

66542-1

66542-1

No. 66542-1-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

---

LEE HAYNES,

Appellant,

v.

SNOHOMISH COUNTY, et al.,

Respondent.

---

REPLY BRIEF

---

Mario August Bianchi, WSBA No. 31742  
Tyler J. Moore, WSBA No. 39598  
Attorneys for Appellant  
LASHER HOLZAPFEL  
SPERRY & EBBERSON, P.L.L.C.  
601 Union St., Suite 2600  
Seattle, WA 98101  
(206) 624-1230

2011 AUG 31 PM 4:14

~~FILED  
COURT OF APPEALS  
DIVISION I  
STATE OF WASHINGTON~~

ORIGINAL

TABLE OF CONTENTS

**SUMMARY OF REPLY**..... 1

**RE-STATEMENT OF THE CASE** ..... 3

    A. Brief Of Respondent Relies On Facts Not Contained In The Record..... 3

    B. The Pipe Running Underneath The Haynes Property Is For the Exclusive Benefit of Snohomish County. .... 4

    C. The County’s Self-Serving Account Of Its Interactions With Lee Haynes Are Disputed And Irrelevant To The Issues Before The Court on Appeal. .... 6

    D. The County Was Never Prevented From Accessing The Haynes Property To Repair The Damaged Pipe. .... 7

**ARGUMENT** ..... 8

    A. There Is No Natural Drainway Across The Haynes Porperty. . 8

        1. The 12 Inch Corrugated Plastic Drainage Pipe Is Not A Drain Formed By Nature. .... 10

        2. The County’s Evidence Contradicts A Finding That The Pipe Follows The Historic Flow Of Water. .... 12

    B. The Intentional Diversion of Water Across The Haynes Property Without Legal Right Is A Trespass. .... 13

        1. The Public Duty Doctrine Does Not Apply To Intentional Torts. .... 16

    C. The Only Alternative to Trespass Is That The County’s Permanent and Recurring Use Of The Plaintiff’s Private Property Is A Taking Which Requires Just Compensation. ... 16

        1. The County’s Use Of The Property Over The Objection Of Lee Haynes Is Chronic And Unreasonable, And A Taking Of The Haynes Property. .... 17

    D. The County Does Not Dispute There Has Been A Permanent Physical Occupation Of The Haynes Property..... 19

    E. Plaintiff’s Cause Of Action For Property Damages Was Improperly Dismissed By The Trial Court..... 22

1.	Plaintiff's Claim For Property Damages Was Not Before The Superior Court. ....	22
2.	There Is Insufficient Evidence Of An Intervening Cause Of The Damages. ....	24
F.	Applicability of Attorney Fee Provisions.....	25

## TABLE OF AUTHORITIES

### **Cases**

<u>Boitano v. Snohomish County</u> , 11 Wn.2d 664, 676-77, 120 P.2d 490 (1941) .....	18
<u>Burnett v. Tacoma City Light</u> , 124 Wn.App. 550, 561, 104 P.3d 677 (2004) .....	16
<u>Currens v. Sleek</u> , 138 Wn.2d 858, 862, 983 P.2d 626 (1999) .....	9
<u>Fitzpatrick v. Okanogan County</u> , 169 Wn.2d 598, 613, 238 P.3d 1129 (2010) .....	2
<u>Gaines v. Pierce County</u> , 66 Wn.App. 715, 725, 834 P.2d 631 (1992) .....	17
<u>Grundy v. Black Family Trust</u> , 151 Wn.App. 557, 569, 213 P.3d 916 (2009) .....	15
<u>Hoover v. Pierce County</u> , 79 Wn. App. 427, 434-436, 903 P.2d 464 (1995) .....	18
<u>In re 14255 32nd Ave S.</u> 120 Wn.App. 737, 743, 86 P.3d 222 (2004) .....	19
<u>Island County v. Mackie</u> , 36 Wn.App. 385, 388, 675 P.2d 607 (1984) .....	9, 10, 11
<u>King County v. Boeing</u> , 62 Wn.2d 545, 550, 384 P.2d 122 (1963) .....	10
<u>Loretto v. Teleprompter Manhattan Corp.</u> , 458 U.S. 419, 441 (1982) .....	19, 20, 21, 22
<u>Maltman v. Sauer</u> , 84 Wn.2d 975, 982, 530 P.2d 254 (1975) .....	25
<u>Margola Associates v. City of Seattle</u> , 121 Wn.2d 625, 644, 854 P.2d 23, 34 (1993) .....	22
<u>McCoy v. Am. Suzuki Motor Corp.</u> , 136 Wn.2d 350, 358, 961 P.2d 952, 957 (1998) .....	24
<u>Nollan v. Cal. Coastal Comm'n</u> , 483 U.S. 825, 832 (1987) .....	20
<u>Rothwieler v. Clark County</u> , 108 Wn. App. 91, 99, 29 P.3d 758 (2001) .....	2, 10, 12
<u>Strickland v. City of Seattle</u> , 62 Wn.2d 912, 385 P.2d 33 (1963) .....	12
<u>West Coast Pizza Investors v. City of North Bend</u> , 2007 WL 4124293 (D. Or.) (2007) .....	14

### **Statutes**

RCW 4.16.080(1) .....	23
-----------------------	----

### **Other Authorities**

Const. Art. I. § 16 .....	3
The Oxford Dictionaries .....	10

## I. SUMMARY OF REPLY

The County introduces new facts into this appeal in an effort to manufacture a viable basis for this Court to hold that the Haynes Property is burdened by a natural drainway. Specifically, the County adds to the record facts regarding the topography of the Haynes Property and a “ravine” the County claims was the natural course drainage prior to the development of the Skylark Plat. Even assuming the County’s modified version of the record, its responsive arguments fail both as a matter of fact and as a matter of law.

As a matter of fact, the County’s natural drainway argument fails to appreciate the path of the water from origination to its final resting place. The water originates “from a multitude of upland sources” and is thereafter artificially channeled underground by the County dedicated road to the top of the Skylark Plat. Once it arrives at the Skylark Plat, the water continues in an artificial pipe which zigzags across the plat inconsistent with any “course formed by nature.” As Appendix B to the County’s brief<sup>1</sup> accurately depicts, the only place in the entire system where the water travels in a southwesterly direction is along the County dedicated easement on Lot 6, and not where it zigzags onto and then off of Haynes Property. Further, the only place from Crawford Road to the detention

---

<sup>1</sup> All references to “Appendix B” refer to Appendix B of the Brief of Respondent.

pond where water travels without the benefit of dedicated legal right is when it enters upon the Haynes Property.

Even if there was a bona-fide question about whether the pipe mimicked nature, that question is necessarily a question of fact which cannot properly be resolved on summary judgment. See Fitzpatrick v. Okanogan County, 169 Wn.2d 598, 613, 238 P.3d 1129 (2010). However, resolution of the factual issue by the Superior Court is not necessary because the County's argument also fails as a matter of law. The binding decision of Rothwieler v. Clark County, 108 Wn. App. 91, 99, 29 P.3d 758 (2001), makes clear that a drainage pipe is a man-made formation and not a drain "formed by nature":

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

108 Wn. App. at 99. The Rothwieler case appropriately resolves the natural drainway argument against the County.

The admitted to salient fact of this case is that the County diverts water beneath the Haynes Property as part of its drainage system without ever having acquired a legal right to do so. The County does not dispute this fact. To use Haynes' property, the County must acquire a legal right

to do so and for that right it must provide Haynes just compensation. See Const. Art. I. § 16. Otherwise, the County is trespassing.

## II. RE-STATEMENT OF THE CASE

### A. Respondent's Brief Relies On Facts Not Contained In The Record.

There are new facts unsupported by the record in the County's brief. Brief of Respondent 3-4.<sup>2</sup> These new facts relate to the topography of the "drainage basin/ravine" allegedly existing on the Haynes Property.

RB 3-4. The paragraph unsupported by the record states:

"The topography of the plat slopes generally from northeast to southwest, draining into a ravine across Haynes' property and then to a natural drainage basin/depression in the southwest corner of the subject property. Prior to 1992, the slope itself conveyed surface water runoff from the uphill drainage basin to a depression in the southwest corner of Haynes property. Runoff from upland properties follow the grade of a road situated above the subject property, Crawford Road, which was dedicated as part of the original 1918 Plat of Alderwood Manor. CP 92. See also CP 97-98, 180, 113, attached as **Appendix A.**"

However, the actual record which the County cites at CP 92 states:

The historical course of drainage from the Crawford Road area runs naturally down towards Mr. Haynes' property. When Skylark was built the drainage system along Crawford Road was already in existence and traveling in a pipe, under the pre-existing Alderwood Manor Development No. 5 and another short plat, to the top of Mr. Haynes' property to an outlet. The as-built drawings from the Skylark development indicate an existing storm drain system (pre-dating Skylark) discharged stormwater out on to Mr. Haynes property and, as indicated by a squiggly line (indicating the drainage path), flowed across his property. When

---

<sup>2</sup> All references to the Brief of Respondent will be denoted "RB" followed by the page number.

Skylark was built, the developers simply mimicked this flow, installing a 12 inch storm drain pipe running under lots 5 and 6 to the catch basins at issue. The drainage system conveys the surface water to a detention pond, which Skylark granted via easement to the County. The purpose of the drainage system is to drain surface water through the natural and historic drainage course and to accommodate the development.

CP 92. There is no mention of the topography the Haynes Property, a ravine, a natural drainage basin/depression, the slope of the Haynes Property, or the uphill drainage basin.<sup>3</sup> CP 92. These facts are simply not in the record for review.

B. The Pipe Running Underneath The Haynes Property Is For the Exclusive Benefit of Snohomish County.

Throughout its brief, the County refers to the pipe running beneath the Skylark Plat as a “private pipeline” that it did not “build, design, or install” and that “the County has at no time asserted ownership over or otherwise maintained the drainage pipeline crossing the Plat of Skylark.” RB 7-8. These statements are not only inaccurate, but also defy the reality of the County’s exclusive use of the pipe. CP 97-99.

The record reflects that the pipeline traveling through the Skylark Plat is part of the County’s extensive “storm drainage system.” CP 96-97.

---

<sup>3</sup> Further, this new evidence is confusing. The paragraph refers to the drainage basin in the southwest corner of the “subject property.” The subject property would presumably refer to the Haynes Property, but there is no indication anywhere in the record of a basin in southwest corner of the Haynes Property. However, the southwest corner of the Skylark Plat does contain a retention pond that is akin to a drainage basin. See RB 5. If the County intended on referring to the retention pond, that would make the “subject property” the Skylark Plat.

The pipeline running beneath the Skylark Plat acts as a thoroughfare to carry water running from the County's road above to the County's detention pond below. CP 98. With respect to the pipeline that travels through the neighboring Lot 6, the County admits that it has an easement for this portion of the pipe:

12. The County has an easement over the portion of the drainage system on Lot 6, but was never granted an easement across Mr. Haynes property – lot 5.

CP 92, CP 99. According to the recorded plat, the County has the legal rights of “ingress and egress and the right to excavate construct, operate, maintain, repair and/or rebuild an enclosed or open channel storm water conveyance system and/or other drainage facilities, under, upon or through the drainage easement.” CP 8. It is only in that limited area where the pipe crosses upon the Haynes Property, that the County can assert the pipe is a “private pipeline” which it has no ownership or responsibility to maintain.

Further, the claim that this is a “private pipeline” ignores the reality that the pipeline serves exclusively a public use. CP 98. No water from Skylark enters into the “tight-line” pipe as it makes its way underneath the Plat. CP 98, 101. The only purpose of the Pipe is to carry water from County source to County source. CP 97-99. The County acknowledges that if it is prevented from continuing to use the pipe the

“outcome would be disastrous.” CP 102. If the pipe were blocked water would “flood public roads, causing a public safety hazard.” CP 93. The County would have to “conduct surveys, temporarily re-route water flows, and create a new drainage system” at a cost of over \$200,000.00. CP 93. In other words, the County claims that even though the pipe is “private,” it must still be allowed to use it for a “public” benefit.

C. The County’s Self-Serving Account Of Its Interactions With Haynes Are Disputed And Irrelevant To The Issues Before The Court on Appeal.

At RB 8-12 the County recounts a self-serving version of events leading up to this pending lawsuit. This version of events is disputed by Haynes in his own declaration testimony in the record. CP 30-37, 128-133, 135-145, 256-259. To summarize the Haynes’ version of events:

- In August of 2006 (a year and half before the 2007 storm) Haynes noticed that the catch basin lids located on Lot 6 were not properly bolted down and called the County to fix the problem. His telephone calls were not returned. CP 31, 258.
- After the damage occurred in December of 2007, Haynes “begged and pleaded” for the County to come out and repair the pipe to stop the continuing damage. CP 129. The County refused to fix the pipe on the basis that it had no responsibility to repair private property. CP 66-67.
- Haynes is not in any way responsible for the damage to the pipe or his property. CP 258. Contrary to Mr. Kirkendall’s recollection, Lee Haynes has never stated that a hole in the side of the pipe could have been caused during a repair to his water service by a private contractor. CP 258. The 2004 leak in the fresh water pipe was located over 30 feet away from the pipe. CP 258.

- Prior to litigation the County offered to repair the pipe on two conditions: (1) Haynes grant the County an easement for its use of the Pipe, and (2) Haynes waive all claims for damages associated with the County's prior use of the pipe. CP 128-129.

It was the County which adopted an irreconcilable position which lead to this pending dispute. Specifically, the County refused to repair the pipe on the basis that it did not have a legal right to enter the Haynes Property, and at the very same time continued to divert water from Crawford road through the pipe knowing that since the pipe was broken the water was simply discharging onto the Haynes Property and eroding it away. CP 66-67. In any event, the contested facts are not properly resolved on summary judgment and, are not relevant to resolution of the issues which are before this Court on Appeal.

D. The County Was Never Prevented From Accessing The Haynes Property To Repair The Damaged Pipe.

In its brief, the County alleges that Haynes prevented the County from repairing the pipe on his property because "Haynes declined to grant the easement, demanding the County pay for the easement." RB 10. The County claims that "absent an easement for access, the County could not and did not attempt any repairs to the pipeline." *Id.* In fact, the County claims that "his refusal to allow the County to access the Haynes' property" was a "clear cause of Haynes' damage." RB 13. This argument

by the County simply ignores the facts that Haynes spent months and months pleading with the County to come out and repair the pipe and even extended an open *invitation* in writing that the County could come out anytime to repair the pipe. CP 64. The County did not need an easement to access the Haynes Property to repair the pipe when it had express permission from Haynes to access his property. CP 64. This is a manufactured excuse by the County not to come out and repair the pipe.

### III. ARGUMENT

#### A. There Is No Natural Drainway Across The Haynes Property.

The Snohomish County water drainage system is a manmade artificial system which was not “formed by nature” and is not a “natural drainway.” Prior to 1992, Crawford Road artificially directed water from numerous upland sources and discharged that water at Catch Basin 4 (CB 4) at the top of the Skylark Plat. CP 97-98. When the Skylark Plat was developed an artificial pipe was installed diverting water through the Plat to an artificial detention pond. CP 97-98. Although the pipe may have been built to mimic the natural flow of water when it exited CB 4 prior to 1992, there is no evidence in the record to support that water previously flowed consistent with current location of the pipe. CP 92, 97-98. In fact, the evidence is clear that at the time of the development CB 4 was moved

and the pipe was artificially directed through an easement located on Lot 6, before traversing back over the Haynes Property. CP 98.

The common enemy doctrine allows landowners to protect themselves against “vagrant and diffuse surface waters” without incurring liability for injury to other landowners’ property. Island County v. Mackie, 36 Wn.App. 385, 388, 675 P.2d 607 (1984). However, there are three exemptions to the common enemy doctrine under Washington law: (1) landowners may not inhibit a watercourse or natural drainway; (2) a landowner may not collect and divert water onto the land of another in quantities greater than the natural flow; and (3) changes made to the flow of water in good faith and without causing unnecessary damage will not incur liability. Currens v. Sleek, 138 Wn.2d 858, 862, 983 P.2d 626 (1999). A landowner will not be shielded from liability if his actions fall within the first two exemptions. *Id.* The common enemy doctrine does not grant a landowner any positive rights, but simply allows the landowner to escape liability for damage caused by surface water directed away from his or her property. *Id.* at 861-62.

The County argues that Haynes cannot stop the flow of water through the plastic pipe buried beneath his property because it is a natural watercourse or drainway. This argument contradicts the law and common sense, because a corrugated plastic pipe is not a drain “formed by nature.”

1. The 12 Inch Corrugated Plastic Drainage Pipe Is Not A Drain Formed By Nature.

To support its permanent use of the Haynes Property, the County argues that the artificial pipe running across the Haynes Property is a drain formed by nature that cannot be blocked. E.g., Mackie, 36 Wn.App. at 388. However, a man-made storm drain is not a drain “formed by nature” within Washington case law. Rothwieler, 108 Wn.App. at 99.

The parties agree on the general principle stated in King County v. Boeing that “[a] natural drain is that course, formed by nature, which waters naturally and normally follow in draining from higher to lower lands.” 62 Wn.2d 545, 550, 384 P.2d 122 (1963). The parties disagree on whether a 12 inch corrugated plastic pipe is “formed by nature”, and a “natural drain.” The Oxford Dictionaries define “nature” and “natural” as follows:

Nature: the phenomena of the physical world collectively, including plants, animals, the landscape, and other features and products of the earth, as opposed to humans or human creations.

Natural: existing in or derived from nature; not made or caused by humankind.

Oxford University Press, Oxford Dictionaries, nature, natural *available at* <http://oxforddictionaries.com/definition/nature>; and [definition/natural](http://oxforddictionaries.com/definition/natural) (last visited August 30, 2011).

These definitions fit the facts of the Mackie case cited by the County. RB 15-18. In Mackie, a drainway formed by nature ran across the defendants' property. 36 Wn.App. at 386-37. A road bisected this natural drainway to the west of the Mackie property, and a culvert underneath the road allowed the natural course of the water to remain intact. *Id.* The Mackies intentionally blocked the culvert and thereby blocked the water from continuing on its natural course across their property. *Id.* When blocked, the natural drainway pooled and caused damage to the road. *Id.*

Unlike the facts in Mackie, this case does not concern any natural drainway formed by nature, but rather an artificial drainage system formed by man. CP 92. Crawford Road artificially diverts water to top of the Skylark Plat. CP 97-98. The water is then diverted under the Skylark Plat in an artificial 12-inch corrugated pipe and exits the pipe at an artificial man-made detention pond. CP 97-98. In Mackie, the defendants' blocking of the culvert interfered with the natural course of drainage, 36 Wn.App. at 386-37, but in the instant case, blocking the pipe would only prevent County from artificially redirecting water across the Haynes Property. CP 97-98, 106. The opinion in Mackie is distinguished.

The County does not distinguish this case from the dispositive opinion in Rothwieler<sup>4</sup>, which held that a pipe is not a “drain formed by nature” even if it generally followed the natural course of drainage. 108 Wn.App. at 99. There is no legal basis to find that the 12 inch corrugated plastic pipe is a drain formed by nature or a natural watercourse. Because the pipe is not a natural drainway, Haynes is not compelled to allow the water to cross his property, and the Order Granting Summary Judgment must be reversed.

2. The County’s Evidence Contradicts A Finding That The Pipe Follows The Historic Flow Of Water.

Even if the court determined that a 12-inch corrugated plastic pipe could be a drain formed by nature, the County has failed to provide sufficient evidence of the historic flow of water.

Prior to 1992, Crawford Road collected water from countless upland sources, and discharged it at the northwest corner of the Skylark Plat. CP 97-99. However there is no evidence in the record which suggests that without Crawford Road the water from those upland sources would still naturally run towards the Skylark Plat or Haynes Property. Furthermore, according to the map provided by the County, the water

---

<sup>4</sup> The County relies heavily on Strickland v. City of Seattle, 62 Wn.2d 912, 385 P.2d 33 (1963). The Court in Rothwieler specifically held that Strickland did not apply to a case of a storm water drainage system, because it involved a stream formed by nature. 108 Wn.App. at 102-103.

collected by the Crawford Road drainage system was discharged at CB 4 prior to 1992, and ran down Lot 5, the Haynes Property. When Skylark was built, the location of CB 4 was *moved*, and the pipe was run underneath the adjacent property, Lot 6. Finally, the County ignores the two significant turns the pipe makes along its path. The pipe turns twice: (1) right before it attaches to the Haynes Property; and (2) a 90 degree turn on the Haynes Property. RB Appendix B. Neither of these turns are discussed or explained in the declaration testimony. The 90 degree turn on the Haynes Property runs directly counter to the County's claim that the pipe follows a course formed by nature. RB 7-8.

The record is at best equivocal and contradictory regarding the natural flow of water. There is insufficient evidence for a finding that the zigzagging pipe running underneath the Haynes property follows the natural and historic course of drainage. The County's natural drainway argument is not a sufficient basis for the Superior Court's granting summary judgment.

B. The Intentional Diversion of Water Across The Haynes Property Without Legal Right Is A Trespass.

The County's response to Haynes' claim of intentional trespass fails to appreciate the salient and relevant time frame. Specifically the County attempts to artificially limit Haynes claim for trespass to the

County's actions prior to December 2007. The County argues that it could not have committed intentional trespass prior to December 2007 because at that time (1) its use of the property was with consent (citing West Coast Pizza Investors v. City of North Bend), 2007 WL 4124293 (D. Or.) (2007)) (2) it had no knowledge, actual or constructive, of the drainage defect, inadequacy, or obstruction, and (3) there were no actual or substantial damages. However, these same arguments fail when they are applied to the relevant time frame in question: from December, 2007, through the present.

With respect to the matter of consent, the respective parties are readily in agreement that prior to December, 2007, Snohomish County used the pipe running beneath the Haynes Property with permission. However that consent was withdrawn in December, 2007, when the County refused to repair the pipe and yet continued to use the pipe knowing that the water was discharging onto and damaging the Haynes Property.

With respect the matter of intention, the County's response ignores that after December 2007, it did receive actual and specific knowledge of its diversion of water across the Haynes Property. In fact, County representatives came out and surveyed the problem but refused to fix the pipe on the basis that it was a "private pipe" even though the County was

exclusively using it. To prove an intentional act, the plaintiff must prove “the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it.” Bradley v. American Smelting And Refining Co., 104 Wn.2d 677, 682, 709 P.2d 782 (1985) citing Restatement (Second) of Torts § 8A (1965). “The defendant need not have intended the trespass; he need only have been substantially certain that the trespass would result from his intentional actions.” Grundy v. Black Family Trust, 151 Wn.App. 557, 569, 213 P.3d 916 (2009). The County’s act of diverting water from Crawford Road to the detention pond knowing that it does not have a legal right to cross over the Haynes Property constitutes intentional trespass because the County is substantially certain that its action will directly interfere with Mr. Haynes right to exclusive possession of his property.

Finally, with respect to the issue of actual and substantial damages, it is undisputed that for the period of time from December 2007 to present, the County directed water onto the Haynes Property knowing that it was causing actual damage to the physical Property. This complained of continuing erosion of the Property was not just foreseeable but actually known to the County and there is no intervening cause to this damage. The only argument made by the County against responsibility for this continuing damage was that “Haynes waived his right to recover when he

refused to grant the County an easement.” RB 29. That issue has already been addressed.

1. The Public Duty Doctrine Does Not Apply To Intentional Torts.

The County argues that “the Public Duty doctrine shields Snohomish County from liability on trespass, nuisance, and inverse condemnation/takings and justifies the grant of summary judgment.” RB 32. This misstates the applicability of the Public Duty Doctrine. See Burnett v. Tacoma City Light, 124 Wn.App. 550, 561, 104 P.3d 677 (2004). “The threshold determination in a negligence action is whether the defendant owes a duty of care to the plaintiff”, and “the public duty doctrine requires that the defendant owe a specific duty to the injured plaintiff rather than to the public in general.” *Id.* The Public Duty Doctrine is intended to limit the duty of a government entity in cases of negligence, and no case law indicates that it would apply to an intentional tort by the County. The County is not shielded from liability by the Public Duty Doctrine.

C. The Only Alternative to Trespass Is That The County’s Permanent and Recurring Use Of The Plaintiff’s Private Property Is A Taking Which Requires Just Compensation.

The pipe on the Haynes Property acts as a conduit to take water collected from numerous uphill sources by a County road to the County

owned retention pond on the Skylark Plat. CP 97-99. This pipe is “tight lined” and does not have any entrance points for water on either Lot 5 or Lot 6. CP 98, 101. This pipe is so important to the drainage system on Crawford Road that to block the pipe would cause a public safety hazard. CP 93, 102. Further, the cost to re-route the water collected by Crawford Road would exceed \$200,000. CP 93.

There is no debating that the County is permanently and exclusively using the pipe located beneath the Haynes Property for a public benefit. In fact the County acknowledges that it cannot discontinue using the Haynes Property, because to do so would create a public safety hazard on Crawford Road. The use of the pipe is a permanent and recurring intentional act of the County and constitutes a taking of the Haynes Property without just compensation.

1. The County’s Use Of The Property Over The Objection Of Haynes Is Chronic And Unreasonable, And A Taking Of The Haynes Property.

The invasion of private property right by a public entity must be permanent and recurring for liability for an inverse condemnation to attach. Gaines v. Pierce County, 66 Wn.App. 715, 725, 834 P.2d 631 (1992). Government conduct that is chronic and unreasonable creates a duty to provide just compensation. *Id.* at 726. Further, the Washington Supreme Court has held that a use of private property that is reasonable

necessary for the use of public property is a compensable constitutional taking. Boitano v. Snohomish County, 11 Wn.2d 664, 676-77, 120 P.2d 490 (1941).

The County enjoyed 15 years of permissive use of the Haynes Property prior to the December 2007 storm event.<sup>5 6</sup> This use prevented the County from having to spend over \$200,000 to re-route the water, and prevented Crawford Road from becoming a public safety hazard. After the storm, Haynes merely requested that the County repair the pipe and the damage done to his property. CP 32. The County refused to repair the pipe or fix the damage, CP 93, but continued to use the pipe causing continuous damage for three years. At that point the County's continued use of the pipe became hostile. The County acknowledges that the pipe on the Haynes Property is "private property", but ignores that it is exclusively continuing to use the pipe for public benefit of maintaining Crawford Road and damaged the Haynes Property by its use.

The County's use of the pipe to drain Crawford Road is as permanent and chronic as rainfall in Snohomish County. The County's

---

<sup>5</sup> The County argues that Lee Haynes does not have standing to bring an inverse condemnation claim because the "condition" pre-existed this ownership of the property. RB 43. The conditions complained of in this paragraph all occur from 2007 to present when there is no dispute Lee Haynes owned the property. As such, Lee Haynes has standing to bring these claims. See Hoover v. Pierce County, 79 Wn. App. 427, 434-436, 903 P.2d 464 (1995).

<sup>6</sup> The permissive nature of the use is admitted and acknowledged by the County. See RB 25.

use to this day is continuous, unreasonable, and derogates the fundamental rights of property ownership included the right to exclude, and the right to alienate. CP 93, 102. It is unreasonable and illegal for the County to conscript Haynes' private property for the County's public use without regard for the private property owners desires. The takings clause of the Washington Constitution acts as a safeguard against the unreasonable and heavy handed actions of the government taking the property rights of its citizens. The County has taken Haynes' fundamental property rights, and that taking requires just compensation.

D. The County Does Not Dispute There Has Been A Permanent Physical Occupation Of The Haynes Property.

In arguing that a per se taking has occurred, Haynes relies on Loretto v. Teleprompter Manhattan Corp., as applied in the state of Washington by In re 14255 32nd Ave S. 120 Wn.App. 737, 743, 86 P.3d 222 (2004). A per se taking occurs when the government or its actor permanently physically occupies private property. Loretto, 458 U.S. 419, 441 (1982). The County responds to this argument in a footnote stating:

Haynes cites Loretto...; that case is distinguishable. First, the taking occurred after the buildings were standing, not to facilitate construction. Second, the attachment of wires was not necessarily to benefit the landowner or tenant, but could have been used to provide cable to neighboring buildings (here, the drain was installed by the developer to drain Haynes' property so that it could be developed). Third, here the drainage of water to facilitate development is a legitimate public interest, as opposed to

private access to cable television by a particular company.<sup>7</sup>  
(Emphasis Added.)

RB 36, n.13. There is no other discussion of the permanent physical occupation of the Haynes Property. The County's attempts to distinguish Loretto are either incorrect, or have no bearing on the Supreme Court's decision.

The County's argument that the pipe was installed to facilitate construction on the Haynes Property, is irrelevant to the Supreme Court's opinion in Loretto. The Loretto Court held the taking was due to the state's encroachment on the property owner's ability to fully exercise the fundamental attributes of a property right. 458 U.S. at 435-37. Further, in a subsequent case, the Supreme Court held that the grant of an easement without compensation is a permanent physical occupation where there is a permanent and continuous right to pass over the property. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 832 (1987). Even if it the grant of an easement is a condition of the permit to build a home on the property, the state must pay just compensation unless the easement substantially advances a legitimate public interest, and does not deny the owner economically viable use of his land. *Id.* at 834. In this case, the County did not condition its use of the property on approval of the development.

---

<sup>7</sup> The County hereby acknowledges in its argument that the drainage across the Haynes Property serves a "legitimate public interest."

The second distinction made by opposing counsel was that the pipe benefited Haynes unlike the facts in Loretto. However, this distinction is also unavailing to the County because the Loretto Court specifically held the benefit from the use of the lines was irrelevant:

In light of our analysis, we find no constitutional difference between a crossover and a noncrossover installation. The portions of the installation necessary for both crossovers and noncrossovers permanently appropriate appellant's property. Accordingly, each type of installation is a taking.

Loretto, 458 U.S. at 438. Crossover installations are those that serve other buildings, and noncrossover installations provided cable TV to the building they were attached to. *Id.* at 422. The Supreme Court's opinion in Loretto applies whether or not there is benefit to the property. Further, the pipe across the Haynes Property is similar to the crossover lines in Loretto, because it acts as a thoroughfare water from one County source (Crawford Road) to another (the retention pond) without any direct benefit to the burdened property.

Finally, the County argues that Loretto is distinguishable, because the pipe serves a "legitimate public interest." This misstates the holding in the Loretto case, specifically:

The Court of Appeals determined that § 828 serves the legitimate public purpose of "rapid development of and maximum penetration by a means of communication which has important educational and community aspects," [citation omitted], and thus is within the State's police power. We have no reason to question the

determination . . . . We conclude that a permanent physical occupation authorized by government is a taking without regard to the public interests it may serve.

Loretto, 458 U.S. 425-426. The Loretto Court found there was legitimate public purpose to the cables, and second, the Court held that the public purpose is irrelevant in the case of a permanent physical invasion. *Id.*

More important than the County's failure to distinguish any relevant aspect of the Loretto case is that the County did not attempt to rebut the evidence of a permanent physical invasion. On summary judgment and in its appeal brief, the County does not present any facts that the County storm water drainage system does not permanently physically invade or occupy the Haynes Property. The failure of the County to rebut the proof of a "physical invasion" requires that the Court categorically grant just compensation. Margola Associates v. City of Seattle, 121 Wn.2d 625, 644, 854 P.2d 23, 34 (1993).

E. Plaintiff's Cause Of Action For Property Damages Was Improperly Dismissed By The Trial Court.

1. Plaintiff's Claim For Property Damages Was Not Before The Superior Court.

The County does not deny that it failed to seek dismissal of Haynes' claim for property damage as part of its request for Summary Judgment. In response, the County's sole argument is that several of its arguments, including statute of limitations and lack of standing, if decided

in favor of the county “would entirely eviscerate the need to make a determination regarding damages. RB 44. This is simply not the case. With respect to the statute of limitations, the physical erosion and waste of the Haynes Property started in December 2007 and continued until the County finally fixed the pipe in 2010. The complaint in this action was filed on January 22, 2010, well inside the 3 year statutory period for filing the claim for property damage and waste. RCW 4.16.080(1). With respect to the County’s standing defense<sup>8</sup>, Lee Haynes owned the property when the damage attributable to the broken pipe occurred and there is no question that he has standing to assert claims for property and damage and waste committed on his property.

Lee Haynes’ cause of action for damages caused by the broken pipe does not depend on whether the County had a legal right to use the pipe. Even if the County had the legal right to use a portion of the Haynes Property to divert water, it did not have the right to inflict physical damage and waste in its use of the Property. The County has failed to show any theory or argument raised in the Motion for Summary Judgment which would allow it to discharge water on the Haynes Property knowing that it

---

<sup>8</sup> The County completely ignores the problems with its standing defense including that it failed to assert standing as an affirmative defense and only raised the issue for the first time on Summary Judgment.

was eroding the property away and causing physical damage to the Property.

2. There Is Insufficient Evidence Of An Intervening Cause Of The Damages.

In its brief the County alleges that there were no actual or substantial damages caused to the Haynes Property cause by water running through the pipe under his property. In doing so the County ignores all of the evidence that for more than two years after the storm the water continuously running through the pipe was discharging onto the Haynes Property and eroding it away.<sup>9</sup>

Instead the County focuses on a separate question of fact: whether there was an intervening cause to the initial damage on the Haynes Property as a result of a third-party removing the vault cover on the County's easement on Lot 6. A party is the cause in fact of an injury if the action complained of caused the injury, and any intervening causes were reasonable foreseeable. McCoy v. Am. Suzuki Motor Corp., 136 Wn.2d 350, 358, 961 P.2d 952, 957 (1998). Whether an intervening cause broke the causal connection between the defendant's actions and the injury is a

---

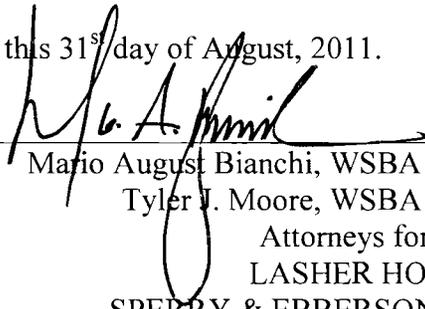
<sup>9</sup> The County claims in a footnote that Haynes has waived his right to recover for damages occurring in the two years after the storm because he refused to grant the County an easement to enter his property. RB 29, fn. 11. This repeated argument that the County could not come onto the property without an easement completely ignores that Lee Haynes gave the County an open *invitation* to enter his property and fix the pipe. In addition, the question of waiver is a question of fact which is not properly resolved on Summary Judgment.

question for the trier of fact. Maltman v. Sauer, 84 Wn.2d 975, 982, 530 P.2d 254 (1975). The question can only be taken from the trier of fact when the intervening cause is “only tenuously related and totally unforeseeable.” *Id.* at 982-83. The County cannot escape Lee Haynes claim for Property damage on the basis of intervening cause until the issues of reasonable foreseeability has been resolved by the trier of fact.

F. Applicability of Attorney Fee Provisions.

In its response the County does not argue the attorney fee provisions cited by Lee Haynes are not applicable. Rather, in asking the Court to deny fees, the County simply argues the merits of its response and that Lee Haynes should be denied fees because his appeal is not well taken. However, the County does not deny that if Lee Haynes does prevail in merits of his appeal that attorney fees and costs are properly awarded as requested.

Respectfully submitted this 31<sup>st</sup> day of August, 2011.

  
Mario August Bianchi, WSBA No. 31742  
Tyler J. Moore, WSBA No. 39598  
Attorneys for Appellant  
LASHER HOLZAPFEL  
SPERRY & EBBERSON, P.L.L.C.  
601 Union St., Suite 2600  
Seattle, WA 98101  
(206) 624-1230