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[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 Bookout 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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