was causing the problem.

CP 000350-51. Instead of purchasing Parcel 1, the Wolfes purchased the abutting 5-acre property, the northern boundary of which was close to, but did not front, the Naselle River (Parcel 2).

The Wolfes were then living in Florence, Oregon, and wanted to build a personal residence on Parcel 2. In order to have sufficient space for their new home, in 2004 they purchased the abutting Parcel 1 and, through a boundary line adjustment, transferred 2.4 acres to Parcel 2. CP 000031; CP 000349. They drew the new property line so that only a sliver of the transferred acreage fronted the river. CP 000033. The resulting 7.4 acre parcel is shaped like an upside-down flag with the bottom of the pole fronting the river. *Id.* Little, if any, of this frontage suffers from erosion. *Id.* They sold the remaining 6.1 acres of Parcel 1, which contained almost the entirety of the eroding river-front property, to a Mr. and Mrs. McLucas, at a price Mr. Wolfe believed fairly reflected the property's eroding condition. CP 000346. *See* Appendix 2 for an aerial photograph showing the two properties' boundaries before and after the adjustment.

Mr. and Mrs. McLucas soon defaulted on the financing instrument and, on January 23, 2007, they deeded the property back to the Wolfes. CP 000172; CP 000031. On or around the same date, the Wolfes quitclaimed it to John and Dee Anttonen, their daughter and son-in-law, in exchange for \$45,000. CP 000173; CP 000347. Before the Anttonens took title, Mr. Wolfe discussed his concerns about the erosion with Mr. Anttonen:

[State's attorney] Q: But you [Mr. Wolfe] had conversations with him [Mr. Anttonen] even before he was in receipt of the quit claim about the fact that the property was eroding?

[Mr. Wolfe] A: Yeah.

Q: Is it your understanding that Mr. and Mrs. Anttonen understood that the property was eroding prior to January 2007 when they were quit claimed the deed?

A: Yeah. Yeah.

CP 000348. Indeed, on July 1, 2007, the Anttonens appointed Mr. Wolfe to "act as their agent regarding all issues related to the investigation of the bank erosion occurring on our Naselle property and any bank stabilization efforts related to it."¹

By February 20, 2008, Mr. Wolfe had drafted a 22-page report in which he summarized his findings and conclusions. CP 000049-70. In the

¹ Although the Anttonens own Parcel 1, they reside in Albuquerque, New Mexico, and to the best of the State's knowledge, have not actively participated in this litigation.

report, Mr. Wolfe concluded that “the [1986] bridge has significantly altered the hydraulics of the river, and that has led to significant erosion problems ever since.” CP 000070. Mr. Wolfe also identified a possible statute of limitations issue. CP 000065.

At Mr. Wolfe’s request, a WSDOT Senior Hydrologist, Jim Park, inspected the site and nearby properties and reached a different conclusion. CP 000264-274. Based upon evidence of channel migration both upstream and downstream from the bridge, as well as evidence that the effect of bridge scour appeared to be highly localized, Mr. Park concluded that the erosion is “overwhelmingly driven by reach-scale channel migration processes.” CP 000273. In other words, he concluded that the erosion is the result of naturally-occurring river migration. Representatives from the Washington Department of Ecology and Department of Fish and Wildlife, who also inspected the site, agreed with Mr. Park’s conclusion.² *Id.*

Approximately 24 years after the bridge was constructed, and seven years after Mr. Wolfe first concluded that the bridge was causing Parcel 1 to erode, the Wolfes and Anttonens served their complaint on

² The Department also hired an expert hydrogeomorphologist from GeoEngineers, Mary Ann Reinhart, to conduct an independent investigation into the cause of the erosion. She also generally concluded it to be natural meander migration. CP 000303. Her report was not included in the record because the issue of causation was not material to the issues presented at summary judgment.

June 2, 2010, and filed it with the Superior Court of Pacific County on June 4, 2010. In their complaint, they alleged inverse condemnation, nuisance, negligence, and violations of the hydraulic code, Chap. 77.55 RCW.³ CP 000106-115. Their requested relief included a request that the court order WSDOT to restore the bridge piers to their pre-1986 orientation. CP 000009. They further requested a judgment that would require WSDOT to restore the river bank back to its 1926 condition, deposit 32,000 cubic yards of soil back in the river and take all necessary actions to prevent future erosion of the river bank. CP 000114-115.

On July 26, 2011, WSDOT moved for summary judgment. CP 000123. Principally, it argued that the Wolfes and Anttonens effectively have no injury of which to complain because they knowingly purchased an eroding property. CP 000328. WSDOT further argued that, presumably, the Wolfes and Anttonens paid a price commensurate with this eroded and eroding condition and, therefore, they cannot now complain of any lost value arising from it. *Id.* After a hearing on August 29, 2011, Judge Sullivan granted WSDOT's motion and dismissed all of the Owners' claims with prejudice. CP 000390.

The Owners timely appealed. CP 000392.

³ The Owners also alleged violations of the Public Records Act, but these claims were dismissed by separate order, which the owners have not appealed. *See generally* CP 000392-395.

cause of the erosion, these facts are immaterial to the issues raised at summary judgment and presented to this court, which primarily are concerned with what the owners' of the eroding property knew and when they knew it. When the facts are undisputed, the question becomes a pure issue of law, to be decided de novo by the reviewing court. *City of Seattle v. Shepherd*, 93 Wn.2d 861, 867, 613 P.2d 1158 (1980).

V. ARGUMENT

A. **The Owners' Inverse Condemnation and Nuisance Claims Fail Under the *Hoover* Subsequent Purchaser Rule**

Because the Wolfes and Anttonens purchased property they knew to be eroding, they cannot later sue for a taking or for damage to their property arising from the unsurprising fact that the property continues to experience erosion. An "inverse condemnation" is merely an action alleging a governmental "taking," brought to recover the value of property which has been appropriated in fact, but without a formal exercise of the power of eminent domain. *Phillips v. King County*, 136 Wn.2d 946, 957, 968 P.2d 871 (1998). As with a direct condemnation action, an inverse condemnation action must be brought by the party that owned the property at the time that the public project gave rise to the taking. *See Hoover*, 79 Wn. App. at 433-34. A subsequent property owner does not have a claim for the taking of property that occurred prior to his or her purchase.

Id. at 433; *see also Tom v. State*, 164 Wn. App. 609, 267 P.3d 361 (2011) (owner who purchased property decades after Department of Corrections' employees began using neighboring property as a firing range had no claim for lost value due to noise levels under an inverse condemnation action).

A subsequent taking can occur if the property owner can show that there has been a change in the nature or degree of government action that results in a greater depreciation of the property value. *E.g., Peterson v. Port of Seattle*, 94 Wn.2d 479, 482, 618 P.2d 67 (1980) (the Port's permission of jet aircraft at the airport resulted in an entirely new noise environment, thereby permitting a new taking cause of action). However, mere additional impact to the property without a change in the nature or degree of government action does not give rise to a new taking. *Hoover*, 79 Wn. App. at 434-35.

In *Hoover*, the governmental action that gave rise to the taking was the installation of a culvert in 1972. The prior owner had tried to short plat her property in 1978 and, in doing so, drainage and flooding problems were identified on the plat filed with the county auditor's office. The notations warned of a drainage problem in the plat area and advised an owner to obtain professional engineering help for flood protection. *Id.* at 429-30. The Hoovers purchased the nearby property in 1988. In 1990 and

1991, they experienced flooding of their property that they concluded was caused by the redirection of water through the county's drainage system. *Id.* at 428-29. This court held that, because the county records contained notice of the land's propensity for flooding, the purchase price "either did reflect or should have reflected the diminished value of the land caused by its propensity to flood." *Id.* at 434. The Hoovers nonetheless argued that each new flooding event constituted a new cause of action. This court disagreed and held that without an additional government action the mere occasion of additional flooding does not give rise to a new taking. *Id.* at 435-36.

The facts here even more strongly support dismissal of the Owners' claims for damages. Unlike the owners in *Hoover*, who had mere *constructive* notice of the drainage problems at the properties they purchased, Appellants here had *actual* notice of the erosion; Mr. Wolfe inspected the property and visually observed it. Indeed, this observation led him to purchase the non-river fronting Parcel 2 at that time, rather than Parcel 1. When he later bought Parcel 1 in order to perform a boundary line adjustment, he quickly sold the remainder at a price he believed fairly reflected the value of its eroding condition. Presumably, when he later re-sold it to his children, the \$45,000 purchase price did as well.

This court barred the Hoovers' claim merely because they *should have known* about the drainage problem and negotiated for a purchase price that reflected the problem. Here, the Anttonens' and Wolfes' claims must be barred because they *did know* about the erosion problem prior to purchase. The court can presume (and the evidence supports such a presumption) that they negotiated for a lower purchase price to account for that deficiency. The court should conclude that these owners have not been damaged by the preexisting condition.

That the erosion unsurprisingly continues every year during high water events does not mean that there has been a new taking. As this court stated in *Hoover*, even if the properties continued to suffer damages due to high water that occurred after the property was purchased, without additional government action, there can be no new taking. *Hoover*, 79 Wn. App. at 435-46. The bridge and its piers are static; they have not changed in nature or degree since 1986. The Owners point this court to no governmental activity that might give rise to a new taking after their purchase.⁴

⁴ At the summary judgment hearing, owners' counsel argued that the *Hoover* rule was inapplicable because there was an issue of fact as to whether the negotiation for the purchase of the property included consideration of the erosion. Verbatim Record of Proceedings at 25. Without conceding that the record contains such a factual dispute (it does not), it would nonetheless be immaterial. The *Hoover* court held that the opportunity for an informed negotiation was sufficient. *Hoover*, 79 Wn. App. at 434 (because the county records showed a drainage problem "[t]he purchase price of the

Applying the same reasoning from *Hoover*, the Owners' nuisance claim also fails. A property owner cannot recover for damages to property arising from an activity that preexisted her purchase and about which she was aware prior to purchase. *Powell v. Superior Portland Cement*, 15 Wn.2d 14, 129 P.2d 536 (1942).⁵ Mr. Wolfe contends that the property has been experiencing significant erosion since no later than the year in which the bridge was built. CP 000070. These owners bought their property in a significantly eroding state with a belief that the bridge was causing the erosion. They should not be allowed to recover under a nuisance theory what they cannot recover under inverse.⁶

B. Owners' Inverse and Nuisance Claims Fail Because the State Acquired a Prescriptive Right to Erode their Property by 1996

Although passage of time generally does not bar an inverse condemnation action, Washington courts recognize that an inverse condemnation claim is barred if, by the time of its filing, the elements of adverse possession have been met – that the use was hostile, open, and notorious for an uninterrupted period of ten years. *Highline School Dist.*

property . . . either did reflect or should have reflected the diminished value of the land caused by its propensity to flood”).

⁵ Although this argument was not raised below, an appellate court may affirm a trial court on any grounds established by the pleadings and supported by the proof. *Lucas Flour Co. v. Local 174, Teamsters, Chauffeurs and Helpers of America*, 57 Wn.2d 95, 103, 356 P.2d 1, 6 (1960). The facts that support this defense are the same as those that WSDOT extensively briefed and argued below to support its *Hoover* analysis. *See e.g.*, VRP at 25 (court requests that owners' counsel respond to the “buyer beware” argument).

⁶ Indeed, only the nuisance claim provides them with the ability to seek injunctive relief. RCW 7.48.020.

No. 401, King County v. Port of Seattle, 87 Wn.2d 6, 12, 548 P.2d 1085 (1976); *Wallace v. Lewis County*, 134 Wn. App. 1, 22, 137 P.3d 101 (2006). In other words, a Plaintiff claiming inverse condemnation must file his or her claim within ten years from the time the government action first damaged his or her property. *Wallace*, 134 Wn. App. at 23, n.17 (plaintiff should have filed its inverse condemnation actions within ten years of the date it claimed the tire pile on neighboring property first damaged its property).

In a case with closely similar key facts, an Ohio appellate court held that the prescription period begins to run the date that the prior owner complained to the Department of Transportation about flooding problems he believed his property was experiencing as a result of the project. *Hatfield v. Wray*, 140 Ohio App.3d 623, 748 N.E.2d 612 (2000) (copy attached as Appendix 3). In the 1970s, the Ohio Department reconstructed a state route. *Id.* at 625. The plaintiff's parents, who then owned the property, met with the Department in 1975 to discuss the father's belief that the project caused flooding on his property. *Id.* at 627. The court affirmed the trial court's decision that the start date for the prescriptive period was 1975, when the prior owner knew of the flooding and its potential cause. *Id.* at 632.

As in *Hatfield*, the ten-year prescription period in this case began when Mr. Erickson contacted WSDOT in 1986. The concern regarding erosion that Mr. Erickson voiced at that time reflects that the erosion was open, notorious, and hostile to his interest. Although a use is not hostile if the property owner has given his permission, there is no evidence of such permission here. Consequently, by 1995, WSDOT had acquired a prescriptive right to direct the water towards the Owners' affected property. Because the Owners bring their inverse condemnation action well beyond the ten-year prescription period, it is now barred. *Wallace*, 134 Wn. App. at 22. As they did below, the Owners neglected to address this issue in their opening brief. *See generally* Brief of Appellants and CP 000318-327 (Plaintiffs' Brief in Opposition to State's Motion for Summary Judgment).

The passage of the ten-year prescriptive period also effectively bars the Owners' nuisance claim. A nuisance is an unreasonable interference with another's use and enjoyment of property. *Kitsap County v. Allstate Ins. Co.*, 136 Wn.2d 567, 592, 964 P.2d 1173, 1185 (1998). But by 1996, any owner of Parcel 1 no longer had an unrestricted right to use and enjoy it, as WSDOT had acquired a prescriptive right to direct water towards it. Each subsequent high water event that leads to additional

erosion does not constitute a new cause of action for nuisance; it constitutes merely the use of an already taken easement.

Indeed, hypothetically, had the former owner brought a timely and successful inverse condemnation action, the end result would have been a court order recognizing WSDOT's taking of a property right. Once held liable for the taking, the court would have ordered WSDOT to pay just compensation, as measured by the change in value to the property caused by the fact that the piers were causing ongoing erosion. *See Anderson v. Port of Seattle*, 66 Wn.2d 457, 460-61, 403 P.2d 368 (1965). And, just as in a direct condemnation action, the court's judgment would also have included a recognition that WSDOT has taken an easement or other property right. *See Wallace*, 134 Wn. App. 1, 137 P.3d 101 (after ten years the County, by authorizing a tire disposal business on a neighboring property, had obtained a prescriptive right to attract rodents and mosquitoes to plaintiff's property); *see also Anderson*, 66 Wn.2d at 461 (recognizing the taking of an air easement); *see also* RCW 8.04.120 ("the court . . . shall also enter a judgment or decree of appropriation of the land, real estate or premises sought to be appropriated, thereby vesting the legal title to the same in the State of Washington."). The recognition of this property right would have foreclosed any future nuisance action, as the owner would no longer have owned the property right (i.e., freedom from

redirection of the river towards his property) that he alleged was being damaged. See *Bradley v. American Smelter and Refining Co.*, 104 Wn.2d 677, 694, 709 P.2d 782 (1985) (once the elements of a prescriptive easement are established, any recovery by landowner is precluded).

The same outcome occurs when, as here, the owner fails to bring a timely inverse condemnation action, with the exception that his right to just compensation is time barred. WSDOT nonetheless acquires a property right to direct water towards the property. Once that prescriptive right came into being, it precluded tort claims for damages arising from erosion.

C. Owners' Negligence and Nuisance Claims are Barred by a Two Year Statute of Limitations

The Owners' tort claims are also barred by the two year catch-all statute of limitations in RCW 4.16.130. *Riblet v. Spokane-Portland Cement Co.*, 41 Wn.2d 249, 248 P.2d 380 (1952); *Mayer v. City of Seattle*, 102 Wn. App. 66, 75, 10 P.3d 408 (2000), *review denied*, 152 Wn.2d 1029 (2004). It is well settled that a tort cause of action accrues when the plaintiff becomes aware, or should have been aware, that he has suffered some actual and appreciable harm caused by the defendants' actions. *Steele v. Organon, Inc.*, 43 Wn. App. 230, 716 P.2d 920 (1986). That all damages may not have been sustained at that time is immaterial. *Streifel*

v. Hansch, 40 Wn. App. 233, 237, 698 P.2d 570 (1985). This rule applies equally in cases involving damage to real property caused by construction on an adjacent property:

In those cases involving damage to real property arising out of construction or activity on adjacent property, the cause of action accrues at the time the construction is completed if substantial damage has occurred at that time. If the damage has not occurred when the construction is completed, the action accrues when the first substantial injury is sustained thereafter.

Vern J. Oja & Assoc. v. Washington Park Towers, Inc., 89 Wn.2d 72, 75-76, 569 P.2d 1141 (1977); *see also Buxel v. King County*, 60 Wn.2d 404, 407, 374 P.2d 250 (1962) (applying same rule in flooding cases).

The negligent act that the Owners contend damaged their property – improper bridge design – occurred in 1986, 24 years before they brought their claim. At the time that the Department built the bridge, the prior property owner, Mr. Erickson, openly objected that it would direct the river towards his property. CP 000046. And, according to Mr. Wolfe, “the new bridge design has significantly altered the hydraulics of the river, and that has led to significant erosion problems ever since [the bridge was built].” CP 000070. Yet, no claim was filed until 2010.

Even if the court focuses solely on these owners’ actual knowledge of the erosion, the negligence and nuisance claims were filed more than two years after the cause of action accrued. Both the Wolfes and

Anttonens were aware that Parcel 1 suffered from erosion even before they purchased their properties in 2004 and 2007. By June 2007, the Anttonens were so concerned about the erosion that they authorized Mr. Wolfe to act as their “authorized agent regarding all issues related to the investigation of the bank erosion occurring on our Naselle property and any bank stabilization efforts related to it.” CP 000342. Despite this apparent concern, they did not file their complaint until June 2, 2010, almost three years later.

D. The Owners’ Miscellaneous Issues Have Been Abandoned or Need Not be Reviewed

The Owners list six issues in their opening brief, however, only the first two require this court’s review. The Owners’ issue number three – alleged violations of the state Hydraulic Code, is subsumed by their negligence claim. They merely contend that the state Hydraulic Code creates a duty that WSDOT owed to the Owners, which they allege WSDOT breached. Brief of Appellants at 10-11. Without conceding the existence of such statutory duty (the purpose of the state Hydraulic Code, Chapter 77.55 RCW, is to protect fish life, not private property), because the Owners treat this claim as an inextricable part of their negligence claim, WSDOT responds by referring the court to its arguments for dismissing the negligence claim. *See supra* at V. ARGUMENT § C. And

because the Owners seem to have abandoned any stand-alone claim that WSDOT violated the state Hydraulic Code, the Owners' attempts to navigate the exceptions to the public duty doctrine (issues four and five) need no response or review.⁷

Finally, the Owners' issue number six contains an allegation that the trial court's summary judgment order failed to comply with CR 56(h). Because the Owners failed to brief this issue, WSDOT need not respond and this court should not review it. *See Building Industry Ass'n of Washington v. McCarthy*, 152 Wn. App. 720, 218 P.3d 196 (2009) (issues relying on incorporated trial court briefing are considered abandoned).

///

///

///

///

///

///

⁷ Plaintiffs' Brief in Opposition to State's Motion for Summary Judgment, at IV. ANALYSIS § C. suggests that they are bringing a stand-alone claim for violations of the Hydraulic Code. However, they have no standing to do so as the Hydraulic Code does not create a private remedy. *See generally* RCW 77.55.011-.291.

VI. CONCLUSION

For the reasons set out above, the court should affirm the trial court's summary judgment order dismissing the Owners' claims with prejudice.

RESPECTFULLY SUBMITTED this 10th day of April, 2012.

ROBERT M. MCKENNA
Attorney General



DOUGLAS D. SHAFTEL, WSBA #32906
Assistant Attorney General
P.O. Box 40113
7141 Cleanwater Drive SW
Olympia, WA 98504-0113
Phone (360) 753-1614; Fax (360) 586-6847
Attorney for Respondent