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No. 70220-3-I

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

KEBEDE ADMASU, et al.,

Appellants,

vs.

THE PORT OF SEATTLE,
a Washington municipal corporation,

Respondent.

APPELLANTS' OPENING BRIEF

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I. INTRODUCTION

This case is emblematic of the consequences of disregarding time-honored judicial mechanisms put into place to balance the scales between the interests of private, individual citizens and powerful, well-funded governmental monoliths. The Port of Seattle ("Port") began operations on its newest, westernmost runway (the "Third Runway") in 2008. Almost immediately, the Port suffered a public backlash as a result of the Third Runway's operations. And rightfully so: changed flight patterns; increased overhead flights at all hours of the day and night; and the resulting deafening noise, bone-rattling vibrations, soot, and fumes generated by airplanes using the Third Runway combined to rob homeowners in the area of any peace or enjoyment they had in their homes and neighborhoods.

As a result, Appellants sought to marshal their resources and avoid hundreds of individual lawsuits both they and the trial courts could ill afford by seeking collective adjudication of their common issues—seeking just compensation for what the Third Runway's operations had taken from them—through a class action lawsuit. Despite presenting ample evidence to the trial court of the overwhelmingly common issues of law and material fact in the case, the trial court denied class certification.

Having already sunk enormous costs into discovery necessary to seek class certification, the parties agreed to manage the sudden morass of hundreds of individual plaintiffs through selecting and subjecting to discovery a small handful of plaintiffs as "test cases." However, the Port

then embarked on a war of attrition, seeking extremely costly, time-consuming, and unnecessary individualized discovery directed at each and every one of them—the very sort of scenario that Washington law favoring class actions aims to prevent.

Moreover, despite refusing to collectively adjudicate the common issues brought by the Appellants, the trial court proceeded to summarily dismiss ***all*** non-noise related claims of huge swaths of Appellants, despite the Port ***never*** moving for or supporting dismissal of such claims. Finally, and in the same vein, the trial court dismissed ***all*** the claims of Appellants who had granted avigation easements to the Port, despite those Appellants never receiving any warning that the Port would use the easements as an unlimited license to ruin their quality of life and muzzle their constitutional rights.

In short, Appellants have had to suffer as their individual lives were drowned out by the din of civilization's expansion. All they ask for now is a level playing field and equal treatment in addressing their claims for what they have lost. Accordingly, Appellants respectfully ask this court to reverse the trial court's order denying class certification and its orders summarily dismissing many Appellants' claims and to remand for further proceedings.

II. ASSIGNMENTS OF ERROR

Assignments of Error

No. 1: The trial court erred in denying Appellants' Second Amended Motion for Class Certification.

No. 2: The trial court erred in granting the Port's Motion for Summary Judgment for Dismissal of Claims Barred by Federal Law Regarding Noise Exposure Maps.

No. 3: The trial court erred in granting the Port's Motion for Summary Judgment Based on Express Avigation Easements.

Issues Pertaining to Assignments of Error

No. 1: Could the proposed class representatives have adequately represented and protected the interests of other class members pursuant to CR 23(a)(4)? (*Assignment of Error No. 1*).

No. 2: Could the proposed class representatives have adequately represented the interests of unnamed class members by pursuing only damages for permanent damage to the value of real property? (*Assignment of Error No. 1*).

No. 3: Did questions of law and fact common to the members of the proposed classes predominate over individual questions? (*Assignment of Error No. 1*).

No. 4: Did Appellants present sufficient evidence of a methodology for proving a class-wide diminution of property values attributable to the Port's Third Runway operations? (*Assignment of Error No. 1*).

No. 5: Is a class action suit a superior method of resolving potentially thousands of inverse condemnation claims with predominantly common issues of law and fact and scant individual value? (*Assignment of Error No. 1*).

No. 6: Did the trial court err in dismissing Appellants' claims based on vibrations, fumes, dust, and other non-noise sources because the Port was not entitled to dismissal of those claims under federal law? (*Assignment of Error No. 2*).

No. 7: Did the trial court impermissibly shift the burden to Appellants on summary judgment to produce evidence rebutting the proposition that "vibrations" are not equivalent to "noise" when the Port did not move for summary judgment on claims of damages based on "vibrations"? (*Assignment of Error No. 2*).

No. 8: Did the trial court impermissibly shift the burden to Appellants on summary judgment to produce evidence rebutting the proposition that "vibrations" are not equivalent to "noise" when the Port failed to meet its initial burden of establishing through evidence that "noise" and "vibrations" are one and the same? (*Assignment of Error No. 2*).

No. 9: Did the trial court impermissibly shift the burden to Appellants on summary judgment to produce evidence of damages attributable to fumes, dust, fear, and other non-noise damages when the Port did not expressly move for summary judgment on such claims? (*Assignment of Error No. 2*).

No. 10: Did the trial court improperly dismiss the claims of Appellants whose properties were affected by avigation easements when, viewing the evidence in the light most favorable to Appellants, they did not ***knowingly*** waive their constitutional right to seek compensation for takings when granting the easements? (*Assignment of Error No. 3*).

No. 11: Did the trial court improperly dismiss the claims of Appellants whose properties were affected by avigation easements when, viewing the evidence in the light most favorable to Appellants, they did not ***voluntarily*** waive their constitutional right to seek compensation for takings when granting the easements? (*Assignment of Error No. 3*).

III. STATEMENT OF CASE

A. The Third Runway's Impact On Nearby Communities

In November 2008, the Port began operations on the Third Runway.[1] The Port built the Third Runway 1,750 feet west of the existing runways (e.g., 1/3 of a mile),[2] and the Third Runway is responsible for 33% of arriving air traffic (e.g., approximately 52,320 arrivals in 2010, or 143 planes per day).[3] The Third Runway changed flight patterns, including overflights from "propeller-driven aircraft that are required to turn on takeoff to avoid being overtaken by faster jet aircraft that are

[1] Clerks Papers (CP) at 3937.
[2] CP at 1502.
[3] CP at 1295; *see also* CP at 1523 (reflecting a total of 313,954 flights in 2010).

taking off behind them."[4]

Unsurprisingly, the Third Runway's operations immediately began impacting the surrounding neighborhoods to their detriment. The Port received hundreds of complaints (a 350% increase) immediately after the Third Runway opened.[5] And the complaints of property owners described the Third Runway's negative impacts in no uncertain terms. As stated by one property owner, "Before, when the planes were in a landing pattern a half-mile away, there was little noise."[6] Property owners were able to enjoy their backyards, carry on conversations without difficulty, watch television without issue, and use electronic devices without any signal interference.[7] After the Port began operations on the Third Runway, however, property owners in the vicinity became prisoners in their own homes, unable to enjoy their outside property. Children no longer played outside, homeowners no longer went for walks or bike rides, and neighbors no longer held conversations outside.[8] As another property owner aptly summarized, "You never see anyone out and about."[9]

For some owners, not even remaining locked inside with all the windows and doors shut was able to bring relief.[10] The Third Runway has brought aircraft directly overhead at low altitudes, and consequently,

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[4] CP at 1503.

[5] CP at 1051-1054, 1103 (noting an increase in complaints per month by a factor of 3.5)

[6] CP at 3588-3589.

[7] CP at 3445-3446; 3452-3453; 3470-3472; 3542; 3548; 3580-3581.

[8] CP at 3470-3472; 3518-3519; 3542; 3573-3574; 3580-3581.

[9] CP at 3573-3574.

[10] CP at 3525; 3573-3574.

the noise was not only louder but significantly more intense.[11] The thrust of jet engines now shook houses, causing so much vibration that glassware rattles, light bulbs unscrewed, and nails backed out of sidewall.[12] The aircraft also disrupted electronic signals, interfered with cellular phone conversations, and disrupted satellite television transmissions.[13] Along with these issues, the aircraft using the Third Runway substantially increased the amount of dust and soot falling on homes and caused jet fuel odor.[14] Furthermore, imprisoning those affected by the Third Runway drastically changed the character of the neighborhoods, essentially causing blight.[15] With reduced property values, some property owners stopped maintaining their homes and tending to their yards.[16]

B. Procedural History[17]

Seeking relief from the detrimental impacts of Third Runway operations on property owners within its vicinity, Appellants filed a class action complaint.[18] Appellants then moved for class certification.[19] The trial court entered an order denying class certification, but permitting Appellants to file another class certification motion.[20] Appellants filed a

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[11] CP at 3542; 3518-3519; 3548; 3588-3589.

[12] CP at 3580-3581; 3489-3490; 3593-3594.

[13] CP at 3445-3446; 3452-3453; 3470-3471; 3542; 3548; 3566; 3580-3581.

[14] CP at 3445-3446; 3452-3453; 3470-3471; 3548; 3580-3581; 3588-3589; 3593-3594.

[15] CP at 3489-3490; 3566-3567.

[16] CP at 3566-3567.

[17] For ease of reference, Appellants discuss additional facts specifically relevant to each challenged trial court order in Section II, Analysis.

[18] CP at 165.

[19] CP at 37, 219.

[20] CP at 897-898

Second Amended Motion for Class Certification, which the trial court again denied.[21]

After the trial court denied class certification, Appellants filed a Third Amended Complaint on behalf of hundreds of individual plaintiffs.[22] The Port then moved for summary judgment on the claims of a number of plaintiffs whose properties were subject to "avigation easements" granted to the Port, and the trial court entered an order dismissing the claims of those Appellants with prejudice.[23] The Port also moved for summary judgment on the claims of a number of Appellants who had purchased their properties after the Port had published "Noise Exposure Maps" (NEMs).[24] The trial court then entered an order dismissing those Appellants' claims with prejudice.[25]

Appellants sought discretionary review of the dismissal of the claims of Appellants based on the NEMs.[26] While Appellants' motion for discretionary review was pending, the Port sought depositions of each of the 25 remaining plaintiffs.[27] This was contrary to the original discovery plan, ordered on August 22, 2012, which envisioned a "test case" litigation to reduce costs and expenses of mass tort litigation.[28] Appellants strongly opposed individual discovery because it ignored a previous plan for "test

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[21] CP at 1256, 2055.
[22] CP at 2070.
[23] CP at 2097, 4294.
[24] CP at 3844.
[25] CP at 4548.
[26] CP at 4605.
[27] CP at 4623-4624, 4628-4629.
[28] CP at 2085, 2087.

case" litigation and because it was yet another cost that the Port sought to impose in an effort to smother the remaining plaintiffs.[29]

Appellants moved the trial court to stay the proceedings pending resolution of their motion for discretionary appellate review, arguing that a successful appeal of the class certification issue would obviate any grounds for such unduly burdensome discovery.[30] The trial court refused to stay the proceedings, and Appellants had no choice strategically other than to strike their motion for discretionary review and to obtain voluntary dismissals of the remaining plaintiffs to preserve their rights.[31] Appellants then timely appealed the trial court's order denying Plaintiffs' Second Amended Motion for Class Certification and the trial court's orders summarily dismissing the claims of the Appellants whose properties were subject to NEMs or avigation easements.[32]

IV. ARGUMENT

A. The Trial Court Erred in Denying Appellants' Second Amended Motion for Class Certification

1. Relevant Facts

Appellants' Second Amended Complaint was before the trial court when it considered Appellants' Second Amended Motion for Class Certification. In their Second Amended Complaint, Appellants alleged:

> By reason of the third runway's close proximity to the Plaintiffs' and Class Members' properties, the flight path of aircraft originating and arriving at Sea-Tac Airport

[29] *See*, e.g., CP at 4301-4306; 4414-4418; 4555-4563; 4817-4819.

[30] *Id.*

[31] CP at 4745-4746; 4839-4842.

[32] CP at 4849.

> is located in the vicinity of Plaintiffs' and Class Members' properties. The number of airplanes passing in the vicinity of Plaintiffs' and Class Members' properties has increased dramatically. Such airplanes, on take-off and landing, use the third runway at all hours of the day and night. The aircraft fly over private property in Sea-Tac Airport's vicinity at a low altitude. The increase in air traffic passing over the Plaintiffs' and Class Members' properties in close proximity to the properties has created heightened noise pollution, increased vibration, and increased toxic discharge and fumes, all of which have negative physical effects on Plaintiffs, Class Members, and other inhabitants of their homes.[33]

Based on this factual predicate, Appellants' Second Amended Complaint presented a single cause of action—inverse condemnation—and specifically alleged:

> *As a direct and proximate result of the increased airport operations at Sea-Tac Airport, including the use of the third runway following its construction*, Defendant has substantially interfered with the practical use and enjoyment of Plaintiffs' and Class Members' properties. *By doing so, Defendant has caused a diminution in the fair market value of the Plaintiffs' and Class Members' properties* and has taken and/or damaged the Plaintiffs' and Class Members' properties without the payment of just compensation and without due process of law, contrary to the United States Constitution and the Washington State Constitution.[34]

In their Second Amended Motion for Class Certification, Appellants proposed two separate classes, Class A and B.[35] Appellants proposed Miriam Bearse, John McKinney, and Darlene Moore as class

[33] CP at 170.

[34] CP at 173 (emphasis added).

[35] CP at 1258. Appellants submitted visual representations of the two proposed classes plotted on a map. CP at 1005, 1007. Appellants do not appeal from the trial court's denial of certification of Class B.

representatives.[36]

(a) Class definition

Appellants defined Class A as (1) residential property owners (2) who as of November 20, 2008, have or had interests in real property (3) located within the areas north, west, and south of the third runway of Seattle-Tacoma International Airport.[37] Appellants developed the criteria for Class A by cross-referencing the Port's 2009 INM noise contours, the Port's complaint data, and a social survey of 936 residents in the proposed class area.[38]

Appellants' noise expert, Dr. Sanford Fidell, undertook an extensive social survey of 936 property owners to measure the actual community reaction to airport externalities approximately one year after the Port started using the third runway.[39] In Dr. Fidell's survey, 43% (402 of 936) of the respondents described themselves as highly annoyed by aircraft noise over the prior year.[40] In general, the results of Dr. Fidell's survey discovered that "the noise and vibration associated with aircraft operations on [the Third Runway] highly annoy, disturb the sleep, and interfere with the speech of substantial proportions of the residential population living north, south, and west of the airport."[41] Many survery respondents also reported that "[t]he soot and fumes associated with

[36] CP at 1262-1263.
[37] CP at 1011, 1260.
[38] *Id.*
[39] CP at 1086, 1096.
[40] CP at 1097.
[41] CP at 1086.

increased aircraft operations was also annoying."[42]

Most importantly, the survey's results revealed that 12.9% of the population in neighborhoods in the Third Runway's vicinity reported being "highly annoyed" at a Day-Night Average Sound Level (DNL)[43] of 51 decibels (dB), a substantially lower threshold than the 65 dB DNL predicted by the Federal Aviation Administration (FAA) and relied on by the Port.[44] These findings were important because federal regulations of airport noise impacts define "significant noise impacts" as occurring when more than 12.9% of the population in a given area is highly annoyed by aircraft noise.[45] Thus, Dr. Fidell opined that the boundary of one class of property owners suffering "significant impacts" from the Third Runway's operations "included all property within the airport's [51 dB DNL] aircraft noise exposure contour as of 2009."[46]

Accordingly, Appellants compared the findings of significant noise impacts with the Port's noise data and concluded that residents experiencing noise exposure of at least 51 dB DNL correlated to significant noise impacts as defined by the FAA.[47] Appellants next examined the Port's 2009 actual DNL contours and plotted them on a map.[48] Thus, the western boundary of Class A is the edges of the 51 dB

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[42] *Id.*

[43] "DNL is . . . a cumulative measure of environmental noise exposure . . . embraced by the [Federal Aviation Administration]. CP at 1041.

[44] CP at 1044-1047, 1050-1051.

[45] CP at 1046-1047.

[46] CP at 1054.

[47] CP at 1260-1261.

[48] The Port of Seattle is required to collect the underlying noise data and to periodically update its noise contour maps in order to qualify for federal noise mitigation

DNL contour as provided by the Port (i.e., where 12.9% or more of the local population are highly annoyed).[49]

Furthermore, Dr. Fidell analyzed the actual complaint data collected by the Port that reflects the change in complaints from property owners before and after the opening of the Third Runway.[50] The northern and southern boundaries of Class A reflected the spread of these intensifying complaints.[51] Not surprisingly, Class A contains an overwhelming majority of the property owners who contacted Appellants' counsel regarding possible action against the Port.[52]

Moreover, because Appellants' claims arose out of the use of the westernmost Third Runway, logic suggested that residents east of the airport do not share a common experience with west-side residents. Thus, the eastern boundary of Class A lay along the extended centerline of the second runway (16C, 34C) of Sea-Tac Airport.[53]

Finally, the Port asserted that avigation easements precluded relief for at least some of the property owners who fell within the contours of Class A, including Miriam Bearse and John McKinney. Because of the common factual and legal issues regarding the easements, Plaintiffs proposed to divide Class A into two subclasses: a subclass with easements

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grant money. *See* 49 C.F.R. 47504 ("Noise compatibility programs"). The Port of Seattle is currently in the process of preparing its next Part 150 study update for the FAA. *See* Port of Seattle, Seattle-Tacoma International Airport Part 150 Study Update website, at www.airportsites.net/SEA-Part150.

[49] *See* CP at 1054.

[50] CP at 1051-1054, 1103-1107.

[51] *See* CP at 1009, 1011.

[52] *See* CP at 1011, 1024-1029.

[53] CP at 1261.

and a subclass without easements.[54]

(b) Valuation Experts

In order to establish the diminution of property value suffered by the class members, Appellants retained Dr. Ronald Throupe and Wayne Hunsperger, Member of the Appraisal Institute and Senior Residential Appraiser, as valuation experts.[55] According to Appellants' valuation experts, Appellants' proposed class "exhibit[ed] commonalities such that any economic impact on value from an environmental disamenity [could] be measured using commonly employed appraisal techniques."[56] Hunsperger proposed the usage of "[m]ultivariate statistics or regression modeling . . . to quantify the relationship between a dependent variable and one or more independent variables."[57] Hunsperger testified that this methodology would control for the impacts of the other two runways, as the impacts of the previous two runways "are inherent in the baseline [property] values because they've been there for a long time. That's already built in"[58]

Hunsperger also made clear that the methodology would ***not*** measure noise, overflight frequencies, or odors in the class area, but ***would*** measure the Third Runway's impact on properties within the class area as a diminution in property values reflected as dollar amounts.[59] Hunsperger

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[54] CP at 1262.
[55] CP at 1214-1218, CP at 1149-1155.
[56] CP at 1153.
[57] *Id.*
[58] CP at 1907.
[59] CP at 1905.

reiterated that this methodology ***would*** demonstrate the Third Runway's impacts on affected properties, as the "impacts [were] the dependent variable that we're solving for in the equation."[60] Thus, "the logic of the model" would support causation of diminution of class property values by the Third Runway's operations, and quantification of the Third Runway's impacts could be further supplemented by social opinion surveys of affected areas, such as Dr. Fidell's study, and "paired sales analysis."[61]

Under the valuation experts' proposed methodology, individual property characteristics "such as quality, type, size, and age [would] not change the substantial common elements among the individual properties in evaluating impacts of the effective negative externalities on them."[62] In any event, such individual characteristics would be accounted for as independent variables in the methodology and could be analyzed en masse, such as applying the county assessor's ratios to subareas.[63] Throupe and Hunsperger also testified that, once the methodology determined the aggregate diminution in value of class properties, the diminution could be apportioned to each individual property through usage of the assessor's ratio.[64]

(c) The trial court's denial of certification

In its order denying class certification, the trial court found that Appellants

[60] CP at 1903; *see also* CP at 1893 ("[W]e'll solve probably for a variable that has to do with noise-related impacts.").

[61] CP at 1895, 1903-1904.

[62] CP at 1153.

[63] *Id.*; CP at 1861-1862, 1893.

[64] CP at 1861-1862, 1894-1895.

met many of the requirements for class certification.[65] However, the trial court concluded that Appellants' proposed class representatives inadequately represented the interests of other class members under CR 23(a)(4) because Appellants "chose[] to limit their case to claims for permanent damage to the value of real property and [had] foregone other theories under which they could arguably recover other types of damages."[66] Particularly, the trial court concluded that Appellants decision to forego "personal injury claims in the class action lawsuit create[d] a conflict with absent class members and ma[de] [Appellants] inadequate class representatives."[67]

The trial court further concluded that Appellants failed to meet the "predominance" requirement of CR 23(b), i.e., "that common legal and factual issues predominate over individual issues."[68] The trial court reasoned that, under Washington law, a plaintiff's showing of a "permanent, measurable diminution in market value" of a plaintiff's property is "not simply the measure of damages in an inverse condemnation case – it is an element for establishing whether a taking has occurred at all."[69] It further reasoned, "[Appellants] have presented no methodology for proving a class-wide diminution of property values based on alleged increases in noise, vibrations or emissions attributable to the

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[65] CP 2062-2065.
[66] CP at 2065.
[67] CP at 2066.
[68] *Id.*
[69] CP at 2067 (citing *Martin v. Port of Seattle*, 64 Wn.2d 309, 318-20, 391 P.2d 540 (1964)).

Third Runway."[70] The trial court concluded that, because the "pivotal issue of liability, including the related questions of causation and defenses to liability" required a number of property-specific determinations, individual issues predominated over common issues in the case.[71]

Finally, the trial court ruled that Appellants failed to meet the "superiority" requirement of CR 23(b), i.e., "that 'a class action is superior to other available methods for the fair and efficient adjudication of the controversy.'"[72] It reasoned, "Diminution in market value is so wedded to noise invasion that the former cannot be proved without again proving the latter."[73] Thus, it concluded, "The evidence necessary to establish liability to the class would have to be considered again in each property owner's damages case."[74]

2. Analysis

(a) Standard of review

This court reviews the trial court's decision to deny class certification for abuse of discretion. *Schnall v. AT&T Wireless Servs., Inc.*, 171 Wn.2d 260, 266, 259 P.3d 129 (2011). A trial court abuses its discretion if its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 668-69, 230 P.3d 583 (2010). "'A discretionary decision is based on untenable grounds or made for untenable reasons if it rests on

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[70] CP at 2067.
[71] *Id.*
[72] CP at 2068.
[73] *Id.* (internal quotation marks omitted).
[74] *Id.*

facts unsupported in the record or was reached by applying the wrong legal standard.'" *McCoy v. Kent Nursery*, 163 Wn. App. 744, 758, 260 P.3d 967 (2011) (internal quotation marks omitted) (quoting *State v. Quismundo*, 164 Wn.2d 499, 504, 192 P.3d 342 (2008))

Class certification is governed by CR 23, which outlines four requirements: (1) numerosity, (2) common questions of law or fact, (3) typicality of the claims by the class representatives and (4) fair and adequate representation of the class. CR 23(a).

Once those prerequisites are established, a case may be maintained as a class action where questions of law or fact that are common to the class predominate over other questions and the Court finds that a class action is superior to other methods for the fair and efficient adjudication of the controversy. CR 23(b)(3); *Sitton v. State Farm Mut. Auto Ins. Co.*, 116 Wn. App. 245, 251, 63 P.3d 198 (2003).

Washington courts favor class certification, particularly in cases where liability is complex but the damages are relatively small:

> Washington courts favor a liberal interpretation of CR 23 as the rule avoids multiplicity of litigation, saves members of the class the cost and trouble of filing individual suits[,] and . . . also frees the defendant from the harassment of identical future litigation. [A] primary function of the class suit is to provide a procedure for vindicating claims which, taken individually, are too small to justify individual legal action but which are of significant size and importance if taken as a group.

Smith v. Behr Process, 113 Wn. App. 306, 318, 54 P.3d 665 (2002) (internal citations and quotations omitted).

Accordingly, courts should exercise discretion liberally and in favor of class certification, particularly because "[a] class is always subject to later modification or decertification by the trial court." *Moeller v. Farmers Ins. Co. of Wash.*, 173 Wn.2d 264, 278, 267 P.3d 998 (2011).

Here, neither the facts nor law supported the following conclusions that the trial court reached: (1) Appellants' proposed class representatives inadequately represented the interests of absent class members, (2) individuals issues predominated over common issues of fact and law, and (3) a class action was not a superior mechanism for resolving Appellants' claims were not supported by either the facts or applicable law. Accordingly, the trial court abused its discretion in denying class certification.

(b) The trial court abused its discretion in concluding the proposed class representatives inadequately represented the other class members' interests

The trial court reasoned that Appellants sought recovery under only an inverse condemnation theory instead of also pursuing personal injury claims, thus engaging in impermissible "claim splitting" and bringing them into conflict with absent class members who might seek to assert potential personal injury claims in individual actions and find them barred by res judicata.[75] In so doing, the trial court misapplied Washington tort law and CR 23—the relevant legal standards—for four reasons: (1) the doctrine of claim splitting does not apply to class actions;

[75] CP at 2065-2066.

(2) the proposed class's inverse condemnation claim would have adequately compensated class members for damages available under a nuisance theory, the primary personal injury claim potentially available to class members; (3) Appellants were not required to bring claims that could have defeated certification; and (4) potential class members with other personal injury claims could have opted out of the class.

First, "Because CR 23 is identical to its federal counterpart, 'cases interpreting the analogous federal provision are highly persuasive.'" *Schnall*, 171 Wn.2d at 271. And many federal courts have held that "the doctrine of claim splitting does not apply to class actions because class actions involve the representation of unnamed class members in absentia." *Rodriguez v. Taco Bell Corp.*, No. 1L13-cv-01498-SAB, 2013 WL 5877788, at *3 (E.D. Cal. Oct. 30, 2013) (citing numerous cases holding that claim splitting does not apply to federal class actions.). Thus, the trial court abused its discretion by applying the wrong legal standard.

Second, under Washington tort law, the primary personal injury claim available to potential plaintiffs under these facts was a nuisance claim. No potential class members would have suffered prejudice by foregoing a nuisance claim because such members would have been made whole under an inverse condemnation theory.

Highline Sch. Dist. No 401 v. Port of Seattle, 87 Wn.2d 6, 548 P.2d 1085 (1976), is instructive. There, the Highline School District sued the Port of Seattle for damages stemming from aircraft noise at Seattle-Tacoma International Airport. *Highline*, 87 Wn.2d at 7. Highline sought

relief under inverse condemnation, nuisance, and trespass theories. *Highline*, 87 Wn.2d at 7. The trial court permitted a portion of Highline's inverse condemnation claim to proceed but summarily dismissed its nuisance and trespass claims. *Highline*, 87 Wn.2d at 7.

On appeal, one of the issues was whether the trial court properly dismissed Highline's nuisance claim.[76] *Highline*, 87 Wn.2d at 16. Our Supreme Court held that the trial court did not err, reasoning that "[i]n circumstances where the inverse condemnation theory is available, potential plaintiffs are not disadvantaged if they are denied recourse to a nuisance cause of action." *Highline*, 87 Wn.2d at 17; *but see City of San Jose v. Sup. Ct.*, 12 Cal.3d 447, 525 P.2d 701 (1974) (under California law, plaintiffs would benefit from bringing both nuisance and inverse condemnation claims in one lawsuit). The *Highline* court continued, "Of course, where a plaintiff seeks to recover damages for other than loss of property rights or where the defendant is not an entity to which eminent domain principles apply, the nuisance remedy is still available." *Highline*, 87 Wn.2d at 17-18.

The *Highline* court concluded that plaintiffs are not disadvantaged in losing a nuisance claim where an inverse condemnation claim is available because the latter provides the same relief without requiring

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[76] Highline abandoned its trespass claim on appeal. Our Supreme Court was in apparent approval, stating that the "modern trespass doctrine protects a landowner's interest in exclusive possession, not his right to be free from interference in the use and enjoyment of his property which is asserted by appellant here." *Highline*, 87 Wn.2d at 18.

proof that the activity constitutes a "'substantial interference.'" *Highline*, 87 Wn.2d at 17, n. 7 (quoting W. PROSSER, THE LAW OF TORTS § 87, at 577-80 (4th ed. 1971); *see also Martin v. Port of Seattle*, 64 Wn.2d 309, at 318-19, 391 P.2d 540 (1964), *cert. denied*, 379 U.S. 989, 85 S. Ct. 701, 13 L. Ed. 2d 610 (1965). In contrast to inverse condemnation, nuisance requires a showing that the defendant's activity is a "'substantial interference'" with plaintiff's use and enjoyment of his land. *Highline* at 17 FN 7 (quoting W. PROSSER, THE LAW OF TORTS § 87, at 577-80 (4th ed. 1971); *see also Martin*, 64 Wn.2d at 318-19. Showing a "'substantial interference'" involves a balancing of the social utility of the interfering use against the gravity of plaintiff's harm; thus, "Inherent is the idea that the individual must bear a certain amount of the inconvenience and loss of peace and quiet as the cost of living in a modern, progressing society." *Martin*, 64 Wn.2d at 318.

Inverse condemnation, on the other hand, affords redress by measuring injury to market value alone and, in so doing, makes a suffering plaintiff whole while allowing defendant's activity to continue without question. Such a plaintiff is made whole by receiving the amount he suffers in diminishment of the value of his land necessary to sell his property and move. *Martin*, 64 Wn.2d at 319. Considering the above principles, it is clear that when both a nuisance and inverse condemnation action are possible, the latter is thus preferable because it (1) allows the necessities of a modern, progressing society to continue while (2) providing the plaintiff with adequate relief. *Highline*, 87 Wn.2d at 17-18;

Martin, 64 Wn.2d at 318.

Our Supreme Court has recognized that, where inverse condemnation applies, it is a better vehicle for recovery than nuisance, and a plaintiff does not suffer any prejudice in foregoing a nuisance claim. *Highline*, 87 Wn.2d at 17-18. By so recognizing, the court has allowed a class action against the airport to proceed on an inverse condemnation theory alone, expressly upholding the dismissal of nuisance claims. *Highline*, 87 Wn.2d at 17-18. Here, like in *Highline*, all potential class members would have been made whole under an inverse condemnation theory. Moreover, Appellants appropriately chose to pursue only an inverse condemnation claim because, with its lesser burden, it was a superior form of seeking compensation for the proposed class than a nuisance claim. *See In re Conseco Life Ins. Co. Lifetrend Ins. Sales and Marketing Litig.*, 270 F.R.D. 521, 532 (N.D. Cal. Oct. 6, 2010) (Plaintiffs are permitted to press a theory . . . that affords them the best chance of certification and success on behalf of the class). Accordingly, no potential class members with a cognizable nuisance action would have suffered prejudice by foregoing nuisance claims.

Third, Appellants were not required to bring claims that could have defeated class certification. *See In re Conseco*, 270 F.R.D. at 532; *In re Universal Serv. Fund Tel. Billing Prac. Litig.*, 219 F.R.D. 661, 669 (D. Kan. 2004) ("This is not a case where class representatives are pursuing relatively insignificant claims while jeopardizing the ability of class

members to pursue far more substantial, meaningful claims. Rather, here the named plaintiffs simply decided to pursue certain claims while abandoning a fraud claim that probably was not certifiable."); *Kennedy v. Jackson Nat'l Life Ins. Co.*, No. 07-0371-CW, 2010 WL 2524360, at *5 (N.D. Cal. June 23, 2010) ("Defendant cannot claim that Plaintiff is inadequate because she declines to assert a theory that could unravel the putative class."). As Appellants explained to the trial court, they elected not to pursue personal injury claims precisely because the individualistic nature of such claims would likely have prevented class certification.[77] Accordingly, the trial court abused its discretion by applying the wrong legal standard and basing its decision to deny class certification on untenable reasons.

Finally, no potential class members with any other personal injury claim would have suffered prejudice from Appellants' class action because such members could have opted out. It is important to first recognize that very few potential class members would have had cognizable personal injury claims other than nuisance. Although certainly possible, potential class members would not have likely suffered physical injury from falling plane parts or cancer from over exposure to jet fuel. Instead, the overwhelming majority of potential class members suffered from the Third Runway because the planes using the runway are a nuisance that invades the quiet use and enjoyment of their property.

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[77] CP at 2065-2066.

With regard to the small, select group who might have had cognizable personal injury claims other than nuisance, the rules of civil procedure provide guidance. In CR 23(b)(3) class actions, like Appellants filed here, CR 23(c)(2) expressly requires that class members be provided "the best notice practicable under the circumstances." This includes among other things, notice that the court will exclude him from the class if so requested. CR 23(b)(3). By virtue of this procedural mechanism, any potential class members who wanted to control their own litigation, and avoid being bound under the class action, would have been free to opt out of the class. Accordingly, Appellants' proposed class action would not have prejudiced this hypothetical set of plaintiffs. Thus, neither the record nor the relevant legal standards governing class actions supported the trial court's reasoning, and it abused its discretion when it denied Appellants' Second Amended Motion for Class Certification.

(c) The trial court abused its discretion in concluding that individual issues of law and fact predominated over common issues

The trial court also reasoned that individual issues of law and fact predominated over common issues, apparently based on its belief that "[Appellants] have presented no methodology for proving a class-wide diminution of property values based on alleged increases in noise, vibrations or emissions attributable to the Third Runway" and, as such, a multiplicity of individualized factual determinations for each property would be required, defeating the predominance of common legal and

factual issues.[78] But Appellants' valuation experts testified that "[m]ultivariate statistics or regression modeling" could be used for a mass appraisal of the class members' properties.[79] Further, the valuation experts testified that this methodology ***would*** demonstrate the Third Runway's impact on class member's property values, that individual characteristics ***would not*** affect the common elements necessary for determining the Third Runway's aggregate diminution of property values within the class area, and their methodology ***would*** demonstrate the Third Runway's causation of such diminution; as Hunsperger testified, the Third Runway's impacts on property values were "the dependent variable that we're solving for in the equation."[80] Moreover, Appellants' valuation experts testified that the causative chain between the Third Runway's operations and diminution in property values could be confirmed through the usage of social surveys—surveys Appellants already had on hand through Dr. Fidell's work and provided for the trial court's consideration. Finally, Appellants' valuation experts testified that the aggregate diminution in value caused by the Third Runway could be apportioned to each individual property through usage of the assessor's ratio, thus establishing causation as to each class member. Thus, ample evidence in the record demonstrates that Appellants ***did*** provide a methodology for proving a class-wide diminution of property values attributable to the

[78] CP at 2067.
[79] CP at 1153.
[80] CP at 1903.

Third Runway. Accordingly, the trial court abused its discretion by denying class certification on a basis unsupported by the record.

(d) The trial court abused its discretion in concluding a class action was not a superior method for adjudicating the controversy

Finally, the trial court reasoned that a class action was not superior to other methods for adjudicating Appellants' claims because "[t]he evidence necessary to establish liability to the class would have to be considered again in each property owner's damages case."[81] As discussed above, however, Appellants' valuation experts testified that not only could their methodology determine the aggregate class-wide diminution in property values, but their methodology could also apportion that diminution to individual properties—thus obviating the need for individual appraisals and valuations in each and every case.

Additionally, in inverse condemnation cases such as Appellants', damage claims of individual class members are likely to be relatively small compared to the enormous costs of litigation and the vast resources of the defendant.[82] Class certification would have vindicated the claims of those "who can ill afford the results of respondents' alleged practices, nor . . . individual suits." *Brown v. Brown*, 6 Wn. App. 249, 255, 492 P.2d 581

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[81] CP at 2068.

[82] The Port's litigation resources include 13 in-house legal staff; nearly three million dollars budgeted annually for legal administration; and an $11 million annual budget for "outside services," which presumably includes outside counsel. *See* Port of Seattle, *2010 Budget and Business Plan*, 142-143, available at www.portseattle.org/downloads/about/2010_Budget_Book_3.pdf (last visited March 24, 2010).

(1971); *see also Darling v. Champion Home Builders Co.*, 96 Wn.2d 701, 706, 637 P.2d 1249 (1982) (noting that class actions "establish effective procedures for redress of injuries for those whose economic position would not allow individual lawsuits" and accordingly improve access to the courts). A class action suit—particularly one where issues of liability and damages could be resolved en masse—would have provided a superior method of resolving Appellants' claims than subjecting to potentially consuming their remedy in the costs of filing individual lawsuits. Accordingly, the trial court abused its discretion by denying class certification on a basis unsupported by the record.

B. The Trial Court Erred in Dismissing the NEM Plaintiffs' Claims

1. Relevant Facts

Because the trial court denied Appellants' Second Amended Motion for Class Certification, Appellants had no choice but to bring individual claims at potentially mind-blowing discovery expense. Appellants filed a Third Amended Complaint on behalf of hundreds of individual plaintiffs, alleging that the "increase in air traffic passing over the Plaintiffs' properties in close proximity to the properties has created heightened noise pollution, increased vibration, and increased toxic discharge and fumes, all of which have negative physical effects on Plaintiffs and other inhabitants of their homes."[83] Appellants' Third Amended Complaint further alleged that the damages that Appellants

[83] CP at 2076.

suffered as a result of the increased airport operations constituted an inverse condemnation, nuisance, and trespass.[84]

On December 21, 2012, the Port moved for summary judgment asking the trial court to find that federal law preempts the state law claims brought by certain appellants who purchased property after "noise exposure maps" (NEMs) were published.[85] The Port stated its position as follows:

> Federal law requires the NEM Plaintiffs to make a threshold showing of increased noise impact from airport operations before they can proceed with the claims alleged in this lawsuit. . . . ***This motion seeks the dismissal of the claims asserted by the NEM Plaintiffs because the undisputed facts show that (1) they acquired their interests in the relevant properties after the Port published either the 1993 NEM or the 2001 NEM, and (2) they cannot make the threshold showing required by federal law.***[86]

Commensurate with the Port's position, the only evidence that it offered in support was related to (1) when the appellants purchased their property and (2) the property's noise level measured in day-night average sound level ("DNL").[87]

The Port never argued in its opening summary judgment brief that vibrations qualify as "noise" under 49 U.S.C. § 47506 and 14 C.F.R. § 150.21, the federal statues the Port claimed preempted the appellants claims. In fact, the Port's entire opening brief only once mentioned the

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[84] CP at 2076-2078.
[85] CP at 3848, 3862.
[86] CP at 3848-3849 (emphasis added).
[87] CP at 3855, 3860-3861.

term "vibrations" in a conclusory statement referencing the plaintiffs' complaint ("Their causes of action (inverse condemnation, nuisance, and trespass) each depend on this alleged increase in operations and the alleged "heightened noise pollution" and vibrations (i.e., low frequency noise) caused by those operations.").[88] Notably, the Port also failed to offer a single shred of evidence in its opening brief to support the highly technical position that "noise" is the same as "vibrations."

In a similar vein, the Port's opening summary judgment brief neither argued nor offered any evidence to show that Appellants did not suffer from fumes, dust, or apprehension of fear. Nowhere did the Port assert that Appellants failed to produce evidence of damages other than noise.

Appellants' response to the Port's motion for summary judgment simply argued that summary dismissal was inappropriate because Appellants pleaded damages other than noise, including vibrations and fumes.[89] Likely realizing its mistake, the Port offered for the first time in its reply documents argument and evidence supporting the notion that "vibrations" are "noise" for purposes of the federal statues and that Appellants did not suffer from fumes, dust, or apprehension of fear.[90]

At the summary judgment hearing, Appellants argued that the Port's reply brief improperly raised new issues, made new arguments, and

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[88] CP at 3848-3849.
[89] CP at 3954-3955.
[90] CP at 4255-4257; CP at 4266, 4269-4270.

offered new evidence regarding the notion that vibrations were "noise" and that the NEM Appellants' claims should be dismissed because they did not offer any evidence that they suffered from other damages such as fumes, dust, or apprehension and fear.[91] Ultimately, the trial court entered an order dismissing the claims of Appellants to whose properties the NEMs applied with prejudice.[92] It reasoned that "The NEM [Appellants] did not provide the Court with evidence of any claims other than claims for 'damages for noise attributable to the airport.'"[93]

2. Analysis

(a) Standard of review

This court reviews the trial court's order granting summary judgment de novo. *Mohr v. Grantham*, 172 Wn.2d 844, 859, 262 P.3d 490 (2011). Summary judgment is appropriate when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." CR 56(c). "Summary judgment is subject to a burden-shifting scheme." *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008). "***After the moving party submits adequate affidavits*** [demonstrating the absence of issues of material fact], the nonmoving party must set forth specific facts which sufficiently rebut the moving party's contentions and disclose the existence of a genuine issue of material fact." *Meyer v. Univ. of Wash.*, 105 Wn.2d 847, 852, 719 P.2d 98 (1986); *see also Ranger*, 164 Wn.2d at 552 (moving party shifts

[91] Verbatim Report of Proceedings Vol. 8 (8 VRP) at 251-254.
[92] CP at 4548, 4550-4551.
[93] CP at 4550 (citing 49 U.S.C. § 47506(a)).

burden by submitting "affidavits establishing it is entitled to judgment as a matter of law.").

(b) The trial court erred in dismissing Appellants' claims based on vibrations, fumes, dust, and other non-noise sources because the Port was not entitled to dismissal of those claims under federal law

The Port moved for summary judgment below on the basis that the Aviation Sound and Noise Abatement Act (ASNAA), specifically 49 U.S.C. § 47506, preempted the claims of Appellants whose properties were affected by NEMs. The trial court dismissed those claims even though Appellants' complaint alleged claims based on non-noise damages. But statute ***clearly applies only to damages based on noise***, and to the extent that the trial court dismissed their claims without resolving the issue of whether the Port was entitled to dismissal of non-noise claims under the statute, it erred as a matter of law in misinterpreting the statute.

The overarching legal question before the trial court was whether 49 U.S.C. § 47506 fully preempted Appellants state law claims, which is a question of first impression in Washington. As Appellants correctly argued below, 49 U.S.C. § 47506 did not fully preempt Appellants' claims because their claims fell outside the statute's scope.

"Congress may preempt state law in three basic manners: express preemption, field preemption, and conflict preemption." *Progressive Animal Welfare Soc. v. University of Washington*, 125 Wn.2d 243, 265, 884 P.2d 592 (1994). Preemption may occur if (1) Congress passes a statute that expressly preempts state law, (2) Congress occupies

the entire field of regulation, or (3) state law conflicts with federal law due to impossibility of compliance with state and federal law or when state law acts as an obstacle to the accomplishment of the federal purpose. *Id.*

"The doctrine of preemption is based in the supremacy clause of the United States Constitution." *Stevedoring Servs. of America, Inc. v. Eggert*, 129 Wn.2d 17, 23, 914 P.2d 737 (1996). "'Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law.'" *Id.* at 23-24 (quoting *Building & Constr. Trades Council v. Associated Builders & Contractors*, 507 U.S. 218, 223-24, 113 S. Ct. 1190, 1194, 122 L. Ed. 2d 565 (1993)). "The goal in a preemption analysis is to determine congressional intent." *Stevedoring*, 129 Wn.2d at 24. "Congress' intent may be 'explicitly stated in the statute's language or implicitly contained in its structure and purpose.'" *Id.* (quoting *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992)).

Here, the ASNAA neither contains an express preemption provision nor so comprehensively or pervasively occupies the field of damages as to preempt plaintiffs' state rights to assert claims for nuisance, trespass, and inverse condemnation claims. *See* 49 U.S.C. §§ 47501-47510; *Progressive*, 125 Wn.2d 243. Indeed, just as the Port conceded before the trial court, the ASNAA establishes only a "limited preemption of state law claims relating to airport operations."[94] The Port's

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[94] CP at 3849.

concession—tactical as it may have been—properly recognized that ASNAA is not an absolute preemption of plaintiffs' state law claims.

The ASNAA statute at issue, entitled "Limitations on recovering damages for noise," states in relevant part:

> (a) General limitations. – A person acquiring an interest in property after February 18, 1980, in an area surrounding an airport for which a noise exposure map has been submitted under section 47503 of this title and having actual or constructive knowledge of the existence of the map ***may recover damages for noise attributable to the airport only if***, in addition to any other elements for recovery of damages, the person shows that—
> (1) after acquiring the interest, there was a significant—
> (A) change in the type or frequency of aircraft operations at the airport;
> (B) change in the airport layout;
> (C) change in flight patterns; or
> (D) increase in nighttime operations; and
> (2) the damages resulted from the change or increase.

49 U.S.C. § 47506 (emphasis added).[95] Under this plain language, the requisite showings under subsections (1) and (2) are only necessary in actions to recover damages for noise. Thus, the statute does not apply in situations, like here, where Appellants had claims that were premised on damages other than noise, such as vibrations, fumes, and dust.

"'[T]here is a strong presumption against finding preemption in an ambiguous case and the burden of proof is on the party claiming preemption.'" *Progressive*, 125 Wn.2d at 265 (quoting *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wash.2d 299, 326, 858 P.2d 1054 (1993)). "'State laws are not superseded by federal law unless

[95] The federal regulation at issue, 14 C.F.R. 150.21, mirrors the statute.

that is the clear and manifest purpose of Congress.'" *Id.* Here, the Port did not meet its burden—and nor could it have met its burden—of showing that Congress has intended to preempt Appellants' state claims of damages other than noise. The plain language of the statute is clear, and Appellants' causes of action, which seek damages other than noise, could have continued parallel to this federal law without any conflict.

Indeed, one of the only federal courts to have considered whether ANSAA governs damages other than noise agrees. In *Provident Mut. Life Ins. Co. of Philadelphia v. City of Atlanta*, 864 F.Supp. 1274, 1277 (1994), the plaintiff asserted claims for nuisance, trespass, and inverse condemnation because defendant's operation of an airport caused plaintiff's property to suffer from high levels of noise, dust, exhaust, and vibration. Defendant argued that it was immune from Plaintiffs nuisance and inverse condemnation claims under former 49 U.S.C. § 2101, currently codified at 49 U.S.C. § 47501. *Id.* at 1290. The court ultimately held that it was unable to determine whether the plaintiff acquired the property after February 18, 1980, based on the record before it. *Id.* at 1291. The court then granted the defendant "leave to file a more developed motion on this ground" and, at the same time, stated that "it appears that the [ASNAA] may not deal with nuisance suits based on vibrations and dust, as opposed to noise." *Id.*

Accordingly, the trial court should have denied the Port's motion to dismiss Appellants' claims because Appellants have asserted colorable

state law claims[96] seeking damages that were not barred under 49 U.S.C. § 47506. By the plain language of this statute, only damages for ***noise*** are affected. Appellants claimed damages or loss of use and enjoyment of their property due to damages for other than just noise, including vibrations, and fumes. Appellants' state law claims could have operated parallel to the statute, so there can be no federal preemption.[97] Any attempt to construe the statute otherwise must be tempered by the longstanding rule that Congress is assumed not to have preempted state claims absent a "clear and manifest purpose." *Progressive*, 125 Wn.2d at 265. Here, the Port moved for dismissal of all Appellants' claims, including non-noise claims, 49 U.S.C. § 47506. But the Port was not entitled to dismissal of such claims under the statute. Thus, to the extent that the trial court dismissed all of Appellants' claims under an erroneous interpretation of this statute, it erred as a matter of law.

(c) The trial court erred in dismissing Appellants' claims based on vibrations, fumes, dust, and any source other than noise because the summary judgment burden never shifted on those claims

"It is the responsibility of the moving party to raise in its summary judgment motion all of the issues on which it believes it is entitled to summary judgment." *White v. Kent Med. Center, Inc., P.S.*, 61 Wn. App.

[96] *See Martin*, 64 Wn.2d at 313; *see also Highline*, 87 Wn.2d 6 at 11; 55 Wn.2d 400, 407-412, 348 P.2d 664 (1960)property owners have a cause of action for interference with their right to use and enjoy their property).

[97] Interestingly, if the noise exposure maps actually precluded all of plaintiffs' claims, obtaining the avigation easements would have been unnecessary and this motion would have been filed first.

163, 168, 810 P.2d 4 (1991). Furthermore, "It is incumbent upon the moving party to determine what issues are susceptible to resolution by summary judgment, and to clearly state in its opening papers those issues upon which summary judgment is sought." *Id.*

Here, the only issue that the Port's opening summary judgment brief raised was whether federal law preempted Appellants' claims for noise damages such that dismissal is warranted. The Port never raised the separate, albeit related, issues of whether "noise" included vibrations or whether Appellants suffered damages other than "noise." And the Port completely failed to include affidavits establishing an absence of material facts regarding those issues in support of its opening brief. Accordingly, the summary judgment burden on those issues ***never shifted*** to Appellants. *Meyer*, 105 Wn.2d at 852; *see also Ranger*, 164 Wn.2d at 552

Failing to adequately raise these issues and support them with affidavits, the Port instead held these issues in abeyance and argued them for the first time in its reply materials, severely prejudicing plaintiffs by leaving them without any opportunity to respond. *White*, 61 Wn. App. at 163 ("Allowing the moving party to raise new issues in its rebuttal materials is improper because the nonmoving party has no opportunity to respond.").

"Rebuttal documents are limited to documents which explain, disprove, or contradict the adverse party's evidence." *Id.* at 169. Here, Appellants never cross-moved for summary judgment or otherwise assumed the burden on the completely separate questions of whether

vibrations are "noise" and whether plaintiffs' are suffering damages other than noise. The preemption issue that the Port raised before the trial court was narrow and strictly legal: Does 49 U.S.C. § 47506 and 14 C.F.R. § 150.21 preempt those damages caused by ***noise***? Importantly, had the trial court denied summary judgment on Appellants' vibration and other non-noise claims, the Port would not have been prejudiced because it could have subsequently moved for summary judgment on those separate issues. *See id.* at 170 (moving party who fails to raise issue on summary judgment "may either strike and refile its motion or raise the new issues in another hearing at a later date.").

In sum, the Port failed to raise, argue, and support with evidence its entitlement to summary judgment on Appellants' non-noise claims in its opening brief, instead holding those issues in abeyance and improperly arguing and supporting them in a reply. Accordingly, the summary judgment burden never shifted to Appellants on those issues, and the trial court erred in dismissing them. Thus, this court should reverse the trial court's order granting summary judgment on Appellants' non-noise claims.

C. The trial Court Erred in Dismissing the Avigation Easement Appellants' Claims

1. Relevant Facts

The Port commenced a Noise Remedy Program pursuant to regulations issued by the Federal Aviation Administration ("FAA") to implement the Airport Safety and Noise Abatement Act of 1979. *See* 14

C.F.R. Part 150 ("Part 150"). Part 150 prescribes requirements for airport noise compatibility programs and establishes a single tool for measuring airport noise (the FAA's Integrated Noise Model ("INM")) and a single, uniform standard for determining the exposure of individuals to airport noise (the Day/Night Level ("DNL") noise metric).[98]

(a) The Port offered only acoustical insulation and transaction assistance to affected property owners

The Port's Noise Remedy Program is legislatively created under RCW 53.54.030. This statute gives the Port different tools for alleviating aircraft noise, including acquisition, transaction assistance (assistance for selling their homes), and soundproofing. Here, the Port has offered only soundproofing and transaction assistance.[99] The Port offered soundproofing to every Appellant executing an easement, but only some of them qualified for transaction assistance.[100] Notably, the homeowner would not find out until after the noise insulation process was complete whether they qualified for transaction assistance.[101]

Under chapter 53.54 RCW, the Port obtained an avigation easement in exchange for soundproofing and transaction assistance. For homes that could not be adequately insulated (such as mobile homes), the Port paid cash in exchange for the avigation easement.[102]

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[98] CP at 2129-2130.

[99] *See*, e.g., CP at 3386-3387.

[100] *Compare id.* (describing circumstances under which transaction assitance was available) with CP at 3424-3425 (offering soundproofing but no transaction assistance).

[101] CP at 3155.

[102] CP at 2128-2131.

The avigation easements granted the Port the following property rights:

- The Port is granted the right of "free and unobstructed use and passage of all types of aircraft . . . , with such use and passage to be unlimited as to frequency, type of aircraft, and proximity."
- The Port is granted "a permanent . . . easement. . . through the airspace over or in -the vicinity of [plaintiffs' properties]".
- The Port is granted an easement for "the benefit of the real property now commonly known as SeattleTacoma International Airport ("Airport"), including any additions thereto wherever located, hereafter made by the Port or its successors and assigns . . . "

This grant language is found in each of the avigation easements.[103] The avigation easements further stated that the burden imposed on the Easement Plaintiffs' properties includes events "which may be alleged to be incident to or result from the flights of aircraft over or in the vicinity of the Premises or in landing at or taking off from the Airport."[104]

As originally enacted in 1974, chapter 53.54 RCW allowed the Port to offer soundproofing to "structures within an impacted area" but required that "the owner waives all damages and conveys a *full and*

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[103] *See*, e.g., CP at 2182 (an avigation easement); *see generally* CP at 2182-2624 (all the avigation easements).

[104] CP at 2182.

unrestricted easement for the operation of all aircraft, and for all noise and noise associated conditions therewith, to the port district."[105]

In 1993, our legislature amended RCW 53.54.030 to allow those affected by aircraft noise to partake in a noise program more than once. To receive additional benefits, including acquisition by way of condemnation, the homeowners need only show that the "property is subjected to increased aircraft noise ***or differing aircraft noise impacts*** that would have afforded different levels of mitigation." RCW 53.54.030(5) (emphasis added). Importantly, the Port must make these benefits available "even if the property owner had waived all damages and conveyed a full and unrestricted easement." RCW 53.54.030(5). Because homeowners could receive benefits more than once, the legislature also dropped the requirement that a homeowner must waive "all" damages and convey a "full and unrestricted easement" in order to receive soundproofing. Former RCW 53.53.030(3) (1992).

As a result of this amendment, avigation easements that went into effect before the amendment ("pre-1993 easements") varied from those that went into effect after the amendment ("post-1993 easements"). The pre-1993 easements described the easement's burden as follows:

> Said easement and burden, together with all things which may be alleged to be incident to or to result from the use and enjoyment of said easement, including, but not limited to, noise, vibrations, fumes, deposits of dust or other particulate matter (which are incidental to the normal operation of said aircraft), fear, interference with sleep and

[105] LAWS OF 1974, 1st Ex. Sess., ch. 121 at 337.

communication and any and all other things which may be alleged to be incident to or to result from flights of aircraft over or in the vicinity of the Premises or in landing or taking off from the Airport, shall constitute permanent burdens on the Premises. The burdens and conditions described with this easement shall run with the land and be binding upon and enforceable against all successors in right, title, or interest to said real property.[106]

In contrast, the post-1993 easements tied the easement's scope to a baseline DNL noise level:

> [S]aid easement and burden, together with the Easement level for average yearly noise exposure at the parcel (as defined in Paragraph 5) and. noise associated conditions, which may be alleged to be incident to or to result from flights of aircraft over or in the vicinity of the Premises or in landing at or taking off from the Airport, shall constitute permanent burdens on the Premises.[107]

The post-1993 easements went on to require each plaintiff to prove that the easement DNL level at his or her property has been exceeded by more that 1.5 dB DNL as a prerequisite to bringing a claim: "[t]he Easement Level shall not be deemed to be exceeded unless anyone so claiming establishes that the yearly average noise exposure as defined herein has increased by more than 1.5 DNL."[108]

Appellants and the Port stipulated that the noise analysis of Steven Alverson would be final and binding for purposes of the avigation easement summary judgment motion.[109] Alverson found that current DNL levels did not exceed the easement levels at any of the relevant

[106] CP at 3427-3428.
[107] CP at 3431-3432.
[108] *Id.*
[109] CP at 2663.

properties.[110]

(b) Appellants had no notice that the Port would use the avigation easements to stop them from asserting their constitutional rights.

In stark contrast to the sweeping rights the avigation easements expressly granted to the Port, neither the various agreements Appellants had to execute in order to participate in the Port's Noise Remedy Program nor the avigation easements themselves, both of which the Port drafted, notified Appellants that the Port was asking them to forfeit their constitutional right to be free from a taking without just compensation. Nothing states that they were voluntarily entering the agreements or had any meaningful choice.

The process of exacting avigation easements from affected Appellants was calculated to avoid transparency about the rights they were giving up. The first step was to sign a Homeowner Participation Agreement – Initial Authorization. The recitals in the Initial Authorization for both the pre-1993 and post-1993 easements stated, in full:

> INASMUCH as the Port desires to decrease aircraft-generated noise levels in homes in the immediate Airport vicinity; and
>
> INASMUCH as the Homeowner desires to do the same; the parties agree as follows:[111]

Nothing in the recitals indicated that the Port also desired to obtain

[110] CP at 2166-2167, 2169-2172.

[111] *See*, e.g., CP at 2812; *see also* CP at 2791 (Initial Authorization using similarly-phrased recitals).

a waiver of all claims and all damages to preclude Appellants from asserting their constitutional right to be free from a taking without just compensation.[112] Similarly, the body of the contract that purported to encapsulate the "entire Agreement" said nothing about waiving constitutional rights.[113] Instead, the Initial Authorization did little else than spell out the scope of work that the Port would cover and include other provisions to exculpate the Port from various liabilities flowing from soundproofing the home, including a hold harmless and a no warranties provision.[114]

The next agreement that the affected Appellants signed with the Port was a Homeowner Participation Agreement – Final Approval. The Final Approval for both pre-1993 and post-1993 easements contained the same recitals:

> WHEREAS, homeowner has previously entered into the "Homeowner Participation Agreement – Initial Authorization" ("Initial Agreement") with the Port which described certain obligations to be performed by the Port and Homeowner as part of the Port's Noise Remedy Program and Homeowner and Port now desire to proceed with the remaining parts of the Program which affect the Homeowner;
>
> WHEREAS, the Port desires to attempt to alleviate aircraft-generated noise levels in residences in the immediate Airport vicinity; and
>
> WHEREAS, Homeowner desires to reduce aircraft-generated noise levels within the Premises;

[112] *Id.*
[113] CP at 2813-2814.
[114] *Id.*

> NOW, THEREFORE, in consideration of the promises made herein, the parties agree as follows:[115]

Again, nothing in the recitals indicated that the Port was bargaining for an absolute waiver of all claims and damages to prohibit Appellants from asserting constitutional rights down the road.[116] Nor did the remainder of the Final Approval explain that the Port was intending the avigation easements to function as a waiver of all constitutional claims and rights.[117]

(c) Appellants would have been penalized for withdrawing from the Program.

In stark contrast to the Port's Noise Remedy Program being completely voluntary, it penalized those homeowners who wished to withdraw. For example, if the homeowner withdrew for ***any reason*** after signing the Initial Authorization, the homeowner would have "three points deducted from the point totals originally held by the Homeowner to determine the priority of future participation in the Program."[118] If the homeowner withdrew after signing the Final Approval, he or she "shall have ten (10) points deducted from the point totals originally held by Homeowner to determine the priority of future program participation."[119] If the homeowner withdrew after signing the sound insulation contract, the homeowner "may be held responsible for all costs of construction (including window manufacture) already incurred plus any additional

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[115] *See*, e.g., CP at 3154; CP at 3174.
[116] CP at 3154-3157; 3174-3175.
[117] *Id.*
[118] CP at 2793.
[119] CP at 3156.

costs of termination.[120] In addition, Homeowner may be denied further participation in the Program, including Transaction Assistance."[121]

Further, if the homeowner withdrew for ***any reason*** after signing the Initial Authorization, he or she would have to pay for "duplicated administrative costs" for reentering the program again.[122] Further, they would not accumulate any "points," presumably used for future benefits, during any period of withdrawal.[123] If the homeowner withdrew after signing the Final Approval, he or she would be responsible for "duplicated administrative or other costs which are required."[124] If the homeowner withdrew after executing the sound insulation contract, the homeowner "may be held responsible for all costs of construction (including window costs) already incurred plus any additional costs of termination."[125]

The Port successfully moved for summary judgment dismissing the claims of Appellants whose properties were subject to an avigation easement.[126]

2. Analysis

(a) Standard of review

Again, this court reviews the trial court's order granting summary judgment de novo. *Mohr*, 172 Wn.2d at 859. Summary judgment is proper only "if the pleadings, depositions, answers to interrogatories, and

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[120] *Id.*
[121] *Id.*
[122] CP at 2813.
[123] *Id.*
[124] CP at 3175.
[125] *Id.*
[126] CP at 4294.

admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). This court views the facts and any reasonable inferences from those facts in the light most favorable to the nonmoving party. *Federal Way Sch. Dist. No. 210 v. State*, 167 Wn.2d 514, 523, 219 P.3d 941 (2009).

(b) Appellants did not knowingly waive their constitutional right to just compensation for takings

In Washington, it is well-established that the operator of aircraft can be liable for the taking of property. Wash. Const. Art. 1, § 16; *see, e.g.*, *Martin*, 64 Wn.2d 309. It is also well-established that courts jealously guard the right to a jury trial. Wash. Const. Art. 1, § 21; *e.g.*, *Auburn Mechanical, Inc. v. Lydig Const., Inc.*, 89 Wn. App. 893, 951 P.2d 311 (1998). The trial court concluded that Appellants forfeited these important constitutional rights because the Port convinced them to sign an avigation easement. When viewing the facts in the light most favorable to Appellants, however, the record demonstrates that no valid waiver occurred.

A waiver of a constitutional right must be knowing, intelligent, and voluntary. *City of Bellevue v. Acrey*, 103 Wn.2d 203, 207, 691 P.2d 957 (1984); *Godfrey v. Hartford Cas. Ins. Co.*, 142 Wn.2d 885, 898, 16 P.3d 617 (2001). Washington courts "must indulge every reasonable presumption against waiver of fundamental rights." *Acrey*, 103 Wn.2d at 207 (citing *Glasser v. United States*, 315 U.S. 60, 62 S. Ct. 457, 86 L. Ed.

680 (1942)); *see also Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461, (1938)). The right to be free from a taking of property without just compensation is a fundamental right. *McPherson Bros. Co. v. Douglas County*, 150 Wn. 221, 224-225, 272 P. 983 (1928).

The affected Appellants could not have knowingly waived their constitutional rights because nothing in the documents they signed gave them reason to believe that the Port was seeking to bar them from asserting the right to be free from a taking without just compensation. Neither the agreements nor the avigation easements made any reference to constitutional rights. Appellants believed they were giving the Port permission to do what they were already doing and would continue to do; namely, flying aircraft near or over their property. The Port never explained to them that signing the avigation easement meant that they were waiving their right to recover diminished property values or their right to ask a jury what constitutes just compensation. In fact, the Port did not explain that Appellants had the right to recover for lost property values under Washington law. *See*, *e.g.*, *Martin*, 64 Wn.2d 309. Appellants had no reason to "know" that they were waiving any right to pursue claims for diminished property value due to the runway.

Furthermore, the affected Appellants signed the avigation easements long before the Third Runway began operations, a point at which they may have been annoyed with the other runways, but not suffering from a depreciation of property rights that amounted to an unconstitutional taking. Appellants could never have foreseen that the

Third Runway would drastically intensify the aircraft noise that now causes them to suffer daily. As discussed above in section III-A of Appellants' brief, Appellants have articulated exactly how the aircraft noise is different now than when they signed the easements, stating that the Third Runway has brought aircraft directly overhead at low altitudes, which has markedly increased vibrations, dust, and noise. The thrust of jet engines now shakes houses, causing so much vibration that glassware rattles, light bulbs unscrew, and nails back out. The aircraft flying overhead at low altitudes also disrupts electronic signals, interferes with cellular phone conversations, and disrupts satellite television transmissions. The repeated and relentlessly intrusive aircraft noise is different now than when they signed the easement. Moreover, even with the affected Appellants' anecdotal testimony aside, the aircraft noise is necessarily different than when they granted easements because the Third Runway did not begin operations until many years later, it is located one-third mile west of the old runways, and is responsible for 33% of arriving air traffic (e.g., approximately 52,320 arrivals in 2010, or 143 planes per day).

In contrast, before the Third Runway, SeaTac operations created only slight to moderate annoyance.[127] Appellants were able to enjoy their backyards, carry on conversations without difficulty, watch television without issue, and use electronic devices without any interference in the

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[127] CP at 3470-3472; 3452-3453; 3445-3456; 3518-3519; 3542; 3548; 3566-3567; 3580-3581; 3588-3589.

signal.[128] They had no idea that the Third Runway operations would force planes to fly everywhere around them, including overhead, and drastically change the noise type and intensity.[129] Without a constitutional right to assert, let alone waive, at the time the Port convinced them to handover the easements, the plaintiffs could not have knowingly waived the right. "[T]o constitute a waiver, the right or privilege claimed to have been waived must generally have been in existence at the time of the purported waiver." *People for Preservation and Development of Five Mile Prairie v. City of Spokane*, 51 Wn. App. 816, 822, 755 P.2d 836 (1988) (quoting 28 AM.JUR.2D ESTOPPEL AND WAIVER § 157, at 839 (1966)).

The flaw in the trial court's reasoning is that it assumed that a taking occurred when the avigation easement was signed and that the soundproofing constituted just compensation. However, at the time they signed the easements, the affected Appellants had not yet realized the effect of the Third Runway and had no idea what it would entail. It would defy credulity, then, to accept that the avigation easements subsumed Appellants' constitutional rights.

(c) Appellants did not voluntarily waive their constitutional rights

The record, when viewed in the light most favorable to Appellants, also demonstrates that Appellants entered the easement agreements under coercion, not on their own volition. At the time they entered the

[128] *Id.*
[129] *Id.*

agreements, Appellants were exposed to aircraft noise from the first two runways. They were not in a position to pay for costly home repairs to reduce the noise that they could not stop, and they welcomed any degree of assistance. As one Appellant stated, "I had no knowledge as to how I could otherwise try to mitigate the existing effects of the airport's operations. I couldn't afford the windows and insulation myself, and we were already experiencing noise and rattling windows."[130] Similarly, another appellant described her decision to enroll in the program as follows:

> I signed the avigation easement because of the impacts I was experiencing from the airport's existing operations at the time. I had no meaningful choice but to sign the avigation easement because I needed the noise remediation offered by the Port and I had no knowledge as to how I could otherwise try to mitigate the existing effects of the airport's operations. We would have done almost anything to help with the noise. The Port made it clear that it was either sign it or we would get nothing.[131]

Living without any soundproofing was not an option for the affected Appellants. However, despite their discomfort before the Third Runway, Appellants could never foresee that Third Runway operations would drastically intensify the aircraft noise, significantly increasing the disruption to their daily lives and substantially diminishing their property value.

Furthermore, planes were flying near their property anyway, and Appellants had no meaningful choice but to enroll in the Program and

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[130] CP at 3599.
[131] CP at 3567.

hope for the best. Declining benefits from the Program meant only that Appellants were in the same situation but without any improved soundproofing. Appellants were faced with the Hobson's choice of accepting some relief from the obnoxious aircraft noise or foregoing any relief from planes that would fly regardless.

Finally, the Program was not voluntary because once they signed the Initial Authorization, the affect Appellants had little other choice but to follow through or face consequences. The various withdrawal provisions made it clear that declining to participate would hinder their ability to participate in the future, such as if things got worse, which they did. The withdrawal provisions in the Final Approval would force Appellants to pay money to participate again and would require them to pay back the costs of insulation. And in the Final Approvals for a pre-1993 easement, withdrawing after signing the sound insulation contract could completely jeopardize future participation in the program altogether. Accordingly, the record, when viewed in the light most favorable to Appellants, demonstrates that Appellants did not voluntarily waive their constitutional right to their takings claims by executing the easements. Thus, the trial court erred in granting summary judgment against the appellants whose properties were subject to avigation easements.

V. CONCLUSION

For the foregoing reasons, Appellants respectfully ask this court to reverse the trial court's order denying their Second Amended Motion for

Class Certification and its orders summarily dismissing the claims of Appellants to whose property the NEMs and avigation easements applied.

RESPECTFULLY SUBMITTED this 13th day of December 2013.

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CERTIFICATE OF SERVICE

Laura Neal, being first duly sworn upon oath, deposes and says:

I am a citizen of the United States of America and of the State of Washington, over the age of twenty-one years, not a party to the above-entitled matter and competent to be a witness therein.

That on December 13, 2013, I personally delivered, a true and correct copy of the above document, directed to:

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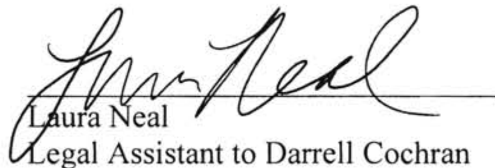
DATED this 13th day of December 2013.



Laura Neal
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