

Court of Appeals No. 44240-0-II

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

JUSTIN M. NELSON and ALLISA S. ADAMS-NELSON,

Appellants,

v.

**SKAMANIA COUNTY, WASHINGTON,
and SHANNON FRAME and JANE DOE FRAME,
and the community thereof;**

Respondents.

BRIEF OF APPELLANTS

**Mark A. Erikson, WSBA #23106
Erikson & Associates, PLLC
Attorneys for Justin M. Nelson and
Allisa S. Adams-Nelson as appellants
110 West 13th Street
Vancouver, WA 98660-2904
Telephone (360) 696-1012
E-mail: mark@eriksonlaw.com**

TABLE OF CONTENTS

Table of Authorities iii

I. Introduction 1

II. Assignments of Error

Assignments of Error 1

Issues Pertaining to Assignments of Error 2

III. Statement of the Case 3

IV. Summary of Argument 8

V. Argument 13

Standard of Review 11

ISSUE 1: Does plaintiffs’ knowledge of trespass five years prior to filing suit preclude trespass claims notwithstanding the continuing presence and/or continuing migration of debris from defendant’s property onto plaintiffs’ property? 11

ISSUE 2: Does lack of action on the part of defendant within three years prior to filing suit preclude continuing trespass claims? 18

ISSUE 3: Does lack of government action within ten years prior to filing suit preclude inverse condemnation claims? 20

ISSUE 4: Does plaintiffs’ purchase of property after occupation preclude inverse condemnation claims where the plaintiffs were unaware of the occupation, and the purchase price was not adjusted for the defect? 24

Summary Judgment 26

ISSUE 5: Does admission of prejudicial evidence regarding prior regulatory proceedings against the plaintiffs constitute error where the evidence is proffered to show retaliation, and where plaintiffs' intent is irrelevant to claims and defenses? 27

VI. Conclusion 31

TABLE OF AUTHORITIES

Washington Cases

<i>Alpine Industries, Inc. v. Gohl</i> , 30 Wash.App. 750, 637 P.2d 998 (1981)	19
<i>Bradley v. American Smelting and Refining Co.</i> , 104 Wash.2d 677, 709 P.2d 782 (1985)	11, 12, 15, 18, 29
<i>Chase v. Beard</i> , 55 Wash.2d 58, 346 P.2d 315 (1959)	28
<i>Cheskov v. Port of Seattle</i> , 55 Wash.2d 416, 348 P.2d 673 (1960)	14, 23
<i>Colella v. King County</i> , 72 Wash.2d 386, 433 P.2d 154 (1967)	20
<i>Davidson v. Municipality of Metropolitan Seattle</i> , 43 Wash.App. 569, 719 P.2d 569 (1986)	28
<i>Davis v. Seattle</i> , 134 Wash. 1, 235 P. 4 (1925)	13
<i>Doran v. Seattle</i> , 24 Wash. 182, 188, 64 P. 230 (1901)	12, 13
<i>Folsom v. Burger King</i> , 135 Wash.2d 658, 958 P.2d 301 (1998)	11
<i>Fradkin v. Northshore Utility District</i> , 96 Wash.App. 118, 977 P.2d 1265 (1999)	12, 15
<i>Gaasland Co. v. Hyak Lumber & Millwork, Inc.</i> , 42 Wash.2d 705, 257 P.2d 784 (1953)	19

<i>Gaines v. Pierce County</i> , 66 Wash.App. 715, 834 P.2d 631 (1992)	20
<i>Gazija v. Nicholas Jerns Co.</i> , 86 Wash.2d 215, 543 P.2d 338 (1975)	23
<i>Gillam v. Centralia</i> , 14 Wash.2d 523, 128 P.2d 661 (1942)	23
<i>Haslund v. City of Seattle</i> , 86 Wash.2d 607, 547 P.2d 1221 (1976)	17, 23
<i>Highline School Dist. 401 v. Port of Seattle</i> , 87 Wash.2d 6, 548 P.2d 1085 (1976)	20, 22
<i>Hoover v. Pierce County</i> , 79 Wash.App. 427, 903 P.2d 464 (1995)	22, 25
<i>Island Lime Co. v. Seattle</i> , 122 Wash. 632, 211 P. 285 (1922)	13
<i>Locke v. City of Seattle</i> , 133 Wash. App. 696, 137 P.3d 52 (2006)	17
<i>Lockwood v. AC & S, Inc.</i> , 109 Wash.2d 235, 744 P.2d 605 (1987)	29
<i>Malotte v. Gorton</i> , 75 Wash.2d 306, 450 P.2d 820 (1969)	17
<i>Mayer v. City of Seattle</i> , 102 Wash. App. 66, 10 P.3d 408 (2000)	17
<i>Northern Pac. Ry. Co. v. Sunnyside Val. Irrigation Dist.</i> , 85 Wash.2d 920, 540 P.2d 1387 (1975)	20
<i>Ohler v. Tacoma General Hospital</i> , 92 Wash.2d 507, 598 P.2d 1358 (1979)	26

<i>Orion Corp. v. State</i> , 109 Wash.2d 621, 747 P.2d 1062 (1987)	20
<i>Papac v. Montesano</i> , 49 Wash.2d 484, 303 P.2d 654 (1956)	23
<i>Peninsula Truck Lines, Inc. v. Tooker</i> , 63 Wash.2d 724, 388 P.2d 958 (1964)	17, 26
<i>Pruitt v. Douglas County</i> , 116 Wash.App. 547, 66 P.3d 1111 (2003)	20
<i>State v. Atsbeha</i> , 142 Wash.2d 904, 16 P.3d 626 (2001)	27
<i>Vern J. Oja & Associates v. Washington Park Towers, Inc.</i> , 89 Wash.2d 72, 569 P.2d 1141 (1977)	23
<i>Walla Walla v. Conkey</i> , 6 Wash.App. 6, 492 P.2d 589 (1971)	25
<i>Weatherbee v. Gustafson</i> , 64 Wash.App. 128, 822 P.2d 1257 (1992)	22
<i>Wilber Development Corp. v. Les Rowland Const. Inc.</i> , 83 Wash.2d 871, 523 P.2d 186 (1974)	19
<i>Woldson v. Woodhead</i> , 149 P.3d 361, 159 Wash.2d 215 (2006)	11, 12, 13, 14, 18, 19
<i>Wolfe v. Dept. of Transportation</i> , 42363-6-II at 6	13

I. INTRODUCTION

This case involves the continuing migration of remnant debris onto plaintiffs' real property from a tract owned by Skamania County, after a portion of the tract was converted from a public landfill to a transfer station. Skamania County argued that the trespass was permanent, that plaintiffs' knowledge of the trespass five years prior to filing suit precluded the action under applicable statutes of limitation, and that the "subsequent purchaser rule" precluded takings claims. The trial court granted summary judgment on Skamania County's motion.

* * *

II. ASSIGNMENTS OF ERROR

Assignment of Error:

Plaintiffs, Justin M. Nelson and Allisa S. Adams-Nelson, assign error to the following:

1. Trial court's grant of defendant Skamania County's motion for summary judgment "as a matter of law," dismissing all plaintiffs' claims with prejudice under CR 56. *CP 233*.

2. Trial court's denial of *Plaintiffs' Motion to Exclude Evidence* filed September 7, 2012. *RP 2*, ln. 11-16, *RP 13*, ln. 8-16; *CP 191-95*.

Issues Pertaining to Assignments of Error

ISSUE 1: Does plaintiffs' knowledge of trespass five years prior to filing suit preclude trespass claims notwithstanding the continuing presence and/or continuing migration of debris from defendant's property onto plaintiffs' property? (Assignment of Error 1).

ISSUE 2: Does lack of action on the part of defendant within three years prior to filing suit preclude continuing trespass claims? (Assignment of Error 1).

ISSUE 3: Does lack of government action within ten years prior to filing suit preclude inverse condemnation claims? (Assignment of Error 1).

ISSUE 4: Does plaintiffs' purchase of property after occupation preclude inverse condemnation claims where the plaintiffs were unaware of the occupation, and the purchase price was not adjusted for the defect? (Assignment of Error 1).

ISSUE 5: Does admission of prejudicial evidence regarding prior regulatory proceedings against the plaintiffs constitute error where the evidence is proffered to show retaliation, and where plaintiffs' intent is irrelevant to claims and defenses? (Assignment of Error 2).

* * *

III. STATEMENT OF THE CASE

Plaintiffs are the owners of an undeveloped parcel of real property comprising approximately 10.79 acres located in Skamania County, Washington,¹ which they acquired from defendant Shannon Frame under a *Statutory Warranty Deed* dated February 26, 2007.² *CP 77*.

Defendant Skamania County is the owner of a parcel of real property comprising approximately 9.46 acres located immediately south of, and contiguous with plaintiffs' parcel,³ which the County acquired in three separate transactions from 1953 through 1962.⁴ Alleged at *CP 2*, ln. 5-15; admitted at *CP 16*, ln. 25-28 and *CP24-25*; depicted at *CP 110*.

Skamania County's property was operated as a landfill for "burning and dumping of waste," "from the 1950's until . . . 1978," when it was converted to a "solid waste transfer station." *CP 33*, ln. 14-16; *CP 42*, ln. 25 – *CP 43*, ln 4.

¹Skamania County Assessor's Parcel No. 01050900020100, located in Section 9 of Township 1 North, Range 5 East of the Willamette Monument. *CP 1*, ln. 19-21.

²Filed for record at Skamania County Auditor's File No. 2007165168. *CP 2*, ln. 1-4.

³Skamania County Assessor's Parcel No. 01050900020000, located in Section 9 of Township 1 North, Range 5 East of the Willamette Monument. *CP 2*, ln. 5-9.

⁴*Warranty Deeds*: (i) dated September 16, 1953, filed for record in Book 37 at page 200; (ii) dated April 19, 1958, filed for record in Book 49 at page 298; and (iii) dated August 9, 1962, filed for record in Book 50 at page 295. *CP 2*, ln. 10-15.

The Mount Pleasant Transfer Site, as it is known, occupies a small tract in the southwest corner of Skamania County's property. *CP 47*, ln. 11-12; depicted at *CP 111-13*. The elevation drops approximately 320 feet (vertical) over approximately 700 feet (horizontal) from the Mount Pleasant Transfer Site, across the undeveloped remainder of Skamania County's property, and across plaintiffs' property, to Canyon Creek. *CP 74*, 11-14; *CP 105*, ln. 18 – *CP 106*, ln. 6; *CP 114*.

On June 21, 2005, Dan Huntington, a prior owner of plaintiffs' property, filed a *Code Violation/Nuisance/Complaint Report Form* with the Skamania County Engineer's Office, alleging as follows:

The portion of this property [01-05-09-00-0201] adjacent to County land is directly in the path of a slide that is heavily laden with garbage. The garbage, things like old water tanks, car parts, scraps of metal, etc., is coming out of an old county land fill that was converted to the Mt. Pleasant Transfer Site. The garbage is cluttering up the banks of Canyon Creek, interfering with efforts to sell the property.

CP 135.

The migration of garbage, debris and contamination onto plaintiffs' property was reported to the Washington State Department of Ecology on October 29, 2008, by a William J. Weller, not a party to the present proceeding. *CP 136*.

On November 8, 2008, Derek Rockett, Lead Inspector, Washington Department of Ecology, visited plaintiffs' property and memorialized his findings in the *Environmental Report Tracking System* (ERTS) #609187. *CP136-40*. Mr. Rockett reported that he did not see any hazardous waste during his investigation, but that solid waste had migrated from Skamania County's property, across plaintiffs' property, into Canyon Creek. *CP 140*.

On November 23, 2011, and again on December 15, 2011, plaintiffs provided statutory notice to Skamania County, in compliance with RCW 4.96.020, using forms provided by said defendant. Skamania County acknowledged receipt of said notice on December 19, 2011. *CP 5*, ln. 19 – *CP 6*, ln. 2. Plaintiffs filed the present proceeding on March 13, 2012, and filed an *Amended Complaint* April 17, 2012, alleging: inverse condemnation, continuing nuisance and trespass against Skamania County, and breach of statutory warranties under RCW 64.04.030 against defendants Frame. *CP 1*, *et seq.*

Skamania County moved for dismissal, arguing that plaintiffs had notice of the trespass since 2007, that the trespass was permanent, that statute of limitations expired on all claims prior to filing suit, and that the subsequent purchaser rule precluded takings claims. *CP 30*, *et seq.*

In defense against the County's motion, Greg Morris, Fisheries Habitat Biologist, Yakima Nation, *CP 188*, ln. 19-23, attested to his observations of debris migration from undeveloped portions of Skamania County's property onto plaintiffs' property:

On multiple occasions over the last four years [prior to September 21, 2012], I visited [plaintiff] Nelson's property situated adjacent to the old landfill near Canyon Creek to assess potential impacts posed by the garbage to Canyon Creek and its resources. Based on my observations, the creek and the stream banks are littered with garbage. I observed a pattern of consistent garbage presence all the way from Canyon Creek, over and through the western portion of Mr. Nelson's property, and up the ravine to the site of the old Skamania County landfill. Based on these observations, including observations made this year, it appears that garbage strewn throughout Mr. Nelson's property and in the creek is of the same source and continuously migrating down the hill from its origin, the old Skamania County landfill.

The garbage I observed on Mr. Nelson's property and in Canyon Creek is in different states of mobility on slopes that appear unstable. Walking in the area is difficult due to the mixture of garbage, vegetation and soils. The visible garbage appears to be a mixture of household waste, vehicle parts, and miscellaneous materials. The volume of garbage present between the old Skamania County landfill, over Mr. Nelson's property, and onto and around the creek and its banks is substantial. It is unknown, but plausible, that hazardous materials are present among the significant volume of garbage migrating through Mr. Nelson's property and into Canyon Creek contaminating the lands and waters situated around the old Skamania County landfill.

CP 189, ln. 133 thorough *CP 190*, ln. 10.

R. Warren Krager, a Registered Geologist (R.G.), Certified Engineering Geologist (C.E.G.), Licensed Geologist in the State of Washington, and expert in the migration of soils and debris, *CP 168-169*, attested to a connected flow of large bulky debris from Skamania County's property (Tax Lot 200) onto plaintiffs' property (Tax Lot 201), including "portions of car bodies and frames, mattress springs and bed frames, car parts, metal buckets, drums, tires, rims, washing machine barrels, [and] broken furniture." *CP 171*. Mr. Krager attested further, "[b]ecause of the steepness of the natural slopes near [plaintiffs'] southern property boundary, it is clear by observation that landfill refuse continually moves down slope onto and through [plaintiffs'] property from gravitational mass wasting geological processes." *CP 171*. Moreover, Mr. Krager concluded as follows:

[M]ultiple landfill refuse laden debris flows from Tax Lot 200 have been moving into the lower ravine on Tax Lot 201 from at least as early as Summer 2005 and continuing through late Summer of 2009 based on hillside scars that were not present in 2006. . . .

[W]ithout massive clean up and environmental restoration of Tax Lot 200, Tax Lot 201, Tax Lot 300, Canyon Creek and its tributary creek, releases of landfill refuse onto private land and into public water courses will continue unabated for decades into the future.

CP 172-73.

The trial court granted Skamania County's motion for summary judgment on October 30, 2012. *CP 231*. Final judgment was entered on November 2, 1012, *CP 234*; and *Amended Final Judgment* was entered February 8, 2013. *CP ***.

* * *

IV. SUMMARY OF ARGUMENT

The present case concerns the factual convergence of trespass, nuisance and takings law; however, dismissal was based upon misapplication of various statutes of limitation. In trespass, damage which is not reasonably abatable is considered "permanent" and actionable upon notice. Of course, the permanence of one trespass does not preclude separate action for separate trespass. In prior cases, periodic flooding, and discharge of particulates from tall smokestacks which settled onto neighboring properties, were continuing in nature and statute of limitations marked only the period for which damages could be awarded.

On the other hand, a distinction lies between permanent and temporary "takings," which relates to the remedy in damages: either market or rental value. Similar to trespass, a takings plaintiff can return to court seeking damages for any additional "take."

Nuisance, however, introduces a complication which seems to conflict with the trespasser's continuing duty to remove intrusive substance, and the rule that trespass is abatable, notwithstanding permanence, as long as curative action can stop continuing damage. For example, excessive noise from a public airport, and erosion from in-stream bridge supports, resulted in a permanent injury, actionable upon notice. In the former, the applicable statute of limitations had run while, in the latter, the subsequent purchaser rule precluded damages already factored into the purchase price.

We submit that this contradiction is merely apparent, and that the outcome turns upon the availability, or unavailability, of abatement. Noise from the Seattle-Tacoma International Airport, having been duly approved and constructed, was clearly not abatable; hence, diminution in the market value of neighboring homes was complete the moment operation of the runway commenced. Likewise, deflected current from piers which carry State Route 4 across the Naselle River was by no means abatable; hence, the damage was complete when the bridge was constructed. Of course, the subsequent purchaser rule would not have applied to continuing trespass, but this observation only reinforces the argument that it is the unavailability of abatement which precludes the remedy for continuing damage.

In the present case, plaintiffs alleged all three causes of action; however, the gravamen was *continuing trespass* at oral argument on Skamania County's motion for summary judgment. The trespass consists of garbage and debris which migrates, continually, onto plaintiffs' property from undeveloped portions of property owned by Skamania County that housed a land-fill dump-site from the 1950's until 1978, when it was converted to a transfer station. Continuing debris migration is facilitated by an extremely steep grade descending onto plaintiffs' property. The trespass is continuing because Skamania County failed to remove debris already present, and because debris continues to migrate onto plaintiffs' property.

This case presents what is truly a continuing trespass because the injury is clearly abatable: the County can remove debris from plaintiffs' property and stop continued migration from undeveloped portions of its own property. Of particular relevance, the availability of abatement affects the statute of limitations; hence, the burden is on defendants to prove facts which establish the affirmative defense. Skamania County offered no evidence to show that abatement is unreasonable, either physical or financial. Having failed to carry its burden, summary judgment should not have been granted in the County's favor.

V. ARGUMENT

Standard of review

Appellate review of summary judgment, is *de novo*. *Folsom v. Burger King*, 135 Wash.2d 658, 663, 958 P.2d 301 (1998).

* * *

ISSUE 1: Does plaintiffs' knowledge of trespass five years prior to filing suit preclude trespass claims notwithstanding the continuing presence and/or continuing migration of debris from defendant's property onto plaintiffs' property? (Assignment of Error 1.)

The statute of limitations governing actions for trespass upon real property is three years. RCW 4.16.080(1). However, in continuing trespass:

the statute of limitations does not run from the date the tort begins; it is applied retrospectively to allow recovery for damages sustained within three years of filing. Second, damages are recoverable from three years before filing until the trespass is abated or, if not abated, until the time of trial.

Woldson v. Woodhead, 149 P.3d 361, 365-66, 159 Wash.2d 215 (2006).

“Continuing trespass” is historically defined as “[a]n unprivileged remaining on land in another’s possession[, which] continues until the intruding substance is removed.” *Bradley v. American Smelting and Refining Co.*, 104 Wash.2d 677, 693, 709 P.2d 782 (1985).

In *Fradkin v. Northshore Utility District*, the Court of Appeals distinguished *continuing* from *permanent* trespass based upon abatability:

Bradley and Doran are consistent with authority in other jurisdictions holding that the reasonable abatability of an intrusive condition is the primary characteristic that distinguishes a continuing trespass from a permanent trespass. A trespass is abatable, irrespective of the permanency of any structure involved, so long as the defendant can take curative action to stop the continuing damages. The condition must be one that can be removed “without unreasonable hardship and expense.” If an encroachment is abatable, the law does not presume that such an encroachment will be permanently maintained. The trespasser is under a continuing duty to remove the intrusive substance or condition.

Fradkin v. Northshore Utility District, 96 Wash.App. 118, 125-26, 977 P.2d 1265 (1999). In *Woldson*, the Supreme Court reviewed, *en banc*, “the application of RCW 4.16.080(1) to the tort of continuing trespass:”

With most torts, a single isolated event begins the running of the statute of limitations. With most torts, past damages are those damages that accrued from the tortious event until trial or judgment. A continuing trespass tort is different; the “event” happens every day the trespass continues. Every moment, arguably, is a new tort. Thus, the statute of limitations does not prevent recovery for a continuing trespass that “began” before the statutory period; instead the statute of limitations excludes recovery for any trespass occurring more than three years before the date of filing. Further, because the continuing offending intrusion upon the property may be removed or abated at any time, future damages are inherently speculative and may not be awarded.

Woldson, 149 P.3d at 363-64.

In reviewing its prior holding in *Doran v. Seattle*, the *Woldson* Court clearly distinguished between trespass and eminent domain based upon available remedies:

[T]he wrongdoer might, by the payment of prospective [trespass] damages, actually become permanently possessed of real property which, under the theory of the law, can only be taken . . . in relation to eminent domain.

Woldson, 149 P.3d at 364; citing *Doran v. Seattle*, 24 Wash. 182, 188, 64 P. 230 (1901). Accord *Island Lime Co. v. Seattle*, 122 Wash. 632, 634, 211 P. 285 (1922), and *Davis v. Seattle*, 134 Wash. 1, 6-7, 235 P. 4 (1925). The Court's analysis is crucial in two respects: First, it distinguishes trespass from nuisance, which was *subsumed* under inverse condemnation in this Court's recent decision in *Wolfe*:

As the Wolfes acknowledged at oral argument, what they have characterized as a "continuing nuisance" claim is essentially an unconstitutional taking claim, such that these two claims conflate into a single claim – that the [Dept. of Transportation] has continually eroded and, thus, taken their river bank without just compensation, in violation of the state constitution, which is, in short, inverse condemnation.

Wolfe v. Dept. of Transportation, 42363-6-II at 6. While we are not privy to Wolfes' acknowledgment at oral argument, sufficed to observe that plaintiffs have insisted on the gravamen of their case sounding in continuing trespass, distinct from inverse condemnation, never *subsuming* one within the other.

Second, the analysis in *Woldson* is crucial because the exclusion of prospective damages precludes the application of *permanent taking* analysis which the Court employed in *Cheskov*, as follows:

[W]here a use which causes damage to adjacent property is permanent in nature, its effect upon the market value of that property is also permanent and is ascertainable at the time it becomes known that the use will continue.”

Cheskov v. Port of Seattle, 55 Wash.2d 416, 420, 348 P.2d 673 (1960).

Of course, *Cheskov* involved a large airport runway, the mere presence of which, in proximity to plaintiff’s residence, caused an immediate diminution in market value. Clearly, prospective purchasers would become aware, upon arrival, of ever-present jet aircraft *running up* their engines prior to takeoff, and decelerating to landings. Hence, the damage in *Cheskov* was not abatable, and the injury was complete upon commencing use of the runway.

Possible comparison to nuisance resulting from a transfer station might consist in odors immediately perceived upon arrival at the property; however, such is *not* plaintiffs’ allegation in the present case. Rather, plaintiffs have alleged, and provided evidence of repeated and continuing trespass in the migration of debris from Skamania County’s property onto plaintiffs’ property. *CP 135; CP136-40; CP 189*, ln. 133 through *CP 190*, ln. 10; *CP 168-73*.

The has Supreme Court identified four elements of continuing trespass: (i) invasion of exclusive possession, (ii) intentional act, (iii) reasonable foreseeability, and (iv) actual damages. *Bradley*, 104 Wash.2d at 692-93. In *Bradley*, particulates emitted from a tall smokestack, which inevitably settled back to earth, was sufficient evidence of intent and foreseeability to support a claim of continuing trespass:

Intent is not . . . limited to consequences which are desired. If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result. . . .

The intent with which tort liability is concerned is not necessarily a hostile intent, or a desire to do any harm. Rather it is an intent to bring about a result which will invade the interests of another in a way that the law will not sanction.

Bradley, 104 Wash.2d at 682-83. Likewise, in the present case, the operation of a landfill on “the steepness of natural slopes” is the intentional act, with knowledge and reasonable foreseeability of resulting trespass, which satisfies the second and third elements. *CP 171*. Moreover, in 1999, the Court of Appeals analyzed continuing trespass as inclusive of “both intentional and negligent intrusions which interfere with exclusive possession.” *Fradkin*, 96 Wash.App. at 123; citing *Bradley*, 104 Wash.2d at 690-91.

Plaintiffs have alleged damage from interference with their exclusive use and possession caused by the presence of debris on their property. At deposition, plaintiff Justin Nelson testified that he “visited the land, took the dogs down there, which wasn’t too great of an idea because they went and got their feet cut up [on the debris], so I stopped taking the dogs there.” *CP 160* (Nelson Transcript, page 43, ln. 13-16). As noted above, E. Warren Krager’s attestations corroborate this claim, *CP 172*; as does the declaration of Greg Morris: “[w]alking in the area is difficult due to the mixture of garbage, vegetation and soils.” *CP 190*, ln. 1-3.

Of course, interference with exclusive use and possession is obvious from photographs taken by plaintiff Justin Nelson – areas occupied by debris are not within the plaintiffs’ *exclusive* use and possession, they are being used and possessed by the County for storage of debris. *CP 82-101*. At deposition, plaintiff Justin Nelson testified that the “mess” resulting from trespass frustrated his investment intentions:

Q Why have you not proceeded with development on your site?

A Financial reasons and this mess.

CP 161 (Nelson Transcript page 86, ln. 20-22).

At hearing on summary judgment, Skamania County focused upon the alleged *permanence* of the trespass, inferring that trespassers may act with impunity as long as long as the result is too burdensome to abate. *RP 31*, ln. 8 – *RP 34*, ln. 14; *CP 219*. Plaintiffs argued that Skamania County bore the burden on summary judgment, regardless where it will lie at trial. *CP 223*, ln. 16-21; *CP 63*, ln. 13-14; citing *Peninsula Truck Lines, Inc. v. Tooker*, 63 Wash.2d 724, 726-27, 388 P.2d 958 (1964).

Of course, the reasonability of abatement governs applicability of the statute of limitations; hence, it was an affirmative defense in the present case. CR 8(c). The reasonability of abatement is clearly an avoidance. *Id.* “[T]he burden is on the defendant to prove those facts that establish the defense.” *Mayer v. City of Seattle*, 10 P.3d 408, 413, 102 Wash. App. 66 (2000); citing *Haslund v. City of Seattle*, 86 Wash.2d 607, 620-21, 547 P.2d 1221 (1976). Accord, *Locke v. City of Seattle*, 137 P.3d 52, 61, 133 Wash. App. 696 (2006); *Malotte v. Gorton*, 75 Wash.2d 306, 311, 450 P.2d 820 (1969). Skamania County presented no evidence regarding the unreasonability of abatement, either physical or financial; hence, the trial court erred in granting the County’s motion for summary judgment.

* * *

ISSUE 2: Does lack of action on the part of defendant within three years prior to filing suit preclude continuing trespass claims?

(Assignment of Error 1.)

Skamania County supported its motion with the observation that “[t]here is no evidence . . . Skamania County has taken any actions in the past three years which have caused debris to be discharged onto Nelson’s land.”

County Motion at 7-8, ln. 8-9. Continuing trespass was based upon *damage* in *Bradley* as follows:

The action of the defendant amounts to a continuing trespass which is defined by the Restatement (Second) of Torts §158, comment ‘m’ as “[a]n unprivileged remaining on land in another’s possession.” Assuming that a defendant has caused actual and substantial **damage** to a plaintiff’s property, the trespass continues until the intruding substance is removed. If such is the case, and **damages** can be proved, as required, actions may be brought for uncompensated injury.

Bradley, 104 Wash.2d at 693, emphasis added. The foregoing decision is supported by recent holding in *Woldson*:

With respect to the tort of continuing trespass, we hold: first, the statute of limitations does not run from the date the tort begins; it is applied retrospectively to allow recovery for **damages** sustained within three years of filing. Second, **damages** are recoverable from three years before filing until the trespass is abated or, if not abated, until the time of trial.

Woldson, 149 P.3d at 365-66, emphasis added.

The rule is based upon *damages* to the plaintiff, not *action* on the part of the defendant, within three years prior to filing. Plaintiff Justin Nelson declared that he “personally observed increased amounts of debris migrating down extreme grades across the undeveloped (heavily forested) portion of Skamania County’s property, onto [his] property.” *CP 75*, ln. 7-9. This testimony was corroborated by both a fact witness, Greg Morris, *CP 189*, ln. 133 – *CP 190*, ln. 10; and an expert witness, K. Warren Krager, *CP 168-73*. In absence of any rebuttal evidence from the County, the plaintiffs have a right to trial on the issue of damages which occurred within three years prior to filing the present action and, under *Woldson*, between filing and trial. *Woldson*, 149 P.3d at 365.

In anticipation of Skamania County’s argument, we note that it is the *fact* of damage, not the *amount*, which must be shown to prevent summary judgment. *Wilber Development Corp. v. Les Rowland Const. Inc.*, 83 Wash.2d 871, 877, 523 P.2d 186 (1974); accord *Gaasland Co. v. Hyak Lumber & Millwork, Inc.*, 42 Wash.2d 705, 712, 713, 257 P.2d 784 (1953); and *Alpine Industries, Inc. v. Gohl*, 30 Wash.App. 750, 754, 637 P.2d 998 (1981).

* * *

ISSUE 3: Does lack of government action within ten years prior to filing suit preclude inverse condemnation claims? (Assignment of Error 1.)

The period of limitations for government taking of private property without compensation is ten years from accrual. RCW 4.16.010-020. *Continuation* does apply to takings; rather, “[a] new taking cause of action accrues with each measurable or provable decline in market value of the property.” *Highline School Dist. 401 v. Port of Seattle*, 87 Wash.2d 6, 15, 548 P.2d 1085 (1976).

“A ‘taking’ occurs when government invades or interferes with the use and enjoyment of property, and its market value declines as a result.” . . . A flooding may be the basis for an inverse condemnation as an “invasion” of property if the invasion is “permanent or recurring” or involves “a chronic and unreasonable pattern of behavior by the government.”

Pruitt v. Douglas County, 66 P.3d 1111, 1118, 116 Wash.App. 547 (2003); quoting *Gaines v. Pierce County*, 66 Wash.App. 715, 725-26, 834 P.2d 631 (1992); and *Orion Corp. v. State*, 109 Wash.2d 621, 671, 747 P.2d 1062 (1987). “Damage is permanent if the property may not be restored to its original condition.” *Northern Pac. Ry. Co. v. Sunnyside Val. Irrigation Dist.*, 85 Wash.2d 920, 924, 540 P.2d 1387 (1975); citing *Colella v. King County*, 72 Wash.2d 386, 433 P.2d 154 (1967).

Skamania County urged dismissal based upon a “permanent” take over ten years prior to filing the present action:

If there was any “taking” by Skamania County arising from discharges from the former landfill, that taking occurred many decades ago. Thus Nelson’s inverse condemnation claim is barred by limitations.

CP 33, ln. 23-27.

Skamania County’s argument is unsupported by expert testimony, or even lay testimony, to rebut allegations of continuing debris migration across “heavily forested” areas of the County’s property. *CP 74*, ln. 7-13; and *CP 102-03*. In addition to the report of Derek Rockett, *supra*, the *Code Violation / Nuisance / Complaint Report* received by Skamania County on June 21, 2005, alleges that “garbage, things like old water tanks, car parts, scraps of metal, etc., **is coming out of an old county land fill** that was converted to the Mt. Pleasant Transfer Site.” *CP 106*, ln. 7-11; *CP 135*. The word “coming” is a present linear participle, which “connotes a continuing process or activity, not one that has a finite beginning and end.” *In re Detention of J.R.*, 80 Wash.App. 947, 956, 912 P.2d 1062 (1996). Hence, the County’s *own* records provide evidence of ongoing debris migration from Skamania County’s property onto plaintiffs’ property in June 2005, well within the ten-year statute of limitations governing inverse condemnation.

As noted above, the County's motion was unsupported by evidence required to shift the burden on summary judgment. *Weatherbee v. Gustafson*, 64 Wash.App. 128, 132, 822 P.2d 1257 (1992). The only evidence on the record supports plaintiffs' allegation that debris migrating down steep grades from Skamania County's property damaged plaintiffs' property in 2005 and 2008, and continues to the present day. *CP 74*, ln. 7-13; *CP 102-03*. "A new taking cause of action accrues with each measurable or provable decline in market value of the property." *Hoover v. Pierce County*, 79 Wash.App. 427, 434, 903 P.2d 464 (1995), *review denied*, 129 Wash.2d 1007, 917 P.2d 129 (1996); citing *Highline School District 401*, 87 Wash.2d at 15.

Moreover, under cases upon which current takings law is based, the statute of limitations does not commence to run until activity is complete:

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. In the instant case, substantial damage had occurred when the project was completed. The respondent was entitled to wait until the completion of the construction project before filing a cause of action so that it might determine the full extent of the damages. . . . A different rule would force a plaintiff to seek damages in installments in order to comply with the statute of limitations.

Vern J. Oja & Associates v. Washington Park Towers, Inc., 89 Wash.2d 72, 75-76, 569 P.2d 1141 (1977), emphasis added; citing *Gillam v. Centralia*, 14 Wash.2d 523, 529-30, 128 P.2d 661, 663-64 (1942); *Papac v. Montesano*, 49 Wash.2d 484, 303 P.2d 654 (1956); *Cheskov v. Port of Seattle*, 55 Wash.2d 416, 348 P.2d 673 (1960); *Gazija v. Nicholas Jerns Co.*, 86 Wash.2d 215, 543 P.2d 338 (1975); *Haslund v. Seattle*, 86 Wash.2d 607, 547 P.2d 1221 (1976).

In the present case, application of the statute of limitations devolves upon factual findings as to when activity at the prior dump site, and/or the present transfer station, was complete, in relation to the last occurrence of damage to plaintiffs' property. This issue, in turn, requires factual findings regarding the relationship between these two *activities*, and whether the latter is actually a mitigation project for the former. Plaintiffs' allege that the current transfer station is a remediation project for the prior dump site, a process which is still ongoing. Hence, *accrual* for purpose of the statute of limitations occurred on the *latter* of the most recent damage to plaintiffs' property, or final completion of the remediation program known as Mount Pleasant Transfer Site. At best, Skamania County's motion served to define disputed issues of material fact.

ISSUE 4: Does plaintiffs' purchase of property after occupation preclude inverse condemnation claims where the plaintiffs were unaware of the occupation, and the purchase price was not adjusted for the defect? (Assignment of Error 1.)

In support of its motion for summary judgment, Skamania County argued that plaintiff's "takings claim is . . . barred by the absence of standing because he was not the owner of the property at the time the landfill allegedly released debris onto his property." *CP 34*, ln. 1-4. This contention is contrary to the *Declaration of Justin Nelson*, which alleges that debris has continued to migrate onto plaintiffs' property from Skamania County's property since plaintiffs' acquisition on February 26, 2007. *CP 75*, ln. 7-13. In addition, the *Department of Ecology - Environmental Report Tracking System* includes a report of Derek Rockett, Lead Inspector, dated November 21, 2008, concluding as follows:

The first priority at this site should be the prevention of any further solid waste/land slides, possibly through bank stabilization and/or creating a buffer between the edge of the bank and the solid waste from the landfill.

CP 140.

Moreover, the rule of standing has been articulated by the Court of Appeals on facts similar to the present case:

No damages should be allowed any appellant found to have acquired his property for a price commensurate with its diminished value. Such parties should not be entitled to recover damages which they did not, in fact, sustain, even though the current market value of their land may be less than it would be without the pollution.

Walla Walla v. Conkey, 6 Wash.App. 6, 17, 492 P.2d 589 (1971), *review denied*, 80 Wash.2d 1007 (1972); accord *Hoover v. Pierce County*, 79 Wash.App. 427, 434, 903 P.2d 464 (1995), *review denied*, 129 Wash.2d 1007, 917 P.2d 129 (1996).

In the present case, Justin Nelson declared that plaintiffs were not aware of the damage to their property until *after* closing their purchase. *CP 75*, ln. 4-6; accord *CP 49*, ln. 21-26. Moreover, Justin Nelson submitted his final *Settlement Statement* evidencing payment of \$169,000.00 for plaintiffs' property. *CP 74*, ln. 3-5; *CP 79*, ln. 101. In addition, plaintiffs submitted: (i) plaintiffs' *Statutory Warranty Deed* dated February 26, 2007, evidencing payment of real estate excise tax in the amount of \$2,590.70, *CP 74*, ln. 1-3; *CP 77-78*; and (ii) a *Statutory Warranty Deed* dated April 24, 2006, received by plaintiffs' seller (defendant Shannon Frame), evidencing payment of only \$1,382.00 in real estate excise tax. *CP 104*, ln 21 – *CP 105*, ln. 3; *CP 107-09*.

By process of interpolation, the court can determine that defendant Frame's excise taxes evidence a purchase price of approximately \$90,000.00 paid by defendants Frame ($169,000.00 \times 1,382.00 \div 2,590.70 = 90,152.47$; or, in the alternative: $2,590.70/169,000.00 = 1,382.00/90,152.47$). Hence, plaintiffs did not acquire their property for a price commensurate with diminished value, paying an increase of \$79,000.00 only ten months after defendant Frame's acquisition, and the rule precluding recovery of amounts offset by the purchase price does not apply.

* * *

Summary judgment

In summary judgment, the moving party bears the burden regardless where the burden will lie in trial. *Peninsula Truck Lines, Inc. v. Tooker*, 63 Wash.2d 724, 726-27, 388 P.2d 958, 960 (1964). In ruling on summary judgment, the court must consider all evidence and reasonable inferences in favor of the non-moving party. CR 56(c); *Ohler v. Tacoma General Hospital*, 92 Wash.2d 507, 511, 598 P.2d 1358 (1979).

In the present case, summary judgment constituted error because Skamania County failed to present evidence to support its defenses, including evidence that abatement would be unreasonable, an affirmative defense.

ISSUE 5: Does admission of prejudicial evidence regarding prior regulatory proceedings against the plaintiffs constitute error where the evidence is proffered to show retaliation, and where plaintiffs' intent is irrelevant to claims and defenses? (Assignment of Error 2.)

The trial court admitted, over objection, evidence of regulatory action against plaintiffs, offered to show a retaliatory motive for litigation. *CP 31*, ln. 13 - *CP 32*, ln. 3; *CP 50*, ln. 13 - *CP 56*, ln. 28; *CP 191*, *et seq.*; *RP 12-13*.

Washington rules of evidence define, and limit admissibility to evidence that is relevant:

“Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

ER 401.

All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of this state. Evidence which is not relevant is not admissible.

ER 402. Admissibility requires that the evidence make “more probable than not,” or less probable than not, one of the elements of plaintiffs’ claims. *State v. Atsbeha*, 16 P.3d 626, 634, 142 Wash.2d 904 (2001). The Court of Appeals provided an expanded explanation in 1986:

This definition encompasses two elements – probative value and materiality. . . . To be relevant, therefore, evidence must (1) tend to prove or disprove the existence of a fact, and (2) that fact must be of consequence to the outcome of the case.

Addressing the question of probative value first, ER 401 defines “relevant evidence” broadly as “evidence having any tendency to make the existence of any fact . . . more probable or less probable.” . . . Thus, it has been said that “[m]inimal logical relevancy is all that is required.” . . . The relevancy of evidence will depend, therefore, upon the circumstances of each individual case and the relationship of such facts to the ultimate issue.

Davidson v. Municipality of Metropolitan Seattle, 43 Wash.App. 569, 572, 719 P.2d 569 (1986); citing 5 K. Tegland §82 and §83 at 170; *Chase v. Beard*, 55 Wash.2d 58, 346 P.2d 315 (1959).

In the present case, plaintiffs alleged trespass, inverse condemnation and nuisance. The only actions on the part of plaintiffs that could affect any of the elements of their claims would be *permission*, or plaintiffs’ responsibility for their own injuries. The proffered evidence did not tend to make either defense more likely; rather, the evidence was offered to show that plaintiffs’ motive is retaliation. Plaintiffs’ intent or motive is not an element of trespass, inverse condemnation or nuisance – *defendant’s* intent or motive may have consequence to the outcome of the case; but *plaintiffs’* intent or motive does not.

The proffered evidence does not relate to the elements of continuing trespass: (i) invasion of plaintiffs' exclusive possession, (ii) defendant's intentional act, (iii) reasonable foreseeability to the defendant, and (iv) plaintiffs' actual damages, *Bradley*, 104 Wash.2d at 692-93; nor to the elements of inverse condemnation. Hence, the proffered evidence has no consequence to the outcome of the present case.

In the alternative, even "relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." *Lockwood v. AC & S, Inc.*, 109 Wash.2d 235, 256, 744 P.2d 605 (1987); citing ER 403. The Supreme Court, in *Lockwood*, expanded upon the meaning of "unfair prejudice" as follows:

The term "unfair prejudice" as it is used in Rule 403 usually refers to prejudice that results from evidence that is more likely to cause an emotional response than a rational decision by the jury. . . . According to the advisory committee's notes on Fed.R.Evid. 403, which is identical to ER 403, "'unfair prejudice' means an 'undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.'"

Lockwood, 109 Wash.2d at 257; citing 5 K. Tegland, §106 at 249-50; and 1 J. Weinstein and M. Berger, *Evidence* at 403-33 (1985).

In the present case, evidence of past regulatory proceedings against the plaintiffs is unfairly prejudicial because it suggests decision on an improper basis. Regulatory actions are civil violations which do not involve convictions, and it is often easier and/or cheaper to comply than defend. However, Skamania County did not offer the evidence in rebuttal of Justin Nelson's testimony; rather, the evidence is offered in an attempt to show a retributive motive. *Supra*. Plaintiffs' motive is an improper basis for decision because the plaintiffs would have an equal right to redress of their injuries even if their motive were retributive.

Moreover, the proffered evidence is highly prejudicial because it is more likely to elicit an emotional response than a rational decision of the fact finder. Jurors, for example, could conclude that regulatory violations expend tax dollars in enforcement actions, so plaintiffs are not entitled to compensation for their injuries. In the alternative, jurors could be offended by activities alleged in regulatory proceedings, and become biased against the plaintiffs. Both alternatives are improper bases for decision.

Based upon the foregoing, the trial court erred in denying plaintiffs' motion to exclude evidence of prior regulatory proceedings.

* * *

VI. CONCLUSION

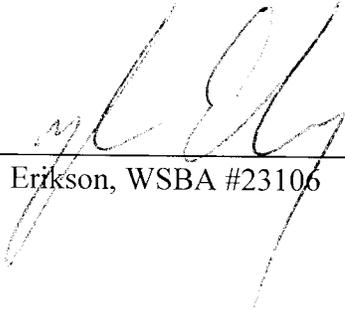
Skamania County's motion for summary judgment should have been denied because the County bore the burden of proof and failed to present evidence to rebut attestations of continuing trespass from both expert and fact witnesses. The defining characteristics of continuing trespass are continuing or repeated damage, and the unavailability of abatement. Skamania County failed to present evidence and carry its burden of proving the unreasonability of abatement, an affirmative defense in the present case.

In addition, and alternative, the "subsequent purchaser rule" does not preclude inverse condemnation because the only evidence supports plaintiffs' claim that they were unaware of government occupancy when they purchased the property, and their purchase price was not adjusted for the defect.

RESPECTFULLY SUBMITTED this 18th day of February, 2013.

ERIKSON & ASSOCIATES, PLLC
Attorneys for the plaintiff/appellants

By:



Mark A. Erikson, WSBA #23106

REVISED CERTIFICATE OF SERVICE

#44240-0-II

I certify that on the 18th day of March 2013, I caused a true and correct copy of this *Brief of Appellants* to be served on the following in the manner indicated below:

Counsel for the defendants:

Mark R. Johnsen
Karr Tuttle Campbell
701 Fifth Avenue, Suite 3300
Seattle, WA 98104
E-mail: mjohnsen@karrtuttle.com

US Mail
 Hand Delivery
 E-mail, as agreed by recipient

Shannon Frame
1431 D Street
Washougal, Washington 98671
E-mail: atomspapa@gmail.com

US Mail
 Hand Delivery
 E-mail, as agreed by recipient

By: 
Kris Eklove

ERIKSON & ASSOCIATES LAW

March 18, 2013 - 5:08 PM

Transmittal Letter

Document Uploaded: 442400-MOSS0201.B01RevisedCertServ.pdf

Case Name: Nelson v Skamania County and Frame

Court of Appeals Case Number: 44240-0

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: ____

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: Revised Certificate of Service

Comments:

No Comments were entered.

Sender Name: Kris Eklove - Email: **kris@eriksonlaw.com**

A copy of this document has been emailed to the following addresses:

mjohnsen@karrtuttle.com
atomspapa@gmail.com

ERIKSON & ASSOCIATES LAW

March 18, 2013 - 2:59 PM

Transmittal Letter

Document Uploaded: 442400-Appellants' Brief.pdf

Case Name: Nelson v Skamania County and Frame

Court of Appeals Case Number: 44240-0

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: Appellants'

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Kris Eklove - Email: **kris@eriksonlaw.com**

A copy of this document has been emailed to the following addresses:

mjohnsen@karrtuttle.com
atomspapa@gmail.com