

Bill Bookout

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Sent: Friday, August 20, 2010 3:32 PM
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Subject: RE:

August 20, 2010

Dear Kronick Moskovitz Tiedemann & Girard
Mona G. Ebrahimi, Jon E. Goetz, William T. Chisum

Please be advised that your information is inaccurate and misleading and may affect my Appeal to the California Supreme Court. I request that you review this case and change the wrong information that you have posted to the internet! The following websites show what was presented to the Second Appellate Court and San Luis Superior Court Judge Martin J. Tangeman!

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Your comments are wrong and may have an impact on public safety in California and my California, Supreme Court Appeal!
“Here, Bookout claims the raised rail bed is the cause of the flooding problem. The raised rail bed has probably been in place for over 100 years. Although the flooding may come and go, the rail bed is a solid structure that remains. Because the rail bed is a solid structure the court found that the nuisance is permanent. Therefore, the limitation period does not begin to run anew every time flooding occurs, but rather it began to run when Bookout first learned of the flooding in 2002.”

The photos and videos below are talked about by the Second Appellate Court and have nothing to do with a raised Rail Road Bed! How does this government use of a storm water drainage channel benefit State highway 1? The Second Appellate Court now puts this culvert drainage liability and this OCSD pipe responsibility of downstream property owners as they stated in their July 28, 2010 published case law decision! *“The court found that the Railroad may have been negligent by failing to enlarge the culvert or requiring that its tenant do so.”*





Video –

The Second Appellate Court is mistaken on P. 8 of their July 28, 2010 published California Case Law, decision as testimony presented to the Second Appellate Court from Phil Davis of the Oceano Community Service District and exhibit 1768 are facts that have been seen and mentioned by the Appellate Court! This evidence is overwhelming as seen above and below! These drainage changes are made after the Appellate Courts P. 8 100% Blame of the Pismo Oceano Vegetable Exchange! OCSD stated to Judge Tangeman P. 383 Answer: *“We run the well— Right now, we’re running about five or six day a week. And we just start it in the morning, so it goes through a cycle”* – Question. *How much water is discharged out of the pipe each time that you do the procedure that you described?*

Answer. *“Approximately 2,500 Gallons per minute?”* Question. *And the rate at which this water is discharged is somewhere around 1,300 gallons per minute?*

Answer. *“Well, it starts out fast and gradually slow down until it stops. And when it stops, all the water is going into the system.”* P. 385 Question: Are you aware of any permission sought by the district, itself for operating this pipe?

Answer: *“Other than the Health Department, I don't know of any.”*

P.386 by Mr. Belsher: Thirteen thirty-six and 1337, is this the same discharge pipe we discussed or saw in the previous photograph, only a different configuration?

Answer. Yes.

Question: And did you oversee an extension of the pipe into the culvert that’s depicted there?

Answer. Yes.

Question. And this picture dated 2002, so does that seem as if that was the state of the – to your recollection, That the pipe was projecting into the culvert as of 2002?

Answer. Yes.

Question. And 1338 is another example of the pipe extended into the culvert. Thirteen thirty nine, is this an OCSD employee? Answer. *“I believe it is.”*

Question: *And I note that the pipe now is cut back from the entrance to culvert?*

Answer: *“That’s correct.”*

Question: *And is that an action which you and your staff took in 2002?*

Answer. *“YES”*

In the published California Case Law Decision July 28, 2010 the Second Appellate Court acknowledges *“The Oceano Community Services District (District) owns a water well. From time to time, the well discharges water into the drainage channel that leads to the culvert under the rail bed.”* This is not the Rail Road or POVE's use of this storm water drainage system other then their allowing government to use this drainage system for other uses then storm water drainage and retention!

This new California Case law decision puts responsibility on downstream property owners for property that they do not own upstream and requires downstream property owner to maintain uphill drainage! **“The court found that the Railroad may have been negligent by failing to enlarge the culvert or requiring that its tenant do so.”**

The Second Appellate Court ignores the fact that this water comes from two County Streets uphill and our State Highway up hill as presented to the Second Appellate court in testimony! How is this that government has no liability for their water going uphill!

“Here, unlike cases applying the five-year statute, no public entity physically entered Bookout's land or maintained possession and control over any portion of it. The trial court correctly concluded the three-year statute applies”

How is it with drainage changes by the Oceano Community Service District in a storm water drainage system does the Second Appellate Court find this flooding relatively consistent and static for several years prior to the time Bookout purchased his property in 2000! *“Here the trial court determined that the date of stabilization theory does not apply. The court found that the last improvements to the drainage system were constructed by the Exchange in the late 1970's, and that the flooding problem was relatively consistent and static for several years prior to the time Bookout purchased his property in 2000.”*

How is it that Government can now withhold evidence from discovery and trial? The Retaining Wall Mentioned is owned by Caltrans! The Modifications to Well # 8 are owned by the Oceano Community Service District and where installed after the POVE Junction Box! *“Bookout challenges the trial court's findings by listing what it characterizes as changed conditions since the Exchange constructed the junction box in the 1970's. The alleged changed conditions include: maintenance activities, modifications to Well No. 8, weed abatement, removal of a retaining wall, alteration of Highway 1, shoveling and grading of debris, accumulation of debris, and an increase in impervious surfaces. But none of these alleged change of conditions compelled the trial court to conclude that the flowing was not relatively consistent and static for several years prior to Bookout's purchase of his property.*

Bookout argues the trial court erred in receiving documentary evidence that was not produced during



discovery. The document is a county 7



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drainage study questionnaire returned by Bookout in July 2002. Bookout stated on the questionnaire that the area floods one foot or more once a year and that the flooding has damaged his inventory.

The County explained that it was unaware of the document at the time of discovery. It said that the questionnaire responses were summarized for inclusion in a drainage study, but they were not filed by name, address or location. The Railroad's counsel happened to find Bookout's response during Crowe's testimony. The County pointed out that Bookout must have been aware of the document because he submitted it to the County. The trial court found the failure to produce the document was not in bad faith, and refused to impose discovery sanctions.” The Second Appellate Court is fully aware of the governments changes in this drainage system and allow a Superior Court Judge to ignore the fact that these change's; change the Statute Of Limitations! Caltrans does not have a right to Grade and shovel debris into our storm water drainage systems as seen in three of these photos above presented to San Luis Obispo Superior Court Judge Martin J. Tangeman!

I ask that each of you correct your online accounting of this case! This case affects all of our prior inverse condemnation laws! The permanent flooding of a State Highway has never been herd of before! I will fight this case to the United States Supreme Court if that is what it now takes to stand up for California residents health and public safety!

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Sincerely

Bill Bookout

Three-Year Statute Of Limitations Applies To Inverse Condemnation Action When Property is Damaged Due To Periodic Flooding

August 13, 2010 | Bulletin No. 947463.1

In *Bookout v. State of California ex rel. Department of Transportation*, (--- Cal.Rptr.3d ----, Cal. App. 2 Dist., June 28, 2010), a court of appeal considered whether a landowner's claim for inverse condemnation was barred by the statute of limitations. The court found that the claim arising from periodic flooding of the landowner's property was barred when he failed to bring his lawsuit within three years from the time he discovered the flooding.

Facts

William Bookout acquired a parcel of property in Oceano, California, in 2000. Bookout opened a nursery on the property shortly after he acquired the property. Bookout's property lies at the intersection of Paso Robles Street and 13th Street. Highway 1, which is owned by the California Department of Transportation ("Caltrans"), cuts through the southwest tip of the property. The Union Pacific Railroad ("Railroad") owns land that is situated across from Highway 1, which its predecessor in interest acquired in 1894 and constructed a railroad line on a raised bed on the property. When it rains, surface water from the surrounding area drains away from Bookout's parcel into a drainage channel on the Railroad's property. A pipe extends under the raised rail bed to carry the water onto land owned by the Pismo Oceano Vegetable Exchange ("Exchange"). Around 1977, the Exchange installed a subsurface junction box at the pipe's outfall from which water is diverted into a pond. However, the junction box is not adequate and water backs up and floods Bookout's property. The Oceano Community Services District ("District") owns a well and sometimes that well discharges water into a drainage channel that leads to a culvert located under the rail bed.

Dan Sutton, who is an employee of the Exchange, stated that Bookout discussed the flooding with him shortly after Bookout opened the nursery. Phillip Davis stated he received a complaint from Bookout about the flooding in December 2002. A Caltrans employee claimed he met with Bookout about the flooding before the employee retired in 2002. In June 2002, Bookout filled out a questionnaire that stated foot-deep flooding occurred on his property once a year.

Bookout filed a lawsuit on May 2, 2006, against Caltrans, District, Railroad, County, and Exchange for inverse condemnation, nuisance, trespass, and negligence. The Exchange entered into a settlement with Bookout. At trial, Bookout claimed he first discovered the flooding in February 2004. The court found that Bookout's action accrued sometime before the middle of 2002 and that the three-year statute of limitations barred the inverse condemnation action.

Decision

The trial court applied Code of Civil Procedure 338, subdivision (j), which provides that a three-year limitations period applies for "[a]n action to recover for physical damage to private property under Section 19 of Article I of the California Constitution." Section 19 of Article I of the California Constitution "requires just compensation where private property is 'taken or damaged' by a public entity." Bookout asserted the five-year statute of limitations that applies for adverse possession should apply here. The court of appeal rejected Bookout's argument.

"If the property is damaged, the three-year statute of limitation applies; if the property is taken the five-year limitation on actions to recover property applies." The three-year statute of limitation has been applied where there is damage to a property caused by flood. The five-year statute of limitation has been applied "where a public entity has physically entered and exercised dominion and control over some portion of plaintiff's property." Here, no public entity has exercised dominion or control over Bookout's property and therefore, the three-year statute of limitation applies.

The next issue was when the statute of limitations started to run. The evidence revealed that Bookout knew about the flooding in 2002. Bookout admitted he took a picture of the drainage pipe after the flooding occurred in 2002. Therefore, Bookout knew about the flooding more than three years prior to filing this lawsuit.

The obvious cause of the flooding was the Exchange's modification of the drainage when it built a junction box and a pipeline that redirected the flow of the water. The Exchange settled Bookout's claim against it. The court of appeal found Bookout failed to show that the District, the County, or Caltrans caused the flooding. Therefore, the trial court did not err in granting judgment on the pleadings in favor of these three entities.

The trial court did not grant Railroad judgment on the pleadings because it found that "[a]t most, the Railroad negligently acted by omission by failing to enlarge a culvert or by failing to require (if that was possible) that its tenant do so." However, the trial court did find that the three-year statute of limitation applied to Bookout's cause of action against the Railroad.

Bookout argued that the flooding of his property "constitutes a continuous trespass or nuisance and a new cause of actions arises each time it floods." If a nuisance "will presumably continue indefinitely, it is considered permanent and the limitations period runs from the time the nuisance is created." A nuisance is considered continuing in character if it may be discontinued at any time. An example of a continuous nuisance is a locked gate because the lock can be removed at any time.

Here, Bookout claims the raised rail bed is the cause of the flooding problem. The raised rail bed has probably been in place for over 100 years. Although the flooding may come and go, the rail bed is a solid structure that remains. Because the rail bed is a solid structure the court found that the nuisance is permanent. Therefore, the limitation period does not begin to run anew every time flooding occurs, but rather it began to run when Bookout first learned of the flooding in 2002.

Questions

If you have any questions concerning the content of this Legal Alert, please contact the following from our office, or the attorney with whom you normally consult.

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[Jon E. Goetz](#) | 805.786.4302

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Subject:

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Sincerely

Bill Bookout

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[Home](#) > [Inverse Condemnation](#) > [Three-Year Statute Of Limitations Applies To Inverse Condemnation Action](#) > August 10, 2010 | Posted By [Sheppard Mullin](#)

THREE-YEAR STATUTE OF LIMITATIONS APPLIES TO INVERSE CONDEMNATION ACTION

[William Bookout v. State of California ex rel. Department of Transportation](#), 2d Civil No. B214906 (2nd Dist., June 28, 2010).

By [Michael Wilmar](#) and Alex Merritt

In *William Bookout v. State of California ex rel. Department of Transportation*, the Second District Court of Appeal provided important guidance on whether an inverse condemnation action is subject to a three-year or five-year statute of limitations, and whether annual flooding constitutes a continuous or permanent nuisance.

In 2000, William Bookout purchased land in San Luis Obispo County and opened a nursery. The nursery flooded annually due to problems with a drainage system that carried rainwater from Bookout's parcel under a railroad track and then to a retaining pond on a neighboring parcel. In 2006, Bookout filed a complaint against five defendants who he alleged had contributed to the flooding: San Luis Obispo County, Caltrans, the Oceano Community Services District, the Pismo Oceano Vegetable Exchange, and the Union Pacific Railroad. His complaint stated claims of inverse condemnation, nuisance, trespass, and negligence. Bookout's theory of how the five defendants had caused the flooding was complex and not of central importance on appeal. But in short, he alleged that the Railroad and the Exchange had failed to properly maintain the parts of the drainage system that lay on their property, and that the government entities had worsened the flooding in various ways.

The Exchange settled, but the other four defendants proceeded to trial. The trial was bifurcated, so that one court heard the inverse condemnation claims and a second heard the tort claims. The first trial court granted a nonsuit on the inverse condemnation claims. It determined that Bookout's cause of action had accrued sometime prior to the middle of 2002, and therefore his 2006 complaint was barred by a three-year statute of limitations. Furthermore, the court found that Bookout had failed to carry his burden of proof on causation as to all the defendants except the Railroad. However, the court also found that the Railroad was not properly subject to an action for inverse condemnation because it was not a public entity.

The second court heard the tort claims and granted the defendants' motion for judgment on the pleadings. The court took judicial notice of the first court's ruling, and under the doctrine of collateral estoppel, found that Bookout had failed to prove causation as to all the defendants except the Railroad. The court then granted judgment on the pleadings in favor of the Railroad on the basis that all the remaining causes of action against it were barred by a three-year statute of limitations.

On appeal to the Second District, Bookout argued that both trial courts had erred. He raised a number of legal arguments, but his key contention was that both courts had applied the wrong statute of limitations.

Inverse Condemnation Claims

As to the inverse condemnation claims, Bookout argued that the trial court had improperly applied a three-year statute of limitations when it should have applied a five-year statute of limitations. The trial court had applied Code of Civil Procedure section 338(j), which sets a three-year limitations period for an "action to recover for physical damage to private property" under the takings clause of the California Constitution. Bookout argued that the court should have applied Code of Civil Procedure sections 318 and 319, which set a five-year limitations period for an action for adverse possession.

In evaluating Bookout's argument, the Second District noted that "courts have applied the five-year statute where a public entity has physically entered and exercised dominion and control over some portion of the plaintiff's property." In contrast, courts have applied the three-year statute of limitations where the plaintiff's property was merely damaged. The court reasoned that the flooding did not trigger the five-year statute because "no public entity physically entered Bookout's land or maintained possession and control over any portion of it." Assuming the defendants were responsible for the flooding, they were merely damaging Bookout's nursery. Therefore, the Second District held that the trial court had properly applied the three-year statute of limitations.

Bookout argued that even if three years was the correct limitations period, his claim was not barred. To make this argument, Bookout advanced a "date of stabilization" theory. Under this theory, which finds support in *Pierpont Inn v. State of California*, 70 Cal.2d 282 (1969), where damages incident to a public improvement are continuous and repeated, the limitations period does not run until conditions have stabilized. Bookout argued that the flooding conditions were changing and unstable, and therefore that the

limitations period had not yet started. The Second District rejected Bookout's argument, deferring to the trial court's finding that the flooding had been "relatively consistent and static" for several years before he bought the property.

In determining when the limitations period began to run, the trial court had relied in part on a questionnaire that Bookout submitted to the County in 2002 describing the flooding at his nursery. Bookout objected to the admission of the questionnaire because the County had not provided a copy to Booker at the time of discovery. The trial court admitted the questionnaire after finding that the County had not acted in bad faith and that Booker should have been aware of the questionnaire because he himself prepared it. The Second District found that the trial court's decision to admit the questionnaire was not an abuse of discretion. Moreover, the court found that even if the questionnaire had been excluded, Bookout was unlikely to have obtained a more favorable result because there was other evidence that documented Bookout's knowledge of the flooding as of 2002.

Tort Claims

As to the tort actions, Bookout contended on appeal that the flooding was a continuous nuisance and trespass, and therefore that the limitations period should restart every time flooding occurred. The trial court had found that the three-year limitations period ran only once beginning in 2002 and had expired by the time Bookout filed his complaint in 2006.

Under California law, a party harmed by a *continuous* nuisance or trespass can bring successive actions, even if an action based on the first instance of the harm would be time-barred. In contrast, when a party is harmed by a *permanent* nuisance or trespass, the limitations period runs only once from the time when the nuisance or trespass began. The distinction between continuous and permanent is that a *continuous* nuisance may be discontinued at any time, while a *permanent* nuisance persists indefinitely.

The Second District disagreed with Bookout that the flooding was a continuous nuisance. The court noted that there was "nothing to suggest the pipe [responsible for the flooding] is temporary or might be modified at any time." Because the flooding could not be freely discontinued or abated, the court found that that it did not qualify as a continuous nuisance. Instead, the court decided that the flooding was a permanent nuisance. It noted that previous cases had found permanent nuisances where "solid structures" were causing the harm. The court noted that the pipe and associated drainage system were solid structures, and that further supported its conclusion that the flooding was a permanent nuisance. Because the nuisance was permanent, the Second District held that the trial court had properly analyzed the limitations period and barred Bookout's tort claims.

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