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STATE OF WASHINGTON
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NO. 66542-1-I

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

Lee Haynes,

Appellant,

v.

Snohomish County,

Respondent.

BRIEF OF RESPONDENT

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ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION..... 1

II. STATEMENT OF THE ISSUES..... 2

 A. Did the trial court err in dismissing Haynes’ complaint for damages relating to overflow of stormwater runoff from a pipeline installed by Haynes’ predecessor in interest/developer where the uncontroverted evidence establishes that such pipeline is situated within a natural drainage way which previously served to convey the same stormwater runoff from the upland properties to a natural discharge point? 2

 B. Whether a trespass has occurred when the water flows through the natural drainway through a privately built and privately owned system?..... 2

 C. Whether inverse condemnation or a constitutional taking has occurred when (1) Snohomish County is not responsible for every drainage system in the County, (2) drainage pipes that are privately built are the responsibility of the landowner, and (3) and the water flows in the natural drainway?..... 3

 D. Whether Haynes has standing to bring a lawsuit? 3

 E. Whether the statute of limitations barred Haynes’ claims for trespass when (1) developers re-routed the Skylark drainage system in 1992, (2) Haynes purchased the property in 1992 with the current drainage system, and (3) no complaints about the drainage system occurred until December 2007? 3

 F. Whether the trial court properly dismissed Haynes’ lawsuit, despite his cause of action for waste? 3

 G. Whether attorneys’ fees are available to Appellant should he prevail? 3

III. STATEMENT OF THE CASE..... 3

 A. Historical Drainage Channel..... 3

B.	Tight-Lined Drainage Channel.	4
C.	No Easement for Private Pipeline.	7
D.	100-Year Storm Event.	8
E.	Procedural History.	11
IV.	ARGUMENT.....	12
A.	The Trial Court Properly Dismissed Haynes’ Claims, as the Water Flows Within the Natural Drainway.	14
B.	Judge Canova Correctly Dismissed Haynes’ Cause of Action for Intentional Trespass Because Snohomish County Does Not Intentionally Collect and Divert Water From Crawford Road To A Pipe Beneath The Haynes Property.	23
1.	Snohomish County Did Not Invade The Haynes Property Affecting An Interest In Exclusive Possession.	24
2.	Snohomish County Did Not Perform An Intentional Act.	25
3.	Damage was Not Forseeable.	27
4.	There Were No Actual And Substantial Damages Caused To Haynes By Water Running Through A Private Pipe Underneath His Property.	29
5.	The Public Duty Doctrine Shields the County from Liability.	31
C.	Judge Canova Correctly Dismissed Haynes’ Cause of Action for Inverse Condemnation/Taking.	33
1.	Water flowing through the pipes does not constitute a taking.	37
2.	Water escaping the pipes is not a taking.	37
3.	Nature of the Damages.....	39

4. Nature of the Invasion.....	40
D. Judge Canova Correctly Dismissed this Case Because Appellant Does Not Have Standing to Bring this Action.....	42
E. Haynes' Claims are Limited by the Statute of Limitations.....	43
F. Haynes' Cause of Action for Property Damage was Before the Court and therefore Properly Dsimished at Summary Judgment.	44
G. Attorneys Fees are Not Available in this Case.	44
1. RCW 8.25.070 Does Not Apply.....	45
2. RCW 4.24.630 Does Not Apply.....	45
3. No Constitutional Taking Has Occurred.....	45
V. CONCLUSION.....	46

TABLE OF AUTHORITIES

CASES

State

<u>Babcock v. Mason County Fire Dist. No. 6</u> , 144 Wn.2d 774, 30 P.3d 1261 (2001).....	31
<u>Beal v. City of Seattle</u> , 134 Wn.2d 769, 954 P.2d 237, 244 (1998)	31
<u>Borden v. City of Olympia</u> , 113 Wn. App. 359, 53 P.3d 1020 (2002), review denied, 72 P.3d 761 (2003).....	33, 37
<u>Bradley v. American Smelting And Refining Company</u> , 104 Wn.2d 677, 709 P.2d 782 (1985)	23, 27, 42
<u>Burnett v. Tacoma City Light</u> , 124 Wn. App. 550, 104 P.3d 677 (2004).....	31
<u>City of Walla Walla v. Conkey</u> , 6 Wn. App. 6, 492 P.2d 589 (1971)	38
<u>Colella v. King County</u> , 72 Wn.2d 386, 433 P.2d 154 (1967).....	17, 19
<u>Currens v. Sleek</u> , 138 Wn.2d 858, 983 P.2d 626 (1999)	16, 18
<u>Development Corp. v. Les Rowland Construction</u> , 83 Wn.2d 871, 523 P.2d 186 (1974).	16
<u>Drinkwitz v. Alliant Techsystems, Inc.</u> , 140 Wn.2d 291, 996 P.2d 582 (2000).....	12
<u>Fitzpatrick v. Okanogan County</u> , 143 Wn. App. 288, 177 P.3d 716 (2008).....	16
<u>Gaines v. Pierce County</u> , 66 Wn. App. 715, 834 P.2d 631 (1992).....	22, 33, 34, 36, 39
<u>Georges v. Tudor</u> , 16 Wn. App. 407, 556 P.2d 564 (1976).....	28
<u>Gillam v. Centralia</u> , 14 Wn.2d 523, 128 P.2d 661 (1942).	41
<u>Grundy v. Brack Family Trust</u> , 151 Wn. App. 557, 213 P.3d 619 (2009), review denied 168 Wn.2d 1007 (2010)	22, 24, 25, 27
<u>Guimont v. Clarke</u> , 121 Wn.2d 586, 854 P.2d 1 (1993).....	37
<u>Halleran v. Nu West, Inc.</u> , 123 Wn. App. 701, 98 P.3d 52 (2004).....	31
<u>Hedlund v. White</u> , 67 Wn. App. 409, 836 P.2d 250 (1992)	19, 20
<u>Hoover v. Pierce County</u> , 79 Wn. App. 427, 903 P.2d 464 (1995)	35, 41
<u>Hughes v. King County</u> , 42 Wn. App. 776, 714 P.2d 316 (1986).....	30
<u>Island County v. Mackie</u> , 36 Wn. App. 385, 675 P.2d 607, review denied 101 Wn.2d. 1008 (1984).....	14, 15, 16, 17
<u>Jaeger v. Cleaver Const., Inc.</u> , 148 Wn. App. 698, 201 P.3d 1028 (2009)29	
<u>Kempton v. City of Soap Lake</u> , 132 Wn. App. 155, 130 P.3d 420 (2006).....	28
<u>Kesinger v. Logan</u> , 113 Wn.2d 320, 779 P.2d 263 (1989)	12

<u>King County v. Boeing Co.</u> , 62 Wn.2d 545, 384 P.2d 122 (1963).....	14, 15, 19
<u>Lambier v. City of Kennewick</u> , 56 Wn. App. 275, 783 P.2d 596 (1989).....	36
<u>Las v. Yellow Front Stores</u> , 66 Wn. App. 196, 839 P.2d 744 (1992).....	12
<u>Laurelon Terrace v. Seattle</u> , 40 Wn.2d 883, 246 P.2d 1113 (1952) ...	20, 21
<u>Margola Assoc. v. City of Seattle</u> , 121 Wn.2d 625, 854 P.2d 23 (1993) .	37
<u>Miotke v. Spokane</u> , 101 Wn.2d 307, 678 P.2d 803 (1984).....	33, 38
<u>Northern Pac. Ry. Co. v. Sunnyside Vly. Irrig. Dist.</u> , 85 Wn.2d 920, 540 P.2d 1387 (1975)	37
<u>Olson v. King County</u> , 71 Wn.2d 279, 428 P.2d 562 (1967).....	33, 39
<u>Orion Corp. v. State</u> , 109 Wn.2d 621, 747 P.2d 1062 (1987).....	34, 39
<u>Patterson v. Bellevue</u> , 37 Wn. App. 535, 681 P.2d 266 (1984).....	15
<u>Peste v. Peste</u> , 1 Wn. App. 19, 459 P.2d 70 (1969).....	29
<u>Peterson v. King County</u> , 41 Wn.2d 907, 252 P.2d 797 (1953) ...	36, 39, 40
<u>Phillips v. King County</u> , 136 Wn.2d 946, 968 P.2d 871 (1998).....	11, 26, 32, 33, 34, 35, 36, 39
<u>Pierce v. City of Seattle</u> , 106 Wn. App. 647, 24 P.3d 1098 (2001).....	36
<u>Presbytery of Seattle v. King County</u> , 114 Wn.2d 320, 787 P.2d 907 (1990).....	37
<u>Pruitt v. Douglas County</u> , 116 Wn. App. 547, 66 P.3d 1111 (2003).....	28
<u>Rainier National Bank v. Security Bank</u> , 59 Wn. App. 161, 796 P.2d 443, review denied 117 Wn.2d 1004 (1990)	13
<u>Ronkosky v. Tacoma</u> , 71 Wash. 148, 128 P. 2 (1912)	17
<u>Seal v. Naches-Selah Irrigation Dist.</u> , 51 Wn. App. 1, 751 P.2d 873 (1988).....	39
<u>Seven Gables Corp. v. MGM/UA Entertainment Co.</u> , 106 Wn.2d 1, 721 P.2d 1 (1986).....	13
<u>State v. Sherrill</u> , 13 Wn. App. 250, 534 P.2d 598, review denied, 86 Wn.2d 1002 (1975).....	41
<u>Strickland v. Seattle</u> , 62 Wn.2d 912, 385 P.2d 33 (1963).....	20
<u>Trigg v. Timmerman</u> , 90 Wash. 678, 156 P. 846 (1916).....	18, 19, 20
<u>Walla Walla v. Conkey</u> , 6 Wn. App. 6, 492 P.2d 589 (1971), review denied, 80 Wn.2d 1007 (1972)	41
<u>Wallace v. Lewis County</u> , 134 Wn. App. 1, 137 P.3d 101 (2006)	23, 27
<u>Wilber Development Corp. v. Les Rowland Construction, Inc.</u> , 83 Wn.2d 871, 523 P.2d 186 (1974)	26, 34
<u>Wilber v. Western Properties</u> , 14 Wn. App. 169, 540 P.2d 470 (1975) ...	15
<u>Wilson v. Key Tronic Corp.</u> , 40 Wn. App. 802, 701 P.2d 518 (1985).....	34, 38
<u>Young v. Key Pharms., Inc.</u> , 112 Wn.2d 216, 770 P.2d 182 (1989)	12

Federal

Chicago, B. & Q. RY. Co. v. Drainage Commissioners, 200 U.S. 561
(1906)..... 16
Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 102 S. Ct.
3164 (1982)..... 35

Other Cases

Bowling Green v. Stevens, 205 Ky. 161, 265 S. W. 495 21
Manteufel v. Wetzel, 133 Wis. 619, 114 N. W. 91, 19 L.R.A. (N.S.) 16720
Riddock v. City of Helena, 212 Mont. 390, 687 P.2d 1386 (1984)..... 41
West Coast Pizza Investors v. City of North Bend, 2007 WL 4124293
(D. Or.) (2007) 23, 24

STATUTES

RCW 4.16.080(1), (2) 42
RCW 4.24.630 43, 44
RCW 8.25.070 43

RULES

CR 56(c)..... 12

TREATISES

29A C.J.S., Eminent Domain, § 383, p. 757 (ed. 1992); 41
30 C.J.S., Eminent Domain § 390, p. 461 (ed. 1965) 41
78 Am. Jur. 2D Waters § 134 (1975)..... 16
Nichols on Eminent Domain, § 5.01[4] (ed. 1995)..... 41

I. INTRODUCTION

In 1992, developers built the Skylark subdivision and included new drainage pipes following the historic drainway, to benefit the development. The developers failed to grant a drainage easement to the County. In 1992, Haynes purchased Skylark lot 5. In December of 2007, a 100 year storm occurred and someone removed a solid catch basin lid upstream from Haynes' property, releasing a cascade of water onto Haynes' property. Haynes contends approximately \$5,000 in damages occurred. The parties agree the County has no easement over the Haynes property and that there is no legal right of access which would allow the County to enter Haynes property to inspect, maintain, or repair this pipe. The flooding on Haynes' property was not caused by County actions.

Haynes commenced this action as a complaint for damages and alleged trespass as against Snohomish County as a result of storm water runoff. The water runoff was the result of an overflowed private drainage pipeline installed by the developer of Haynes' property to "tight-line" a natural drainage channel (ravine) into which surface water runoff from the upland drainage basin, including a county road (Crawford Road), naturally flowed into. Haynes' cause of action is premised on the argument that, because his developer failed to reserve an easement for the pipeline as located upon his property, the County should be held liable for damage

caused by the overflow of such pipeline as a trespass together with payment of compensation for the acquisition of such easement.

Haynes' argument confuses the law of easements with the law of drainage applicable to surface water runoff. Haynes' property was and remains subject to the burden of a natural drainage channel regardless of the grant or reservation of any easement for the pipeline installed by Haynes' developer to replace the natural drainage channel. Accordingly, it is Mr. Haynes and his predecessor/developer who remain liable for any damages caused by the obstruction or alteration of such natural drainage channel.

II. STATEMENT OF THE ISSUES

- A. Whether the trial court erred in dismissing Haynes' complaint for damages relating to overflow of stormwater runoff from a pipeline installed by Haynes' predecessor in interest/developer when the uncontroverted evidence establishes that such pipeline is situated within a **natural drainage way** which previously served to convey the same stormwater runoff from the upland properties to a natural discharge point?
- B. Whether a **trespass** has occurred when the water flows through the natural drainway through a privately built and privately owned system?

- C. Whether **inverse condemnation or a constitutional taking** has occurred when (1) Snohomish County is not responsible for every drainage system in the County, (2) drainage pipes that are privately built are the responsibility of the landowner, and (3) and the water flows in the natural drainway?
- D. Whether Haynes has **standing** to bring a lawsuit?
- E. Whether the **statute of limitations** barred Haynes' claims for trespass when (1) developers re-routed the Skylark drainage system in 1992, (2) Haynes purchased the property in 1992 with the current drainage system, and (3) no complaints about the drainage system occurred until December 2007?
- F. Whether the trial court properly dismissed Haynes' lawsuit, despite his cause of action for **waste**?
- G. Whether **attorneys' fees** are available to Appellant should he prevail?

III. STATEMENT OF THE CASE

A. Historical Drainage Channel.

Mr. Haynes' property was originally platted in 1918 as part of the Plat of Alderwood Manor, and re-platted in 1992 into nine lots as part of the Plat of Skylark by Select Homes, Incorporated, the developer of the subject property and Haynes' predecessor in interest. CP 7-9, 47-49, 97.

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 follows the grade of a road¹ 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**.

B. Tight-Lined Drainage Channel.

At some point prior to 1992, the developer of the upland property along Crawford Road installed a catch-basin and drainage pipeline to "tight-line" the natural drainage channel. CP 108. The pipe terminated above the northeast boundary of Skylark and discharged into the ravine located on Haynes' property. CP 92. As part of the re-plat in 1992, the

¹ The storm drainage system in Snohomish County is a collection of publicly and privately maintained pipes, structures, channels and underground pipes that carry stormwater (rain water) to ponds, lakes, streams and rivers. CP 96. Many of these pipes are very old, unrecorded or privately built, and/or privately owned. It is a vast system. Id. Snohomish County does not assume responsibility for every drainage system within the County. CP 97. The County maintains storm drainage systems along and under roads in the County's public right of way. Id. The County does maintain storm drainage systems conveyed to the County by easements. Id. However, drainage pipes which are privately built and owned are the responsibility of the landowner. Id. The County does not inspect, maintain, or repair private pipes which it has no authority to access. Id. The County will only repair private systems when public safety or infrastructure is threatened and the landowner grants express permission. Id.

developer of the Plat of Skylark, Select Homes, Inc., extended this “tight-lining” of the natural drainage channel and continued the pipeline underground, following the general course of the ravine across the subject property and what would become Lots 5 and 6, Plat of Skylark. CP 92. See also CP 97-98. The extension of the drainage pipeline was designed by Select Homes, Inc.’s engineer, McCardle and Murray, Inc.² CP 97.

The lot configuration for the Plat of Skylark located the common boundary between Lots 5 and 6 along the ravine corridor and provided for a “20’ Common Reciprocal Drainage Easement” situated along the South boundary of Lot 6 roughly encompassing the Northerly ridge line of the ravine. CP 7-9, 92. See also CP 97-98. Within this easement corridor, the developer of the Plat of Skylark installed a 12 inch pipeline extension which connected to the existing terminus of the stormwater drainage pipeline, which previously discharged into the ravine, and “tight-lined” the remaining natural drainage channel in an underground pipeline which conveyed the stormwater drainage to the southwest corner of the plat where it discharges into a stormwater detention pond. CP 110, attached hereto as **Appendix B**.

² This development and drainage system was designed to the standards in place in 1992: planning for a 25 year storm event. It was not built to accommodate the 100 year storm event.

While the majority of this pipeline is located within the designated easement corridor, the pipeline turns at the west end of Lot 6 then turns south, onto Lot 5 to a point where it intercepts a private driveway easement corridor located upon Lot 5. Id. It then turns west again, following the driveway easement corridor out to a point where it joins a public right of way and connects to another drainage pipeline which discharges into the detention pond. Id. At each point where the pipeline turns, it feeds into a “closed” drainage vault which serves as the hub joining the two sections of pipe and has a lid (also known as a catch basin lid) which is bolted to the surface of the vault to allow for access but otherwise contains any stormwater flow within the pipeline. Id. See also CP 101.

The uncontroverted evidence presented by the County established the existing nature of the natural drainage way as follows:

The historical course of drainage from Crawford Road area runs naturally down towards Haynes’ property [Lot 5]. When Skylark was built, the drainage system running along Crawford Road was already in existence and traveled in a pipe, under the pre-existing Alderwood Manor development No. 5 and another short plat, to the top of 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 Haynes property and, as indicated by a squiggly line (indicating drainage path), flowed across his property.

When Skylark was built, the developer 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 drainage and historic drainage course and to accommodate the development.

CP 92. See also CP 97- 98. The pipeline located upon Haynes' property was located underneath the natural water course as follows:

...When Skylark was built, the developers moved CB [catch basin] 3 slightly at the top of Haynes' property, then built the existing drainage pipe below the natural course of water to CB 2 and CB 1. The water continues underground until it reaches a detention pond.

CP 98. Thus predating the Plat of Skylark, water flowed out over what would become Haynes' property and flowed across his property. CP 97-98, 92.

C. No Easement for Private Pipeline.

The pipeline was not dedicated to the County, nor was there any provision made for a public easement for ingress and egress to maintain the pipeline - other than what is referred to as a "common reciprocal drainage easement" relating to an easement between the owners of Lots 5 and 6.³ CP 7-9, 47 - 49. Accordingly, the County has at no time asserted

³ The reasons for this omission are unclear. Suffice it to say, both parties agree that no written easement exists which would convey this portion of the pipeline to the County.

ownership over or otherwise maintained the drainage pipeline crossing the Plat of Skylark.

Likewise, the County did not build, design, or install the pipe running under Haynes' property. CP 98. The County has never maintained or inspected the portion of the pipe that rests beneath Haynes' property. Id. The County has done nothing to increase the flow of water through the drainage system subsequent to Haynes' purchase of the property in 1992. CP 102-103. Until December 2007, the County had no complaints relating to this system. CP 98. Drainage pipes which are privately built and owned are the responsibility of the landowner. CP 92. The County does not inspect, maintain, or repair private pipes which it has no authority to access. CP 93. The County will only repair private systems when public safety or infrastructure is threatened and the landowner grants express permission. CP 97.

D. 100-Year Storm Event.

From 1992 to December 2007, the drainage system as installed by Haynes' predecessor in interest functioned without incident.⁴ On December 3 and 4, 2007, there was a 100 year storm event. CP 101. Haynes alleges during the course of that storm event, storm water was allowed to escape from one of the closed drainage vaults located adjacent

⁴ Haynes had previously hired a private contractor to perform water service or sanitary side sewer repairs on the property. CP 100.

to his property due to an improperly attached vault cover and that escaping water allegedly caused erosion and other damage to Haynes' property. CP 31.

On December 5, 2007, Chris Kirkendall, a County Engineer, was inspecting the nearby detention pond. CP 99. Haynes approached Mr. Kirkendall with questions regarding the overflow of the drainage pipe. Id. With Haynes' permission, Kirkendall inspected the pipeline. The lid of catch basin 1, located on Lot 6, had been removed by an unknown person. CP 100, pictured at CP 115. It is a solid 80 pound lid, and intended to be bolted to the catch basin.⁵ CP 97, 100, 106, 117. The removal of the lid from catch basin 1 allowed a large amount of water to escape the system through the top of the catch basin. CP 100.

In addition to the removal of the catch basin lid, the neighbor at Lot 6 had stacked plywood panels next to their house. CP 100, pictured at CP 119. The effect concentrated all of the water escaping the drainage system directly onto Haynes' property. This water caused erosion of the downstream ground along Haynes' driveway. CP 100, pictured at CP 35-37.

Mr. Kirkendall also noted a hole in the side of the pipe near the water service line for the property. CP 100. Haynes told Mr. Kirkendall

⁵ It is bolted on to keep the water "tight-lined" or under pressure, such that the water should push out obstacles downstream the pipe. CP 101.

that the hole in the side of the pipe could have been created during a repair to his water service or sanitary side sewer by a private contractor. Id.

At that time County employees advised Haynes that the overflow appeared to be due to the removal of the catchbasin lid as there was a blockage in the pipeline between catch basins 1 and 2. CP 101-102. Because the pipeline was located on private property with no dedicated public easement access, the County advised Haynes that responsibility for maintaining and repairing the pipeline and related damage was the private property owners. CP 100. Haynes contended it would cost him \$5,000 to fix the damage. CP 133.

The County offered to fix the problem if Haynes would grant the County an easement (so the County could maintain, inspect, and repair the pipe going forward). CP 93, CP 128-30. Haynes declined to grant the easement, demanding the County pay for the easement. Id., CP 67. After negotiations, the parties were unable to come to an agreement. CP 120. In doing so, Haynes adopted the irreconcilable position that, while the County was responsible for the damages on his property, the County did not have any easement, therefore could not access the pipe without permission. Thus, absent an easement for access, the County could not and did not attempt any repairs to the pipeline. CP 93, 120.

E. Procedural History.

On January 27, 2010, this case was filed with King County Superior Court and assigned to the Honorable Judge Gregory Canova. CP 1-9. Haynes filed a preliminary injunction requesting Snohomish County to cease directing water through the pipe located on Haynes' property. CP 20-29. While the Court urged the parties to settle the matter, the parties were ultimately unsuccessful. On April 30, 2010, the Honorable Gregory Canova granted Haynes' motion for a preliminary injunction. CP 146-148. Snohomish County complied with the injunction expending approximately \$5,000 in labor and costs to repair the pipe, as directed. CP 154. The repair has stopped further erosion of soil on Haynes' property. CP 177.

On September 10, 2010, the parties filed cross-motions for summary judgment. The County's motion was based upon three alternative grounds: (1) First, that Haynes lacked standing to maintain any claim for inverse condemnation or trespass where the alleged act giving rise to the claim (i.e. the installation of the pipeline over and across Haynes' property), had occurred prior to Haynes acquiring ownership of the subject property; (2) Second, that Haynes' claims for damages were based upon an allegedly deficient storm water drainage system designed and installed by Haynes' own predecessor/developer for which the County

has no liability under Phillips v. King County, 136 Wn.2d 946, 958, 968 P.2d 871 (1998); and (3) Third, that there can be no claim for inverse condemnation or damages arising out of the discharge of naturally occurring surface water runoff into a natural drainage channel. CP 149-171. On December 17, 2010, Judge Canova granted Summary Judgment in favor of Snohomish County and denied Haynes' motion for summary judgment. CP 288-289. Although the court did not state which theory it was relying upon in granting summary judgment, each theory is equally dispositive of Haynes' claims in this matter.⁶ Haynes filed for appeal on January 13, 2011. CP 290-296.

IV. ARGUMENT

Haynes asks this Court to reverse Judge Canova's decision granting summary judgment to the County and dismissing Haynes' Complaint. "When reviewing an order granting summary judgment, an appellate court reviews the matter de novo by engaging in the same inquiry as the trial court." Drinkwitz v. Alliant Techsystems, Inc., 140 Wn.2d 291, 295, 996 P.2d 582 (2000). Summary judgment is appropriate where the pleadings, depositions, and admissions on file demonstrate there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); Kesinger v. Logan, 113 Wn.2d

⁶ This Court can, of course, affirm Judge Canova's decision on any theory of law supported by the record below.

320, 325, 779 P.2d 263 (1989). A defendant may support a motion for summary judgment by “merely challenging the sufficiency of [Mr. Haynes’] evidence as to any material issue.” Las v. Yellow Front Stores, 66 Wn. App. 196, 198, 839 P.2d 744 (1992); Young v. Key Pharms., Inc., 112 Wn.2d 216, 226, 770 P.2d 182 (1989).

The non-moving party may not rely on speculation or argumentative assertions that unresolved factual issues remain, but instead “must set forth the specific facts that sufficiently rebut the moving party’s contentions.” Seven Gables Corp. v. MGM/UA Entertainment Co., 106 Wn.2d 1, 13, 721 P.2d 1 (1986). Where the parties do not contest the facts but only the legal conclusions resulting therefrom, summary judgment is appropriate. Rainier National Bank v. Security Bank, 59 Wn. App. 161, 164, 796 P.2d 443, review denied 117 Wn.2d 1004 (1990).

There are four clear causes of Haynes’ damage: the removal of the catch basin lid, the wood piled up by a neighbor, his refusal to allow the County to access Haynes’ property, and the developers’ omission of an easement allowing the County to access Haynes’ property. The County cannot be held liable under these facts.

A. The Trial Court Properly Dismissed Haynes' Claims, as the Water Flows Within the Natural Drainway.

Snohomish County is not liable for water traveling along its natural drainway through a private pipeline. Haynes asserts that the stormwater pipeline located upon his property is the responsibility of the County and therefore the County should be held liable for damages caused by the alleged overflow of that pipeline. At the same time, Haynes asserts that the County does not have the right to maintain such a pipeline across his property in the absence of an express easement (and consequently the County has no right of access to maintain or repair the pipeline). He cannot have it both ways. Haynes seeks damages for trespass and/or inverse condemnation associated with the presence of the pipeline as well as damages for the alleged overflow of such water upon his property.

Haynes' claims are predicated on the assumption that neither the County nor any other upland property owner has the right to discharge naturally occurring surface water runoff onto Haynes' property absent an express easement for the pipeline. However, Haynes' property has at all times been burdened by a natural drainage channel/ravine which has historically served as the drainage channel for the upland drainage basin.

A natural drain has been defined as "that course, formed by nature, which waters naturally and normally follow in draining from higher to

lower lands.” King County v. Boeing Co., 62 Wn.2d 545, 550, 384 P.2d 122 (1963).

Island County v. Mackie is directly on point and dispositive of Haynes’ claims. 36 Wn. App. 385, 675 P.2d 607, review denied 101 Wn.2d 1008 (1984). There, Island County brought an action against landowners for damages and injunction against their blocking a county culvert and redirecting water out of the drainway. The culvert facilitated the natural passage of water through the drainway under Humphrey Road. The County, though a system of drainage ditches upland of the Mackie property, had not redirected any additional waters into the drainway. Because the Mackies plugged the culvert under Humphrey Road, the water backed up and formed a pond on the west side of the road, leading the road to collapse. Id. at 387.

In addressing the right of the discharge water into the natural drainage channel situated upon the defendants’ property, the court specifically held that the common enemy rule did not apply to waters flowing through natural water courses. Id. at 388; see also King County v. Boeing Co., 62 Wn.2d 545, 550, 384 P.2d 122 (1963); Wilber v. Western Properties, 14 Wn. App. 169, 173-74, 540 P.2d 470 (1975); Patterson v. Bellevue, 37 Wn. App. 535, 681 P.2d 266 (1984). The court determined the Mackie property, the upland property, and the culvert were all located

within a “natural drainway” extending from the northwest across the Mackie property. The court held that the common enemy rule is inapplicable to both natural watercourses and natural drains. Thus, the Mackies were not permitted to apply the common enemy doctrine and block the flow of water on to their property. Mackie, 36 Wn. App. at 391.

The rule was adopted by the Supreme Court, and stated as follows:

[A]lthough landowners may block the flow of diffuse surface water onto their land, they may not inhibit the flow of a watercourse or natural drainway. Island County v. Mackie, 36 Wn. App. 385, 388, 675 P.2d 607 (1984). Under this exception, a landowner who dams up a stream, gully, or drainway will not be shielded from liability under the common enemy doctrine. A natural drainway must be kept open to carry water into streams and lakes, and a lower proprietor cannot obstruct surface water when it is running in a natural drainage channel or depression. 78 Am. Jur. 2D Waters § 134 (1975).

Currens v. Sleek, 138 Wn.2d 858, 861-62, 983 P.2d 626 (1999); see also Fitzpatrick v. Okanogan County, 143 Wn. App. 288, 295, 177 P.3d 716 (2008).

For over a hundred years, the vast majority of states have recognized that such natural drainage ways and watercourses impose a “natural easement” upon the lowland property owner. See Chicago, B. & Q. RY. Co. v. Drainage Commissioners, 200 U.S. 561 (1906). In quoting the law of the state of Illinois the United States Supreme Court noted the rule as follows:

The right of drainage through a natural watercourse or a natural waterway is a natural easement, appurtenant to the land of every individual through whose land such natural watercourse runs, and every owner of land along such watercourse is obliged to take notice of the natural easement possessed by other owners along the same watercourse.

Chicago B. & Q. RY. Co., 200 U.S. at 586. An upland property owner may even hasten or increase the flow of surface water into a drainway, but only so long as the water is not diverted from its natural direction such as to cause damage. Development Corp. v. Les Rowland Construction, 83 Wn.2d 871, 875, 523 P.2d 186 (1974).

Like the property at issue in Mackie, it is undisputed that the Haynes' property is located within a natural drainway, including a ravine. As with the culvert maintained by Island County in the Mackie case, the catch basin and pipeline located adjacent to Crawford Road merely facilitate the passage of the naturally occurring surface water runoff from the upland properties through the drainway and into the ravine. The only difference in the present case is that Haynes' own predecessor in interest elected to continue the system of culverts and pipelines across Haynes' property to facilitate the passage of such water into the detention tract rather than allowing it to continue to flow freely down the ravine.

It is of particular interest to note that the Court in Mackie addressed the liability of the County to maintain the culvert which the

County had installed over and across the natural drain way stating, “when a county or municipality builds a road across a natural drain, it is legally required to provide an adequate culvert and maintain it in a reasonable condition.” Mackie, 36 Wn. App. at 393 citing Colella v. King County, 72 Wn.2d 386, 390, 433 P.2d 154 (1967); Ronkosky v. Tacoma, 71 Wash. 148, 152, 128 P. 2 (1912). The same reasoning applies with equal force to a land owner who elects to install a culvert to enclose a natural drainage way.

Here, Haynes’ own predecessor in interest installed the pipeline and series of catch basins/drainage vaults to facilitate the passage of the upland surface water runoff to the detention tract. To the extent Haynes’ predecessor – the developer - failed to reserve the appropriate easements, Haynes may well be entitled to remove such structures and allow the natural flow of water over his land (barring any claim of prescriptive easement by neighboring property owners who may wish to assert the right to continue to maintain the pipeline in its present location). However, in the absence of such pipeline, Haynes cannot obstruct or otherwise seek to block what would otherwise be the natural flow of such water onto Haynes property through the natural drainage way across his property. See Currens, 138 Wn.2d at 862 (“A natural drainway must be kept open to carry water into streams and lakes, and a lower proprietor

cannot obstruct surface water when it is running in a natural drainage channel or depression.”)

The fact that a Crawford Road may direct diffuse surface water runoff into the natural drainage way does not give rise to any cause of action against the County. Currens, 138 Wn.2d at 862 (the common enemy rules prohibit a landowner from creating an unnatural conduit but allows him or her to direct diffuse surface waters into pre-existing natural waterways and drainways); Trigg v. Timmerman, 90 Wash. 678, 681-82, 156 P. 846 (1916) (“The flow of surface water along natural drains may be hastened or incidentally increased by artificial means, so long as the water is not ultimately diverted from its natural flow onto the property of another.”)

In the present case, there is no evidence or allegation that Crawford Road is collecting and diverting water from its natural course so as to discharge a greater volume of water onto Haynes’ property than naturally occurs within the drainage basin. Rather, the grade of the road merely serves as a conduit following the natural flow line to the point where the water flows into the ravine located upon Haynes’ property. Such routing of surface water in its natural direction is permitted. See Hedlund v. White, 67 Wn. App. 409, 836 P.2d 250 (1992); Trigg, 90 Wash. at 682 (a landowner may collect or channel surface water on the premises by means

of a ditch or other collection system that causes the water to flow in its natural discretion); Colella, 72 Wn.2d at 930 (The water that a landowner may discharge into a particular watercourse or drainway surface water is that which naturally would have flowed there); King County. v. Boeing Co., 62 Wn.2d at 551-52 (but not that which naturally would have flowed into a different watercourse or drainway). As stated by the court in Hedlund:

The apparent objects of these rules are to allow an uphill owner to drain and thus utilize his property, while at the same time limiting the burden of the downhill landowner to approximately that created by the forces of nature.

67 Wn. App. at 415.

In Strickland v. Seattle, 62 Wn.2d 912, 385 P.2d 33 (1963), a similar claim was made against the City of Seattle for damages allegedly caused by the city collecting water and directing it into a natural waterway. In reversing the trial court and directing judgment in favor of the city dismissing the plaintiff's claims for injunctive relief the court stated the law as follows:

... there is no evidence here that the city was negligent in accelerating drainage by the installation of street paving, culvert, and ditches.

In Trigg v. Timmerman, 90 Wash. 678, 156 Pac. 846, where damage resulting from the construction of channels by an upper riparian owner was claimed, we quoted with

approval the following language from Manteufel v. Wetzel, 133 Wis. 619, 114 N. W. 91, 19 L.R.A. (N.S.) 167:

Where the upper proprietor does no more than collect in a ditch, which ditch follows the course of the usual flow of surface water, the surface water which formerly took the same course toward the land of the lower adjacent proprietor, and causes to pass through this ditch the surface water which formerly took the same course but spread out over the surface, he has committed no actionable legal wrong of which the lower proprietor can complain, or upon which such lower proprietor can maintain an action...

Strickland, 62 Wn.2d at 916.

Strickland relied on Laurelon Terrace v. Seattle, 40 Wn.2d 883, 246 P. (2d) 1113 (1952), in which the city constructed sewers which utilized a natural stream. There was no showing that the city increased the flow beyond its natural capacity. During heavy rains, property of the plaintiff was flooded by the stream; the plaintiff brought suit against the city. The Court held the discharge of sewage into the stream was not actionable unless it increased the flow beyond its natural capacity, stating:

A city is not negligent if it increases the flow of water through a natural drainway, due to streets and catchbasins, unless the drainage is increased beyond the capacity of the watercourse in its natural condition. [emphasis added] Citing In Bowling Green v. Stevens, 205 Ky. 161, 265 S. W. 495 ("Manifestly, the rights of the lower proprietor are subject to the right of the upper proprietor to use his land in the natural and ordinary way, so long as there is no substantial change in the natural flow of the water.")

Laurelon Terrace, 40 Wn.2d 883.

Here, the County did not design, construct, or install the drainage system which Haynes claims was the cause of his damages. Rather, Haynes' own predecessor/developer designed and constructed the pipeline and drainage vaults which allegedly overflowed and caused any damages. The only action which Haynes alleges the County engaged in is the channeling of the uphill surface water runoff along the grade of Crawford Road down to the point where it fed into the catch basin and drainage pipeline constructed by Haynes' predecessor/developer within the natural drainage way which previously served to drain the uphill basin. In the absence of any evidence that such road grade diverts surface water runoff from another drainage basin over and onto Haynes' property so as to increase the volume of water which naturally would have flowed there, there can be no cause of action against the County in this matter.

Plaintiff has not provided a shred of evidence to support its contention that the water is not in the historic drainway – no expert testimony, no declarations. The County has submitted the declarations of two engineers who work in surface water who both verify this water flows in the natural drainway. Judge Canova properly dismissed this lawsuit.

B. Judge Canova Correctly Dismissed Haynes' Cause of Action for Intentional Trespass Because Snohomish County Does Not Intentionally Collect and Divert Water From Crawford Road To A Pipe Beneath The Haynes Property.

For the reasons set forth above, a lowland property owner cannot complain of “trespass” relating to surface water runoff discharged into a natural drainway. See Grundy v. Brack Family Trust, 151 Wn. App. 557, 570, 213 P.3d 619 (2009), review denied 168 Wn.2d 1007 (2010). As stated by the court therein, a trespass is an act which unlawfully interferes with the right to exclusive possession of property and can include a nuisance which intrudes on the interest in use and enjoyment of property. Grundy at 566; Gaines v. Pierce County, 66 Wn. App. 715, 719, 834 P.2d 631 (1992). The concept of trespass includes a trespass by water. Grundy at 566.

Trespass interferes with the right to exclusive possession of property; nuisance intrudes on the interest in use and enjoyment of property. Gaines, Wn. App. at 719. To show intentional trespass, Haynes must prove (1) an invasion of property affecting an interest in exclusive possession; (2) an intentional act; (3) reasonable foreseeability⁷

⁷ Snohomish County had no notice of any problems regarding this drainage system or complaints from Haynes until December 2007. Thus, at the very least, there is no trigger to any obligation to maintain this system until Haynes contacted the County. But the county must first assume control, and then *must have knowledge*, either actual or constructive of the drainage defect, inadequacy, or obstruction. Kempter v. City of Soap

that the act would disturb the Appellant's possessory interest and (4) actual and substantial damages. Wallace v. Lewis County, 134 Wn. App. 1,15, 137 P.3d 101 (2006) citing Bradley v. American Smelting And Refining Company, 104 Wn.2d 677, 692-693, 709 P.2d 782 (1985).

1. Snohomish County Did Not Invade The Haynes Property Affecting An Interest In Exclusive Possession.

Water flowing through a private pipe beneath the Haynes Property does not constitute an invasion of property that affected Haynes exclusive right of possession.

In West Coast Pizza Investors v. City of North Bend, multiple storm sewer pipes were connected to a manhole on plaintiff's property prior to West Coast's ownership. 2007 WL 4124293, *1 (D. Or., 2007) attached as **Appendix C**. The City of North Bend did not participate in the construction of the manhole or the pipes, and at no time after West Coast purchased the property did it ask the City to maintain, inspect, replace or repair the pipe.⁸ Id. However, one of the pipes collapsed causing damage to the West Coast's property. Id. West Coast alleged that the City intentionally directed water through the storm drain and directed it onto their property. Id. at *2. But, the court held that the West Coast

Lake, 132 Wn. App. 155, 158, 130 P.3d 420 (2006); Pruitt v. Douglas County, 116 Wn. App. 547, 558, 66 P.3d 1111 (2003); Georges v. Tudor, 16 Wn. App. 407, 411-12, 556 P.2d 564 (1976).

⁸ There were no complaints about these pipes for over 26 years. CP 77.

consented to the entry of storm water into the manhole and drain pipe on its property by connecting to the storm sewage system; therefore, the City of North Bend could not be liable for trespass. Id.

Similar to West Coast Pizza Investors, Haynes consented to the entry of water into the catchbasin and pipe on his property. The drainage system running along Crawford Road was in existence before the Skylark Development was built. When Skylark was built in 1992, the developers changed the drainage system by inserting new pipes, making the Skylark drainage system private.⁹ By connecting a private drainage system to a drainage system already in place on a County road, one consents to the entry of water through the private drainage system. Thus, there can be no invasion if Haynes consented to entry of water.¹⁰

2. Snohomish County Did Not Perform An Intentional Act.

Intentional trespass requires an intentional act. Grundy, 151 Wn. App. at 569. In Grundy, the plaintiff alleged trespass by water and illegal

⁹ Moreover, Haynes cannot argue that this is not a private pipe. Haynes admitted to Kirkendall that he had the pipe privately maintained and it is undisputed that there were never complaints about the pipe prior to December 2007. If Haynes thought the pipe was the County's responsibility, when there was an issue with the pipe prior to December 2007, he would have contacted the County instead of privately fixing the damage.

¹⁰ Haynes argues that "The County has a specific reason for its denial of the property right: it does not want to assume the responsibility for repair and/or maintenance..." Appellant brief at 20. First, the supporting clerk's papers (CP 66) do not support that statement. Second, the County has been firm in its' position that it will not assume the cost of repairs where (1) there is no easement and (2) there is no legal right to access the property. Of paramount concern is the County's ability to inspect and maintain pipes for which it has liability, such that the County has an opportunity prevent damage without trespassing. CP 66-67.

diversion of water resulting from sea spray that was re-directed onto plaintiff's property as a result of the defendant/neighboring property owner raising the height of its bulkhead/seawall. Id. at 561. In dismissing the claim of trespass the Court of Appeals held a "property owner is not liable for seawater entering the property of another unless he intentionally or wrongfully directs water onto his neighbor's property." Id. at 570.

Like Grundy, Snohomish County has done nothing to intentionally or wrongfully divert water onto Haynes' property. Rather, such water naturally flows onto Haynes' property because the property is located within a natural drainway. The fact the Haynes' developer/predecessor in interest elected to "tight-line" the drainage channel by installing a drainage pipeline does not divest the right of the upland property owners, including the County, to continue directing the flow of surface water runoff from the upland drainage basin into such natural drainway.

All of the evidence in the record indicates that water, coming from innumerable sources, has flowed down the natural slope towards Haynes' property for years. The County has not intentionally altered, acted, or changed its' behavior in any way since before Skylark was built. The County cannot be held liable for damages to neighboring properties due to increased surfacewater flows. Phillips, 136 Wn.2d 946, 958. As stated by the court:

Surface waters may not be artificially collected and discharged upon adjoining lands in quantities greater than or in a manner different from the natural flow thereof. At the same time, it is the rule that the flow of surface water along natural drains may be hastened or incidentally increased by artificial means, so long as the water is not ultimately diverted from its natural flow onto the property of another.

Phillips, 136 Wn.2d at 958-59, quoting Wilber Development Corp. v. Les Rowland Construction, Inc., 83 Wn.2d 871. 874-75, 523 P.2d 186 (1974).

There is no evidence in the record that Snohomish County has intentionally acted to collect and divert water into this drainage system beyond the natural and historic flow. There is no evidence this pipe was overburdened. It is undisputed that the County has done nothing to increase the flow of water through the drainage system subsequent to Mr. Haynes' purchase of the property in 1992. The road was present prior to the Skylark development. It is not the fault of Snohomish County that water falls on this road and down a pipe; it is simply the topography of the land. Further, nothing has changed since Haynes purchased his property. Therefore, the County is not liable because it has done nothing to "concentrate and gather" water into the Crawford Road drainage system.

3. Damage was Not Foreseeable.

An action is reasonably foreseeable if there is knowledge that the act would, to a substantial certainty, result in trespass. See Grundy at 569.

In Grundy, the defendants raised the bulkhead on their property to a height where water would travel across the top of the bulkhead and “find entrance” onto the neighboring property. Plaintiffs’ alleged intentional trespass by water; however, the court found that the defendants did not intentionally cause water to enter the plaintiff’s property. There was insufficient evidence to demonstrate that the defendants knew their actions would cause this result. Therefore the Court held that the mere fact water was caused “to enter [plaintiff’s] property does not, without more, create liability for trespass.” Id. at 570.

The apparent cause of the damage, here, was the removal of a catch-basin lid. Even if the pipeline had been the responsibility of the County, in this matter there is no evidence that the County knew or should have known of any imminent failure of that system for purposes of a claim of trespass. See Wallace v. Lewis County, 134 Wn. App. 1,15, 137 P.3d 101 (2006) citing Bradley v. American Smelting And Refining Company, 104 Wn.2d 677, 692-693, 709 P.2d 782 (1985) (holding that a claim of trespass requires proof of reasonable foreseeability that the act would disturb the Appellant’s possessory interest.)

In the present case the County had no notice of any problems regarding the drainage system or complaints from Plaintiff until after the storm event in December 2007. CP 77. Thus, at the very least, there is no

trigger to any obligation to maintain this system until Haynes contacted the County. But the County must first assume control, and then *must have knowledge*, either actual or constructive of the drainage defect, inadequacy, or obstruction. Kempter v. City of Soap Lake, 132 Wn. App. 155, 158, 130 P.3d 420 (2006); Pruitt v. Douglas County, 116 Wn. App. 547, 558, 66 P.3d 1111 (2003); Georges v. Tudor, 16 Wn. App. 407, 411-12, 556 P.2d 564 (1976).

Snohomish County did not intentionally direct water onto the Haynes Property. The only intentional, harmful act which would have created reasonably foreseeable harm was the third party's action of prying off the catch basin lid during a storm event and diverting water on to Haynes' property. How could the County foresee a third party removing the catch basin lid during a 100 year storm? That is the action which caused damage – not the historic flow of water downhill towards Haynes' land. Snohomish County cannot be held liable.

4. There Were No Actual And Substantial Damages Caused To Haynes By Water Running Through A Private Pipe Underneath His Property.

The water flowing under Haynes' property was not the cause of any injury or damages.¹¹ Haynes alleges that the County “continued to

¹¹ Haynes states, in his brief, that the damages occurred for the two years after the County failed to repair the pipe. Haynes waived his right to recover when he refused to grant the County an easement to enter his property. Peste v. Peste, 1 Wn. App. 19, 24, 459 P.2d 70

divert water through the pipe knowing that it was discharging onto Lee Haynes' property and eroding the property." Brief of Appellant 21. However, those damages would be after a third party intervened and tampered with the system. "To commit intentional trespass, a person must cause 'actual and substantial damage' to the property of another." Wallace v. Lewis County, 134 Wn. App. 1, 15, 137 P.3d. 101 (2006). The cause of the initial damages occurred upon the removal of a catch basin lid by a third party and water to escaping from CB 1 due to a blockage in the pipe that connected CB 1 to CB 2. The damages escalated when a third party placed lumber against the side of the residence located on lot 6, diverting the flow of excess water from CB 1 onto the Appellant's property.¹²

Further, Snohomish County did not own or control the drainage system at issue and thus, cannot be found liable for damages in a trespass action. In Hughes v. King County, plaintiffs alleged that King County was responsible for damages when a storm sewer overflowed and flooded their property. 42 Wn. App. 776, 779, 714 P.2d 316 (1986). King County

(1969). Haynes has failed to mitigate his damages. "The doctrine of avoidable consequences, or mitigation of damages, prevents an injured party from recovering damages that the party could have avoided through reasonable efforts." Jaeger v. Cleaver Const., Inc., 148 Wn. App. 698, 714, 201 P.3d 1028 (2009). When he learned his pipe had been damaged, Haynes called the County, but refused to grant the County an easement to access the pipe. Further, Haynes then did nothing to remedy the situation himself. Therefore, as a matter of law, Haynes should be prevented from recovering any damages that occurred after he denied the County an easement to access his property.

¹²CP 119. See also Section for Failure to name 3rd party defendants.

did not own or control the drainage system at issue. Although the plaintiffs in Hughes argued that the County was liable for trespass, absent any intentional acts or negligence, the court rejected that argument in part because portions of the sewer system were on private property. Id. at 782. The Court held that King County did not have “any control, much less exclusive control, over the private drainage system that was located downstream of appellants' property and that contained the bottleneck causing the flooding.” Id. at 784.

Just as in Hughes where King County was not found liable because portions of the sewer system were on private property, Snohomish County was correctly found not liable because portions of the storm drainage system were on private property. Similar to Hughes, the erosion of Haynes' property was caused by a blockage in a private drainage system. Snohomish County did not own the property at issue and did not have control over the private drainage system which had a blockage. Therefore, Snohomish County cannot be held liable for damages.

5. The Public Duty Doctrine Shields the County from Liability.

The Public Duty Doctrine limits the scope of Haynes' claims against Snohomish County for permitting the development of property neighboring Haynes' property, actions Haynes claims led to trespass and nuisance. In an action against a governmental entity, to prevail the

plaintiff must first show the governmental entity owed a special duty of care to him. Beal v. City of Seattle, 134 Wn.2d 769, 769, 954 P.2d 237, 244 (1998). So, in order to prove liability, a plaintiff must show the duty allegedly breached was owed to the plaintiff individually and not just to the public in general. Id. If the duty is a general public duty only, then no liability will be found. Id.; see also Burnett v. Tacoma City Light, 124 Wn. App. 550, 562-63, 104 P.3d 677 (2004); Halleran v. Nu West, Inc., 123 Wn. App. 701, 703, 98 P.3d 52 (2004). The Public Duty Doctrine precludes municipal liability unless the plaintiff demonstrates one of four exceptions applies: (1) legislative intent; (2) failure to enforce; (3) the rescue doctrine; and (4) a special relationship. Babcock v. Mason County Fire Dist. No. 6, 144 Wn.2d 774, 786, 30 P.3d 1261 (2001). In this case, none of the recognized exceptions to the Public Duty Doctrine applies. Defendant does not owe a legal duty to Haynes for approving Haynes' development in 1992, nor does the County owe a duty to Haynes for approving other private development neighboring Plaintiff's property. The Public Duty doctrine shields Snohomish County from liability on the trespass, nuisance, and inverse condemnation/takings and justifies the grant of summary judgment in favor of the County on those claims.

C. Judge Canova Correctly Dismissed Haynes' Cause of Action for Inverse Condemnation/Taking.

An inverse condemnation action is an action to recover the value of property allegedly taken by the government without a formal exercise of the power of eminent domain. Phillips, 136 Wn.2d at 957. A county may be liable for damages caused by the trespass of surface water across a plaintiff's land, thereby establishing a taking of that property without compensation. Id. at 957. Liability can also arise if "surface water is artificially collected and discharged on surrounding properties in a manner different from the natural flow of water onto those properties." Id. at 958.

To succeed on a theory of inverse condemnation, a claimant must establish: (1) a taking or damaging; (2) without just compensation; (3) of private property; (4) for public use; (5) by a governmental entity that has not instituted formal proceedings. Phillips, 136 Wn.2d at 957. As a matter of law, no taking has occurred.

If Haynes alleges a taking occurred when some County run-off flowed through the pipe beneath his property, he is too late to make that challenge. If Haynes alleges a taking has occurred because the pipe was blocked or the catch basin lid removed, Haynes is wrong because there was no governmental action causing that occurrence.

"A 'taking' occurs when government invades or interferes with the

use and enjoyment of property, and its market value declines as a result." Gaines, 66 Wn. App. 715, 725. The interference must be more than merely tortious; it must be permanent or recurring and destroy or derogate from one or more fundamental attributes of property ownership. Borden v. City of Olympia, 113 Wn. App. 359, 374, 53 P.3d 1020 (2002), review denied, 72 P.3d 761 (2003). To prove a taking, governmental activity must be the direct or proximate cause of the claimant's loss. Phillips, 136 Wn.2d 946, 966. A 'taking' occurs when government invades or interferes with the use and enjoyment of property, and its market value declines as a result." Gaines, 66 Wn. App. at 725. If the evidence fails to support this inference, the governmental conduct cannot be considered a taking of the type necessary for inverse condemnation. Gaines, 66 Wn. App. at 726.

While the constitution guarantees recovery for a taking, not every trespass upon or tortious damaging of real property becomes a constitutional taking or damaging simply because the trespasser or tortfeasor is the state or one of its subdivisions. Miotke v. Spokane, 101 Wn.2d 307, 334, 678 P.2d 803 (1984) (citing Olson v. King County, 71 Wn.2d 279, 284, 428 P.2d 562 (1967)).

A flood may be the basis for an inverse condemnation as an "invasion" of property only if the invasion is "permanent or recurring" or involves "a chronic and unreasonable pattern of behavior by the

government.”” Gaines, 66 Wn. App. at 725-26, 834 P.2d 631 (quoting Orion Corp. v. State, 109 Wn.2d 621, 671, 747 P.2d 1062 (1987)). Unreasonable behavior in the context of a takings claim based on flooding can be proven by (1) the “diversion of waters from the direction in which they would naturally flow and onto the land of Appellant” or (2) where “the amount of water has been increased.” Wilber Dev. Corp. v. Les Rowland Constr., Inc., 83 Wn.2d 871, 875, 523 P.2d 186 (1974), overruled on other grounds by Phillips, 136 Wn.2d 946, 968 P.2d 871. Additionally, the damage to the property must be permanent to be compensable. Wilson v. Key Tronic Corp., 40 Wn. App. 802, 816, 701 P.2d 518 (1985).

In a summary judgment proceeding, “the evidence must at least support a reasonable inference that the damage alleged to constitute inverse condemnation would not have occurred but for the governmental conduct in issue.” Gaines, 66 Wn. App. at 726. If the evidence fails to support this inference, the governmental conduct cannot be considered a taking of the type necessary for inverse condemnation. Gaines, 66 Wn. App. at 726.

In Phillips, the court found that the defendant county had not accepted a drainage system for maintenance and, thus, it was factually impossible for the county's lack of maintenance to be the cause of

damages. 136 Wn.2d at 966. Here, the same is true.¹³ The County did not act to drain Haynes' property: the developer did. The developer installed the pipe. Further, that water flowed in the natural drainway and would have crossed Haynes' property in any event.¹⁴

At most, this case is merely a routine tort and does not rise to the level of a constitutional taking. In Washington, "not every trespass upon or tortious damaging of real property becomes a constitutional taking or damaging of property simply because the trespasser or tortfeasor is the state or one of its subdivisions." See Hoover v. Pierce County, 79 Wn. App. 427, 431, 903 P.2d 464 (1995). This strategy requires a focus on the key requirements of a taking claim - permanent or recurrent damage that directly and proximately results from a governmental activity. Hoover at 432; Phillips at 946, 966, 968 P.2d 871 (1998).

¹³ Haynes cites Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 102 S. Ct. 3164 (1982); that case is distinguishable. First, the taking occurred after the buildings were standing, not to facilitate its 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.

¹⁴ Haynes' reliance on Biotano v. Snohomish County, 11 Wn.2d 664, 120 P.2d 490 (1940) is misplaced. There, the County acted to divert and channel water. That is simply not the case here.

1. Water flowing through the pipes does not constitute a taking.

Haynes' property is located on the natural and historic drainway at the base of a ravine. Haynes cannot show the County has increased the flow of water in the drainage system or diverted water from its historic and natural drainway subsequent to Haynes' purchase of the property. To have a taking, some governmental activity "must have been the direct or proximate cause of the landowner's loss." Phillips, 136 Wn.2d at 966, 968, P.2d 871 (citing Lambier v. City of Kennewick, 56 Wn. App. 275, 283 n. 4, 783 P.2d 596 (1989); Peterson v. King County, 41 Wn.2d 907, 252 P.2d 797 (1953); Gaines, at 726. The County's mere approval of an action resulting in water discharge, such as the approval of private development, does not create State liability for the unlawful discharge or its damage. Phillips, 136 Wn.2d. at 961. Claims for unconstitutional takings or inverse condemnation are inappropriate where government inactivity, rather than activity, is blamed for the loss. Pierce v. City of Seattle, 106 Wn. App. 647, 660, 24 P.3d 1098 (2001). That is the case here. This water was tight-lined along the natural drainway by a private developer to facilitate this development. No taking occurred.

2. Water escaping the pipes is not a taking.

If Haynes is alleging that the water escaping above ground onto

Haynes' property constitutes a taking, this claim must also fail. The escaping water was not caused by Snohomish County – all evidence in the record demonstrates a third party removed the lid and channeled it on to Haynes' property. It was simply not a County action.

Further, “[t]emporary interference with a private property right, which is not continuous nor likely to be reoccurring, does not constitute condemnation without compensation.” Northern Pac. Ry. Co. v. Sunnyside Vly. Irrig. Dist., 85 Wn.2d 920, 924, 540 P.2d 1387 (1975) (citations omitted). The interference must be one that destroys or derogates from “one or more fundamental attributes of property ownership. Margola Assoc. v. City of Seattle, 121 Wn.2d 625, 643-44, 854 P.2d 23 (1993); Guimont v. Clarke, 121 Wn.2d 586, 602, 854 P.2d 1 (1993); Presbytery of Seattle v. King County, 114 Wn.2d 320, 329-30, 787 P.2d 907 (1990).

In Borden v. City of Olympia, 113 Wn. App. 359, the court found that landowners failed to state a claim for inverse condemnation against the city, based upon recurrent flooding that allegedly caused water to intrude into Borden's basement and killed trees on Borden's property. The court stated that Borden failed to allege a permanent or recurring interference that derogated from the fundamental attributes of property ownership. For purposes of determining whether there exists a taking, damage is

permanent if property may not be restored to its original condition. Northern Pac. Ry. Co., at 390.

Here, Haynes' fundamental attributes of property ownership have been far less affected than the Borden's were. The damage to Haynes' property is not permanent, and could easily be repaired. Furthermore, the damage was not recurring and has ceased.

Haynes cannot show inverse condemnation. No government action caused Haynes' damage; similarly, there is no governmental use. The County never accepted ownership or maintenance responsibilities for the pipe. Importantly, the damaged alleged could be easily cured and is not permanent. This claim must be dismissed as a matter of law.

3. Nature of the Damages

An important distinction exists between a government's complete or permanent taking of property as opposed to intermittent or noncontinuous interference. Where the government's interference with private property, however, is not permanent or continuous, plaintiff may sue in tort for damages or injunctive relief. Miotke v. Spokane, 101 Wn.2d 307, 334, 678 P.2d 803 (1984); Wilson v. Key Tronic Corp., 40 Wn. App. 802 (1985) (diminution of property value damages were available under inverse condemnation with general compensatory damages also available for nuisance); City of Walla Walla v. Conkey, 6

Wn. App. 6, 492 P.2d 589 (1971) (recurring discharges of sewage into public waters entitle plaintiff to relief under inverse condemnation).

Here, the type of damage was intermittent to begin with; the Court-ordered injunction has prevented further damage to Haynes' property. Monetary damages provided under tort law is the proper remedy for Haynes' alleged damages.

4. Nature of the Invasion

Courts require an intentional invasion by the public entity. Phillips at 967-69 (inverse condemnation allowed where county knowingly permitted construction of drainage systems through its property and right-of-way); Seal v. Naches-Selah Irrigation Dist., 51 Wn. App. 1, 751 P.2d 873 (1988) (court did not find a taking of or damaging of orchard property by seepage from an irrigation district on the grounds that the damage was not contemplated by the original plan of construction for the irrigation canal); Olson v. King County, 71 Wn.2d 279, 428 P.2d 562 (1967) (debris deposits from a county culvert did not support inverse condemnation because of the temporary nature of the deposits, although the damage was actionable in tort). The court in Gaines at 715, underscored that an inverse condemnation claim against a municipality may be based on "invasion" of property if the damage is (1) "permanent or recurring" or (2) "involves a chronic and unreasonable pattern of behavior by the government." Gaines

at 725-26 (citing Orion Corp. v. State, 109 Wn.2d 621, 671, 744 P.2d 1062 (1987)). The plaintiff must, nonetheless, establish that the government's conduct was the cause of the damage. Gaines at 726.

Peterson, at 907, highlights key distinctions between takings and mere negligence. The damaging landslide in Peterson occurred as a result of negligent maintenance nine years after the construction of a county road fill and associated drainage system above the plaintiffs' property. The court held that there were not grounds for a taking claim because there was only a single episode of damage and that episode was not directly attributable to governmental action, such as the original planning and building of the road. 41 Wn.2d at 913-15.

Here, the only governmental action involved was the approval of the plat map before 1992.¹⁵ Whether County water flows through the pipe, and in what quantity, is somewhat unknown, but has not altered since 1992. Further, the injuries came from the removal of a catch basin lid by a third party, and the consequential channeling of water onto Haynes' property – damages which occurred only in this circumstance where the heavy rainflow caused erosion. Because Haynes' injuries occurred as a result of negligent actions of a third party, a taking has not occurred.

¹⁵ There is no argument an official condemnation process occurred. Therefore, the County will not address that issue.

D. Judge Canova Correctly Dismissed this Case Because Appellant Does Not Have Standing to Bring this Action.

Haynes did not have standing to bring an unconstitutional takings claim. “[A] grantee or purchaser cannot sue for a taking or injury occurring prior to his acquisition of title, but he may sue for any new taking or injury.” State v. Sherrill, 13 Wn. App. 250, 257 n. 1, 534 P.2d 598, review denied, 86 Wn.2d 1002 (1975) (quoting 30 C.J.S., Eminent Domain § 390, p. 461 (ed. 1965)). Further, where property is taken or injured under the exercise of the power of eminent domain, the owner thereof, at the time of the taking or injury, is the proper person to initiate proceeding or sue therefore. Hoover v. Pierce County, 79 Wn. App. 427, 433, 903 P.2d 464 (1995), citing 29A C.J.S., Eminent Domain, § 383, p. 757 (ed. 1992); Nichols on Eminent Domain, § 5.01[4] (ed. 1995); Riddock v. City of Helena, 212 Mont. 390, 687 P.2d 1386 (1984) (property owner could not maintain inverse condemnation action for construction that occurred on land then owned by predecessor in interest). The right to damages for an injury to property is a personal right belonging to the property owner; the right does not pass to a subsequent purchaser unless expressly conveyed. Hoover, 79 Wn. App at 434; Gillam v. Centralia, 14 Wn.2d 523, 530, 128 P.2d 661 (1942). No taking damages should be awarded to plaintiffs who acquired property for a price

commensurate with its diminished value. Hoover, 79 Wn. App. at 434; Walla Walla v. Conkey, 6 Wn. App. 6, 17, 492 P.2d 589 (1971), review denied, 80 Wn.2d 1007 (1972).

Here, Haynes did not have standing to bring an unconstitutional takings claim for a condition that pre-existed the purchase of his property. It is an undisputed fact that the Haynes was not the owner of the property when the pipeline was constructed and installed. When Haynes purchased the property in 1992, the current pipeline was under the property with water from the same sources flowing through it. Furthermore, the County has done nothing to increase the flow of water to the drainage system subsequent to Haynes' purchase of his property. Given that the condition Haynes complains of existed prior to his purchase of the property, he did not have standing to bring an unconstitutional taking claim.

E. Haynes' Claims are Limited by the Statute of Limitations.

Haynes' claims were based on an allegation that the County is improperly redirecting water under his property; if true, he was limited by the statute of limitations. The statute of limitations for bringing an action for trespass upon real property, or for nuisance, is three years. See RCW 4.16.080(1), (2); Bradley v. American Smelting and Refining Co., 104 Wn.2d 677, 709 P.2d 782 (1985). Seeing as the pipe beneath Haynes'

property had functioned identically since 1992, the action was barred by the statute of limitations.

Consequently, Haynes' claims for trespass and nuisance must be limited to three years. Haynes alleged the County directed regional stormwater onto his property and there was excess development in the area of his property. There is no evidence in the record that any such stormwater increased since 1992. The Court should limit Haynes' claims for trespass and nuisance to the three year statute of limitations.

F. Haynes' Cause of Action for Property Damage was Before the Court and therefore Properly Dsmissed at Summary Judgment.

Haynes argues that the damage issue was not before the trial court on summary judgment and therefore the case, in its entirety, should not have been dismissed. That is false. Several of the arguments made by the County, 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. Therefore, the trial court could have properly concluded the entire lawsuit should have been dismissed as a matter of law.

G. Attorneys Fees are Not Available in this Case.

Haynes claims he is entitled to his attorneys fees if he prevails in this action. His claim is based on (1) RCW 8.25.070, (2) RCW 4.24.630,

and (3) a constitutional taking. Even if some run-off from County roads flows through the pipe beneath Haynes' property, he is not entitled to attorneys' fees.

1. RCW 8.25.070 Does Not Apply.

RCW 8.25.070 provides for attorneys' fees in a condemnation action. No such action has taken place here. The County has taken no action to condemn Haynes' property.

2. RCW 4.24.630 Does Not Apply.

RCW 4.24.630 provides:

(1) Every person who goes onto the land of another and ... wrongfully causes waste or injury to the land ... is liable ... For purposes of this section, a person acts "wrongfully" if the person intentionally and unreasonably commits the act or acts while knowing, or having reason to know, that he or she lacks authorization to so act... In addition, the person is liable for reimbursing the injured party for the party's reasonable costs, including but not limited to investigative costs and reasonable attorneys' fees and other litigation-related costs.

Here, Haynes can make no argument that the County acted in an intentional or knowing way, as discussed above. Therefore, RCW 4.24.630 does not apply.

3. No Constitutional Taking Has Occurred.

Haynes cannot base his claim for attorneys' fees on a constitutional taking. While attorneys' fees are available to an appellant in a successful

inverse condemnation or taking lawsuit, that is not the case here. As is mentioned above, no constitutional taking can be proven.

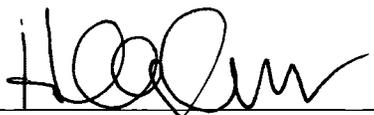
V. CONCLUSION

For the reasons stated above, the trial court's ruling should be upheld; Summary judgment in favor of Defendant was appropriate as was the dismissal of all of Haynes' allegations. Mr. Haynes' problem was caused, quite clearly by four distinct actions: (1) the removal of the catch basin lid; (2) the neighbor's funneling water towards the Haynes property (3) Haynes' refusal to grant an easement to the County and (4) the developer's failure to create an easement for this portion of pipe and dedicate the same to the County. Therefore, the County is not responsible for this damage.

Haynes' home was built *because* the developers installed this pipe, pulling the natural drainage course underground. Haynes then bought his property with a drainage system running underneath it, along the natural drainway. There was no easement to the County, nor did he grant the County an easement once damage started to occur (despite the fact that the County was willing to accept an easement.) He should not prevail in now suing the County for actions of a third party who tampered with the system causing damage. Haynes should not be permitted to seek attorneys' fees on any ground.

Respectfully submitted on August 1, 2011.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: 

Hillary J. Evans, WSBA #35784
Deputy Prosecuting Attorney
Attorney for Respondent

CERTIFICATE OF SERVICE

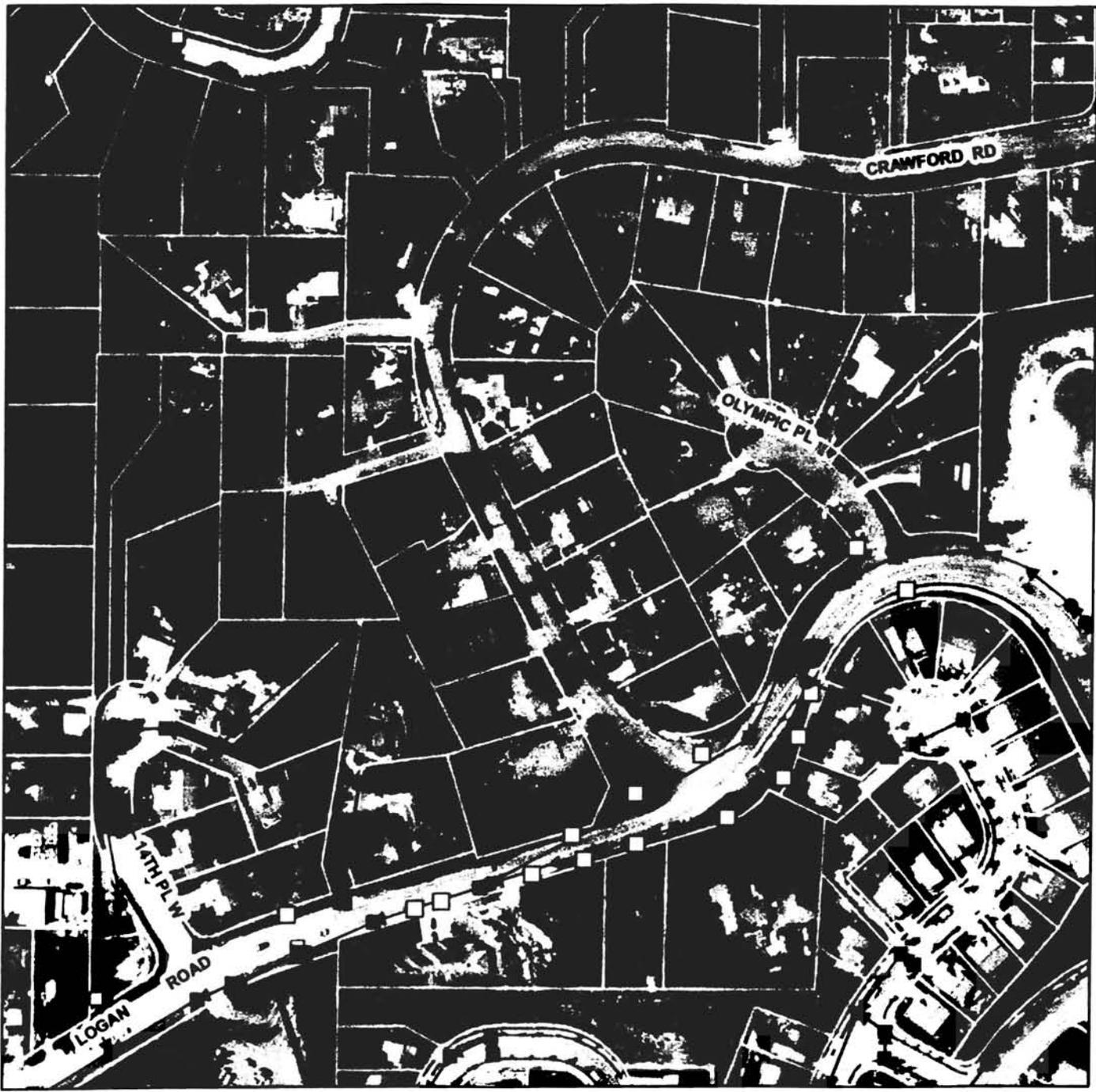
I certify that on August 1, 2011, I caused a copy of the foregoing document to be served via legal messenger to the following counsel of record for Appellant:

Mario A. Bianchi
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Legal Assistant

APPENDIX A



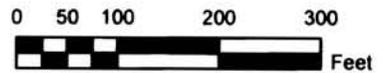
Legend

Drain Points

- TYPE**
- Pipe In
 - Pipe Out
 - Pipe Invert
 - Other Drainage Features

Catch Basins

- TYPE**
- CB Yard Drain
 - CB Type 1 Inlet
 - CB Type 1
 - CB Type 2
 - CB Type 2 Flow Restr/Pool Cntrl
 - Other CBs
 - Vault Access; CB Type 3 WQ Vault; Filters
 - Detention Pipe Access
 - network



Snohomish County

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APPENDIX B

APPENDIX C

Not Reported in F.Supp.2d, 2007 WL 4124293 (D.Or.)
(Cite as: 2007 WL 4124293 (D.Or.))

Only the Westlaw citation is currently available.

United States District Court,
D. Oregon.
WEST COAST PIZZA INVESTORS, LP, Plaintiff,
v.
CITY OF NORTH BEND, Defendant.

Civ. No. 06-6256-HO.
Nov. 15, 2007.

Michael James Lilly, Portland, OR, for Plaintiff.

Jason M. Montgomery, Robert E. Franz, Jr. Law Office of Robert E. Franz, Jr., Springfield, OR, Michael R. Stebbins, Stebbins & Coffey, North Bend, OR, for Defendant.

ORDER

MICHAEL R. HOGAN, District Judge.

*1 In this diversity case, plaintiff West Coast Pizza Investors, LP alleges that the failure of a storm water pipe under its property caused, and will continue to cause, erosion to the property. The complaint alleges claims of negligent maintenance of the pipe, negligent and intentional trespass by the direction of excess water onto plaintiff's property, and inverse condemnation. The city filed a motion for summary judgment.

Undisputed Facts

Plaintiff owns the property located at 1977 Newmark Street, North Bend, Oregon. The property is situated at the southeast corner of the intersection of Newmark Street and Broadway Street. Newmark runs east to west. Broadway runs north to south. Broadway is a State of Oregon highway from the south edge of the intersection to the north. Newmark is a State of Oregon highway from the east edge of the intersection to the west. The State of Oregon has maintained and controlled the intersection since 1971. In that year, the state performed construction on the intersection and other portions of Broadway and Newmark Streets.

At some time between 1971 and 1977, an 18" diameter storm sewer pipe and a 24" diameter storm sewer pipe were connected to a manhole on plaintiff's

property. During this same time period, a third 24" diameter storm sewer pipe was also attached to the manhole and placed in the natural drainage draw on the property. The City of North Bend did not participate in construction of the manhole or installation of the pipes. No permits were requested of or issued by the city for construction and installation of the 24" diameter pipe in the draw across plaintiff's property. In 1977, the City issued a building permit and certificate of occupancy for a savings and loan building on the property. The pipe in the natural draw was buried during construction of the parking lot for the savings and loan. During this time, plaintiff's predecessor owned the property.

City Engineering Manager Matthew Whitty found no permits, drawings or other records of the 24" diameter pipe running under the parking lot on plaintiff's property. The 18" and 24" storm sewer pipes connected to the manhole on plaintiff's property run under the intersection of Newmark and Broadway, and are controlled and maintained by the Oregon Department of Transportation (ODOT). City-maintained storm sewer pipes connect to these pipes, so that water flows through city storm sewer pipes, into ODOT's pipes, into the manhole on plaintiff's property, and into the 24" line under the parking lot on plaintiff's property.

The 24" diameter storm sewer pipe under plaintiff's property collapsed on January 15, 2006, causing damage to the property.

The configuration of storm sewer lines depicted in exhibit 108 is unchanged since at least 1980. At no time prior to the failure of the 24" pipe under plaintiff's property did plaintiff ask the city to maintain, inspect, replace or repair the pipe. Plaintiff never inspected, repaired or performed maintenance on the pipe. Prior to the pipe failure, plaintiff never objected about storm water flowing in the 24" pipe under the property.

*2 Plaintiff filed the complaint in the Circuit Court of the State of Oregon for Coos County on August 28, 2006.

Whitty testified that rerouting the drainage

Not Reported in F.Supp.2d, 2007 WL 4124293 (D.Or.)
(Cite as: 2007 WL 4124293 (D.Or.))

around plaintiff's property would involve significant taxpayer expense, and filling the manhole on plaintiff's property would cause flooding in Newmark and Broadway streets.

Discussion

Summary judgment is appropriate if there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(C).

I. First Claim-Negligent Maintenance

To prevail on its negligence claim, plaintiff must prove that the city is at fault. Oregon Uniform Civil Jury Instructions 20.01 & 20 .02. The city argues that it has no duty to maintain the pipe located on plaintiff's property because it does not own the pipe or hold an easement permitting it to go onto plaintiff's property to maintain the pipe. The city argues that Or.Rev.Stat. § 105.175 requires prescriptive easement holders to share costs and maintain an easement in good repair.

Section 105.175 imposes obligations on holders of an interest in an easement. Plaintiff produced no evidence that the city owns the drain pipe or holds an easement to maintain the pipe. There is no evidence that the city had a duty to maintain the pipe.

II. Second and Third Claims-Negligent and Intentional Trespass

For these claims, plaintiff alleges that the city negligently and intentionally directed water through its storm water collection system onto plaintiff's property in quantities greater than the "natural flow" of water that would have entered the property had the water not been collected by the storm sewer system and directed onto plaintiff's property. Complaint, ¶¶ 11, 13. The city argues that the State of Oregon, and not the city, is directing water onto plaintiff's property, plaintiff consents to the connection of the storm sewer system to the manhole on its property, and these claims are barred by Oregon's statutes of ultimate repose and limitations, and laches.

In the circumstances of this case, a reasonable juror could only conclude that plaintiff consented to the entry of storm water into the manhole and drain pipe on its property. Thus, plaintiff's trespass claims fail. Hager v. Tire Recyclers, Inc., 901 P.2d 948, 951 (Or.App.1995). Plaintiff's trespass theory is that more water flows to its property than would occur in the

absence of the storm sewer system. It is undisputed that plaintiff purchased the property after the construction of the system, including the manhole and 24" drain pipe on plaintiff's property, and that plaintiff did not previously object to the conduct it now contends is trespass.

Plaintiff argues that the city has impliedly threatened litigation should plaintiff disconnect the 24" diameter pipe on its property from the manhole, or fill the manhole with concrete. The city's alleged threat originated after the pipe collapsed-too late to constitute a justification for plaintiff's prior failure to object.

IV. Inverse Condemnation

*3 Plaintiff's final claim alleges inverse condemnation, the popular description of a cause of action for a governmental taking in the absence of a formal exercise of the power of eminent domain. City of Ashland v. Hoffarth, 753 P.2d 925, 928 (Or.App.1987). The complaint alleges that by its actions in directing flow in excess of natural flow onto plaintiff's property, the city has "taken an easement across Plaintiff's property for Defendant's use" and failed to compensate plaintiff. Complaint, ¶ 15. Notwithstanding the city's alleged recent threat to prevent plaintiff from disconnecting the 24" diameter pipe from the manhole or filling the manhole, the city has not taken an easement as a matter of law.

It is undisputed that the city has not formally exercised power of eminent domain over any portion of plaintiff's property. One claiming a prescriptive easement must prove open and notorious adverse use for a continuous and uninterrupted period of ten years by clear and convincing evidence. Winters v. Knutson, 962 P.2d 720, 722 (Or.App.1998). Permissive use defeats a claim of prescriptive easement. Martin v. G.B. Enterprises, LLC, 98 P.3d 1168, 1170 (Or.App.2004); see also 55 A.L.R.2d 1144 § 7(b). As noted above, a reasonable juror could only conclude that plaintiff permitted the use of the manhole and storm sewer pipe. Plaintiff cannot prove by clear and convincing evidence that the city acquired a prescriptive easement.

Conclusion

Based on the foregoing, the city's motion for summary judgment [# 14] is granted. This action is dismissed.

Not Reported in F.Supp.2d, 2007 WL 4124293 (D.Or.)
(Cite as: 2007 WL 4124293 (D.Or.))

IT IS SO ORDERED.

D.Or.,2007.
West Coast Pizza Investors, LP v. City of North Bend
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(D.Or.)

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