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## Tollefson v. State, No. 27768-9-11, 2003 Wash. App. LEXIS 2075 (Wash. Ct. App. Sept. 16, 2003)

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**Tollefson v. State, No. 27768-9-II, 2003 Wash. App. LEXIS 2075 (Wash. Ct. App. Sept. 16, 2003)** (holding that evidence of flooding on private land without proof of causation or legal duty is insufficient to withstand a municipality's motion for summary judgment).

Herbert and Eve Tollefson ("Tollefsons") brought suit against multiple defendants including the State of Washington and Pierce County, Washington ("County") for trespass, nuisance, inverse condemnation, regulatory taking, and entitlement to damages for violation of constitutionally protected rights by one acting under color of state law. The Tollefsons argued the County was negligent in designing and installing a drainage system and sewage lines, and in maintaining neighboring waterways. They further claimed the County's negligence caused water to flood their property. The County moved for summary judgment, which the Superior Court of Pierce County granted. After the trial court denied the Tollefsons' motion for reconsideration, they appealed to the Washington Court of Appeals. The court held the Tollefsons did not provide evidence of a duty for the County to prevent such flooding, nor did they offer any evidence to show that the County caused the flooding.

On appeal, the Tollefsons relied on a report produced by a wetlands expert who attributed the flooding to a neighboring drainage ditch that frequently backed-up because of the small size of its culverts. The Tollefsons claimed the expert's report was evidence that the County caused the water to trespass on their land, raising a triable issue of fact. Additionally, the Tollefsons asserted the County's failure to act on the report and poor maintenance of the ditch was evidence of nuisance. The County responded that no evidence suggested that it installed the culverts or had any duty to update the drainage system. To succeed on trespass and nuisance theories, the Tollefsons needed to show the County had a duty to prevent such flooding and that the County's breach of the duty caused damages to the Tollefsons' property. The court held the Tollefsons failed to prove legal causation because there was no evidence the County built, owned, or had a duty to maintain the ditch.

Next, the court considered the trial court's disposition of the Tollefsons' inverse condemnation claim. The elements of inverse condemnation include "(1) a taking or damaging; (2) without just compensation; (3) of private property; (4) for public use; (5) by governmental entity that has not instituted formal proceedings." As evidence of their inverse condemnation claim, the Tollefsons produced photos that showed flooding. The County argued that no evidence proved it owned the ditch, caused the water to flood the Tollefsons' property, or anticipated the flooding. The appellate court held that the trial court properly granted summary judgment because Tollefsons failed to identify County conduct that interfered with their use and enjoyment of property.

Finally, the Tollefsons maintained that they met the requirements

of their violation of constitutional rights claim because the County acted under color of state law when it used its power to divert water onto the Tollefsons' property in an unduly oppressive manner. The County replied that the Tollefsons failed to show a policy or custom, causation or deprivation as required for a constitutional claim. However, the Tollefsons countered that by ignoring the expert recommendations, the County followed a policy of deliberate indifference. The court concluded that the County had no clear duty to the Tollefsons, who failed to provide evidence that an official sanctioned the decision not to follow the recommendations. Additionally, the court found "no evidence showing a causal connection between the alleged policy and a deprivation of the Tollefsons' constitutional rights." Accordingly, the court of appeals affirmed the summary judgment decision of the trial court.

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**Upton v. Goff, No. 27948-7-II, 2003 Wash. App. LEXIS 1744 (Wash. Ct. App. Aug. 5, 2003)** (holding that: (1) neither water certificates nor other real estate transaction documents conveyed ownership interests of subdivision's water system to the lot owners; (2) water system did not transfer with the land, but was personal property; and (3) intent of the developer could determine if the water system qualified as a real property fixture).

The Uptons commenced a lawsuit against Goff and five other lot owners in the Superior Court of Clallam County, Washington. The Uptons sued to quiet title to the subdivision's water system, enjoin the lot owners from interfering with the water system, and for trespass and conversion damages. The superior court concluded no issue of material fact existed, the Uptons owned the water system, and the lot owners could not interfere with the Uptons' ownership of the water system. Thus, the superior court granted summary judgment in favor of the Uptons. The lot owners appealed the superior court's grant of summary judgment to the Uptons and the denial of their cross-motions for summary judgment. The Washington Court of Appeals affirmed the superior court's decisions.

In 1994, Cascade Investment Properties ("Cascade") recorded an eight-lot subdivision plat, which included six residential lots. Additionally, Cascade created a lot owners' association and granted the lot owners an easement. Cascade developed and owned the water system along the easement. When Cascade sold the six residential lots, water certificates issued to the buyers. In December 2000, Cascade sold the subdivision's water system to the Uptons for \$2000. The Uptons then sued the lot owners after the lot owners denied the Uptons access to the water system.

On appeal, the lot owners first relied on the word "share" in the