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CASE NO. 63943-9-1

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

ROBERT B. STRUTHERS AND VITEZSLAVA OTRUBOVA

Appellant,

v.

CITY OF SEATTLE

Respondents.

APPELLANTS' REVISED REPLY BRIEF

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I. INTRODUCTION

The first sentence in the Respondent's Brief is that Vitezslava Otrubova and Bruce Struthers first knew about leaky City of Seattle pipes in 1993-1994. This would be difficult, as neither had met until June 19, 1994, when Mr. Struthers signed a lease for a rental property owned by Ms. Otrubova. The parties had no relationship other than tenant and landlady until 1996. The first sentence in the Respondent's Brief amply demonstrates a creative interpretation of the evidence before the Court that runs through the City's brief. This Reply Brief will endeavor to strip the evidence and argument down to what happened.

II. ASSIGNMENT OF ERROR

Appellants Vitezslava Otrubova and Robert B. Struthers ask this Court to review errors made by the trial court in dismissing the claim of inverse condemnation with its Orders of March 7, 2008 and November 25, 2008. Appellants also ask this Court to consider with the trial court erred in allowing plaintiffs' attorney Karen Willie to withdraw three weeks before trial, on the day of several pre-trial deadlines, while simultaneously prohibiting any further continuance. The end result is that the plaintiffs were left to represent themselves pro se, with three weeks to prepare for what became a ten-day jury trial.

III. STATEMENT OF THE CASE

A. Procedural Background

Vitezslava Otrubova filed a claim with the City of Seattle on March 27, 1997 (CP2857), alleging the underwater three pipes in Lake Washington were damaging her bulkhead, and causing sinkholes in her yard. She detailed her efforts the year before to get anyone from the City

of Seattle to come on site, much less investigate the cause of the damage. The first City employee on site before the claim was filed, a Mr. Aderhold, did not know where the water was coming from and what was on the other side of the pipes (CP 2865). The City continued to ignore the situation, waiting until September 2, 1997 before sending another crew on site (CP 2863). This first claim was denied and no repairs to the Meadowbrook Outfall were made for over ten years.

A large storm on October 21, 2003 continued to damage the outfall, as storm water forced cracks in the monolithic concrete seawall on the shore of Lake Washington (CP 44). This major storm event resulted in a visit by City consultants Herrera Associates in November 2003. On September 29, 2004 Herrera Associates completed a final report warning of the damage that was “likely to increase in magnitude” unless repairs were made. Herrera specifically stated:

During storms all three pipes leading from the upgradient structure to NPDES outfalls 101, 102 and 103 are likely under pressure due to the surcharging in the upgradient structure. Due to this pressurization cracks observed in the concrete sections of pipes are likely conduits for exfiltration. The cracks in the concrete pipes are a possible source of flows that are expressed during large storms from the surface near the seawall

Herrera did not see a connection between the 48” corrugated metal pipe in the water and the damages experienced by Ms. Otrubova:

In summary, no evidence of flow discharging from the southerly 48-inch outfall (PSD 103) was observed that could be directly attributable to the scour along the property immediately south of the outfall alignment.

Repair of the damaged Meadowbrook Outfall began over three years later, on July 27, 2007 when Richard Phillips Marine began construction on the Meadowbrook Outfall Rehabilitation Project (CP 36).

On June 29, 2007 Robert B. Struthers and Vitezslava Otrubova filed a complaint against the City of Seattle in the Superior Court of Washington (CP 1-12). The eight causes of action were:

- A) continuing negligence,
- B) strict liability for artificial diversion of surface waters,
- C) strict liability for collection, concentration and channeling of surface waters
- D) strict liability for failure to provide a proper outflow for channeled surface waters,
- E) continuing nuisance,
- F) continuing trespass, and finally,
- G) inverse condemnation.

In this complaint, the plaintiffs requested an injunction against continuing trespass and continuing nuisance. A second amended complaint was filed August 9, 2007 (CP 83-94). The new claim of spoliation of evidence was added as claim G), and inverse condemnation was listed as claim H).

On August 10, 2007 Judge Michael Hayden signed an order requiring the City of Seattle to produce schedules and documentation of the ongoing Meadowbrook Outfall Rehabilitation Project, and provide access to physical evidence and observe the videotaping of the outfall pipes before they were rehabilitated. (CP 143-145)

City Attorneys Thomas Carr, Rodney Eng and Gregory Narver withdrew on August 17, 2007. David Bruce appeared as replacement counsel for the City of Seattle.

On August 21, 2007 Judge Michael Hayden signed an order appointing retired Judge Terrence Carroll as Discovery Master in this case (CP 187-190). This order specifically directed the City of Seattle to

comply with the Court's August 10, 2007 order, as production deadlines had been missed. The case was transferred from Judge Michael Hayden to Judge Steven González on January 7, 2008.

The City of Seattle filed a motion for summary judgment of all claims on February 8, 2008, stating that all claims were time-barred, and should be dismissed (CP191-209). On March 7, 2008 Judge Steven González wrote an order dismissing the inverse condemnation claim (CP 413), but clearly stated:

The only claims extant in this case are the continuing tort claims, which include B-F, to the extent that plaintiff is able to segregate damages;

Six of the eight original claims survived this order.

Plaintiffs' attorney Karen Willie filed a second complaint for damages against the City of Seattle on May 27, 2008. The cause of action was inverse condemnation. The alleged damage was a diminution in value of the plaintiffs' residence as a result of the design of the Meadowbrook Outfall Rehabilitation Project. The cause of this damage was alleged to be inadequate repairs of the broken concrete pipes at the Meadowbrook Outfall. This case, King County Superior Court cause 08-2-17862-5, was heard before Judge Douglas McBroom. On August 14, 2008, the City of Seattle described this case as "related litigation" (CP 1321):

To be clear, the City is not withholding responsive documents. In the related litigation, involving the same parties, same counsel and same subject property (No. 08-2-17862-5 SEA), the City has previously produced non-privileged documents that are responsive to plaintiffs' Requests for production.

A motion for summary judgment filed by the defendants in that case was denied in an order entered January 9, 2009.

On October 16, 2008 plaintiffs' attorney Karen Willie filed a motion for continuance of trial (CP 922-935), to permit discovery into the inverse condemnation claims arising from increased storm water flows directed to the Meadowbrook Outfall as a result of the City's Meadowbrook Diversion Pond Project. In the proposed order submitted with this motion, Ms. Willie left the new trial date to the Court's discretion. The City responded with an Opposition to Plaintiffs' Motion For Continuance on October 22, 2008 (CP 3655-3669), relying on a 133 page Declaration of David N. Bruce (CP 3498-3630). In this motion, the City brought to the attention of the trial court Ms. Willie's difficulties with the conflicting schedule of another matter, *Ketter v. King County*, Superior Court Cause 07-2-22992-2. The Ketter case was originally scheduled for trial December 29, 2008, two weeks after the trial date set for this case. The City alleged that Ms. Willie's scheduling issues, not the need for further discovery on the claim of inverse condemnation, were the roots of her Motion for Continuance. In a footnote (CP 3659), the City accused Ms. Willie of misleading at least two judges. The City pointed out the expense of litigation in this matter and paradoxically, expressed their fear of not having enough time for discovery:

Granting a continuance only will increases (sic) the expense of this matter and complicate efforts to resolve it. A continuance will prejudice the City in two ways. First, the City already has diligently conducted the depositions of the plaintiffs and some of the plaintiffs' key experts. We anticipate that if a continuance is granted, plaintiffs will re-formulate their case without allowing the City an opportunity to discover the case as re-formulated in an effort to gain the advantage of surprise. In addition, and significantly, a continuance will increase the expense to the City attendant in resolving this matter. The City is currently spending a significant sum every week in discovery and trial preparation. A continuance will drive up the total cost of defense.

In reply, the Declaration of Karen Willie (CP 988-993) complained of “character assassination” on the part of the City, but brought forth another case that her law firm was handling, *Steel v. Havre*, Superior Court cause 07-2-22385-1, which was originally scheduled for trial on December 22, 2008. Ms. Willie stated that this case was positioned for mediation, and trial dates would not conflict. Her statement has not borne out by the facts; trial has been rescheduled three times, to June 1, 2009, September 21, 2009 and May 10, 2010.

On October 23, 2008, Judge González signed the City of Seattle’s Stipulation and Order Modifying Case Schedule, extending the discovery cutoff deadline from October 27, 2008 to November 14, 2008. The original trial date of December 15, 2008 was preserved.

The extended discovery deadline and an order by Discovery Master Terrence A. Carroll (CP 1330-1331) did not reduce discovery disputes between the parties’ attorneys. In the deposition of David Hartley (CP 1332-1334) taken November 12, 2008, plaintiffs’ attorney Karen Willie complains:

Second, that we have been hamstrung yet again by not getting documents in a timely manner ...

This protest was repeated the next day at the deposition of Glenn Hasegawa (CP 1255):

Q: We also sent you a subpoena duces tecum because we’ve had difficulty getting any records from the City. Have you brought any records with you here today?

A: I brought a box of items that I thought might be helpful today to answer some questions.

Q: And on the record, we got 12 DVD’s last night and I don’t know how many hundreds of pages of documents. One of the DVD’s numbered City production 3564 is totally corrupt, and we

cannot open it. I have before me a box that is a banker's box size that is jammed full of documents. And Mr. Hasegawa, are there emails in this box?

A. Some, yes.

On November 25, 2008 Judge González signed an Order Granting City of Seattle's Motion for Partial Summary Judgment, which stated:

Plaintiffs' only remaining claims in this case are continuing tort claims.

On December 5, 2008 the Court issued an Order Re-Setting Trial and Pretrial Deadlines (CP 1651). The new date for trial was set six months later to accommodate the schedules of Judge González and the attorneys (CP 1661):

4. That Order set this matter for trial on June 1, 2009, the earliest date on which all counsel and the Court were available for a trial of the length contemplated by all parties.

In contrast to their opposition of October 22, 2008, the City was silent on the additional expense that would be borne by all parties as a result of continuing the trial by six months.

Karen Willie filed her notice of withdrawal on March 30, 2009 (CP 1623-1624). The City objected, not to the withdrawal, but to further delay (CP 1625) and requested that no further continuance be allowed.

The case went to trial on June 1, 2009. After three weeks of trial, the jury answered "No" to the first question on the Special Verdict Form:

Did the plaintiffs prove by a preponderance of the evidence that the City was negligent?

A "no" to this question is not the same as finding that the City was not negligent, as the City asserts in the Respondent's Brief. Rather, it is simply a measure of how well a pro se plaintiff, with three weeks to prepare for trial, will fare against a team of seasoned attorneys in court.

B. Factual Background

Appellants Robert B. Struthers and Vitezslava Otrubova reside directly south of the Meadowbrook Outfall, a structure constructed in the early 1950s by the Lake City Sewer District. Seattle Public Utilities redeployed the Meadowbrook Outfall through the construction of the Meadowbrook Detention Pond (CP 318). This project diverted storm water from Thornton Creek to the Meadowbrook Outfall at two points:

1. a high-flow diversion structure built on Thornton Creek, and
2. an overflow riser on a concrete pipeline which connects to the outfall structure.

This modification of the original design changed the public good provided by the system, from conveyance of treated sewage for Lake City residents to storm water detention and flood control for the Thornton Creek watershed. Sunchasers, Inc. was retained to inspect the outfall site in December 1998 (CP 292). A weir system within a control structure at Riviera Place NE prioritized flow between the 90” pipe and a 30”, 42” and 48” pipe (CP 867). In their December 7, 1997 report, Sunchaser Inc’s divers observed no signs of flow at the underwater lake end of the 42” and 48” pipe (CP 293, 295). Flow was only detected at the 30” pipe (CP 294).

Deliberate actions over the years by Seattle Public Utilities engineers responsible for the design of the Meadowbrook Diversion Pond led to a multi-million dollar rehabilitation project (CP 2968-2969). The criteria for measuring success of this project (CP 320) was specified to be:

Proposed design alternative eliminates exfiltration of storm water from the concrete portions of the outfalls and defective sections of CMP outfalls.

The rehabilitated Meadowbrook Outfall has not met its success criteria. Storm water leaking from this outfall during storm events still continues to damage the property of its neighbors to the south.

In their Respondent's Brief, the City of Seattle's provides a clear, concise description of the components of the complex system that brings water from Meadowbrook Pond to Lake Washington at the Meadowbrook Outfall. However, the City neglects to mention Thornton Creek, which drains more than eleven square miles of Seattle and Shoreline, and is the sole source of water feeding the Meadowbrook Diversion Pond. It is only in this larger perspective that the extent of the good provided to the public by the Meadowbrook Outfall can be understood, and the damaging power of the storm water diverted to this facility be realized.

The damage inflicted by the rehabilitated Meadowbrook Outfall is permanent. The City needs the bypass pipeline to address flooding on Thornton Creek. Recent litigation brought against the City of Seattle by residents living by Thornton Creek (King County causes 09-42593-1 and 10-2-05089-2) reinforce that need.

C. Design of the Meadowbrook Outfall

The Meadowbrook Outfall Rehabilitation Project was designed to continue to divert storm water from Thornton Creek to Lake Washington. The beneficial uses of this project to the public were weighed every step of the way, from feasibility study to capital approval to construction and closeout. The rehabilitated structure, **as originally designed**, would not have damaged the bulkhead, yard and residence owned by Vitezslava Otrubova and Bruce Struthers (CP 319-320). The project as first proposed would have replaced all pipes between Riviera Place and the outfall on

Lake Washington. The only aspect not addressed in the original project plan was a replacement of the weir within the Riviera Place control structure, which determined the priority of flows to the 30", 42" and 48" concrete pipes.

The structure that **was** constructed, after several design iterations, under increasing budget and permitting time pressure, is deficient and continues to damage the Appellants' property. The rehabilitated structure has one less outfall pipe (CP 2969), unrepaired cracks in concrete pipes underground which are more likely to be surcharged (CP 992), and no repair of the shared bulkhead. The cause of continuing damage to Ms. Otrubova and Mr. Struthers is clearly stated in the declarations of Bruce Blyton (CP 387-393), Jeffrey Laub (CP 430-458) and Richard Hagar (CP 1030-1056). This Court has not seen fit to admit new photographic documentation of the recurrence of sinkholes one day after a major rain on October 17, 2010.

D. History of the Rehabilitation Project

The timeline that follows documents the history of the project through a series of project deliverables and correspondence between project staff. It shows that Seattle Public Utilities was aware of problems at the Meadowbrook Outfall since the Meadowbrook Detention Pond was constructed, and considered projects to avoid damage from this facility.

October, 1998

A 10 foot by 10 foot sinkhole appears along the 90" concrete pipeline in the front yard of 10515 Exeter Avenue, one block west of Riviera Place (CP 1310-1313).

December 7, 1998

Robert Peraino, Field Operations Manager for Sunchasers, Inc, described conditions at the outfall in a memorandum to Chollada Yesuwan (CP 292):

The concrete structure appears to have been poured over concrete pipes to anchor them. There is approximately 8” of concrete pipe visible on each outfall, extending out to that concrete structure and the CMP pipes are clamped over them. It is apparent that the concrete structure was poured in place. The lower half of the structure exhibits signs of concrete being poured underwater without being properly tremied in place to prevent air and water entrainment. There are numerous voids and loose aggregate visible.

February 5, 2004

Herrera Environmental Consultants prepared a report (CP 42-75) for Seattle Public Utilities in response to conditions observed by Vitezslava Otrubova during a storm on October 20, 2003 (CP 2871-2874). The report (CP 52) describes conditions within the control structure at Riviera Place NE:

The structure appears to be in good shape with no visible deterioration or cracking of the exterior concrete, however the structure was not entered nor examined on the inside. Those areas of the structure that are visible from the manhole appear to be in good condition. From the view down the manhole it appears that a weir was removed from the structure. A mastic or Epoxy type coating/sealing was seen in the bottom of the structure suggesting that the weir was jack hammered out and the flow channel was modified.

Conditions at the outfall at that time show deterioration of the concrete outfall structure:

The stormdrain pipes exit the City of Seattle property and pass through a mass-poured concrete seawall prior to entering Lake Washington (Figures 4, 5, and 9). The seawall is a concrete structure with four steps down to the east and a concrete masonry unit (CMU) retaining wall to

the west of the top step. The structure drops approximately 9 feet 6 inches from street level elevation and is 35 feet 2 inches wide.

...

Measurable scour is present under the bottom step in the vicinity of the three pipes. The scour extends greater than 24 inches under the structure. At the connection to the concrete stubouts, the corrugated metal pipes are suspended 3 to 6 inches above the lake bottom sediment.

Herrera engineers observed the rapid pace of development of sinkholes in the Otrubova-Struthers yard, directly south of the 48" pipe:

Evidence of scour and sinkholes were observed at the residence directly south of the City Easement (10514 Riviera Place NE) during the inspection on December 8, 2003. On December 18, 2003, a sinkhole was observed in the yard approximately 10' northeast of the foundation of the residence (Figures 26a and b). This sinkhole was not visible 10 days earlier during the initial diving inspection. The sinkhole is approximately 10 inches in diameter on the surface and is approximately 4 feet deep. The subsurface dimensions are irregular but volume of the void is estimated at 1.5 to 2 cu yards.

Engineers at Herrera Environmental Consultants concluded their report (CP 72) with this warning:

The December 2003 inspection has identified significant issues with the outfall pipes that are deleteriously affecting the substrate underlying the pipes and nearby seawall. The damage resulting from these newly identified holes is not contained and is likely to increase in magnitude if not arrested.

In addition to finding new damage to the pipes, there is evidence suggesting ongoing damage to the seawall, CMU wall and *adjacent properties* is not related to the underwater portion of the outfalls. This damage includes cracking of both the seawall and CMU wall, settling of the seawall, scour/undermining of the seawall and several sinkholes that have appeared in the fall of 2003. The newly identified damage is localized to both the zone between the upgradient structure and the seawall and the first 30 feet of

outfall pipe in Lake Washington. Due to the unknown source of this continuing damage further inspection of the pipes and structures was recommended.

July 2, 2004

Ms. Otrubova retained the services of Geotechnical Engineers HWA Geosciences, Inc. (CP 2874-2875). Engineers Thomas C. Kinney and Steven E. Green prepared a report that categorically stated:

It is obvious that the broken City outfalls are the direct cause of this damage and you should be able to get relief from them on this issue.

The credentials of these two experts are beyond reproach. They were technical reviewers of the August 16, 2007 *Best Available Science Report for Peat Settlement-prone Geological Hazard Areas*, which was included by reference into Seattle City Ordinance 122738.

May 11, 2005

Correspondence (CP 314) between Robyn Kelly and Lilin Li, Project Manager, acknowledges that the City is exposed to litigation as a result of the damages resulting from the Meadowbrook Outfall and recommend. The liability of Seattle Public Utilities is clearly acknowledged in a project background statement (CP 372-375) that called out project objectives. Edits (CP 324) to the June 2005 Project Development Plan (PDP) made by Glenn Hasegawa, supervising engineer responsible for the Meadowbrook Detention Pond, attempted to soften and diffuse clear statements of liability contained within this document.

June 8, 2005

Project Development Plan 1 was presented to the Asset Management Committee on June 8, 2005 (CP 343). The statement of the problem to be solved with a potential Capital Investment Project was:

The primary objective of this PDP was to determine the most effective approach (based on triple bottom line analysis) to maintain the existing system function (i.e. to divert and convey flows during the 6-month storm event and above from the creek and pond to Lake Washington to prevent flood and habitat damage). The outfalls serve the majority of the Thomson Creek Basin. Avoiding failure of the outfall pipes and seawall will prevent or reduce potential risks associated with damages to both private and public properties.

The secondary objective of the PDP was to investigate the feasibility to increase the size of the outfalls and, thereby, increase the service level of this particular element of the bypass system. The upgrade of the outfall system would allow for a diversion of creek flows above and beyond what could already be accomplished given the available system capacity. (As noted above, the three outfalls as well as the 90-inch tunnel and outlet control structure have about 100 cfs of additional capacity based on previous modeling efforts. The "bottleneck" of the existing bypass system that prevents the diversion of additional creek flows is the 72-inch bypass pipe that transitions to the 90-inch tunnel.)

November 9, 2005

In response to the questions raised by the Asset Management Committee, Project Development Plan 2 (CP 329-344) was prepared and provided a detailed analysis of options available to Seattle Public Utilities. The discussion of schedule emphasized a concern for moving forward quickly to avoid possible permitting issues (CP 343).

July 7, 2007

Contractor Richard Phillips is given a notice to proceed and begins construction on the site of the Meadowbrook Outfall. Several "unanticipated conditions", such as concrete underwater on site, voids over joints in the concrete pipes (CP 450-459), and asbestos in the corrugated metal pipes, are discovered during construction.

December 2-3, 2007

A large rainstorm caused flooding in several areas bordering Thornton Creek around Meadowbrook Pond (CP 1525). Nathan Hale High School was flooded and closed for a week. Mr. Struthers called Seattle Public Utilities on the afternoon of December 2, 2007, when bubbles and geysers of water were observed along the replaced outfall pipes. Associate Director Trish Rhay returned the call and promised to send engineers to the site the next day. By the time the engineers, and contractor Richard Phillips returned to the site, the bubbles had stopped.

February 23, 2009

Following the advice of engineer Bruce Blyton, Bruce Struthers excavated a trench, two feet wide by over three feet deep, along the south side of the bulkhead where the sinkholes have appeared in the past. Two large cedar logs, running north and south in line with the outfall's concrete gravity bulkhead (CP 364, 366), are uncovered. Directly north to the end of these cedar logs is the "wing wall" component of the Meadowbrook Outfall. The uncovered cedar logs are the remains of a timber bulkhead constraining the original shoreline, which was removed on the City's property and replaced by the concrete gravity bulkhead (CP 2970).

October 18, 2009

Sinkholes re-appear in the Otrubova-Struthers yard. These sinkholes gradually increase in size with each rain heavy enough surcharge the two remaining pipes at the Meadowbrook Outfall.

IV. ARGUMENT

A. The Claim of Inverse Condemnation Should Stand

Seattle Public Utilities has known about problems with the Meadowbrook Outfall at least since June 1998. Over a period of ten

years, various engineering solutions were designed and proposed to the SPU Asset Management Committee for approval as a Capital Improvement Project. The broken concrete pipes that leak under pressure were considered for replacement, or lining with carbon fiber. Seattle Public Utilities engineers performed a detailed analysis of the risk of implementing any solution, including doing nothing. The results of these analyses were presented time and time again to senior management of Seattle Public Utilities, including former director Chuck Clarke, and current director Ray Hoffman. While Seattle Public Utilities deliberated for ten years over what to do about the Meadowbrook Outfall, the property directly to the south continued to sustain damage. The project that was eventually approved and constructed, for the public good, did not replace or line the broken concrete pipes underground, and did not erect a permanent bulkhead to protect the Otrubova-Struthers property (CP 1285).

Seattle Public Utilities needs the Meadowbrook Outfall to continue to divert the majority of storm water flows from Thornton Creek to Lake Washington.

B. Relevant Decisions and Opinions

In *Mayer v. City of Seattle*, 10 P. 3d 408 – (Wash: Court of Appeals, Div. 1 2000) the court found:

In cases where a delay occurs between the injury and the plaintiff's discovery of it, the court may apply the **discovery rule**. *Crisman*, 85 Wash.App. at 20, 931 P.2d 163. The **discovery rule** will postpone the running of a statute of limitations until the time when a plaintiff, through the exercise of due diligence, should have discovered the basis for the cause of action.

The cause of the damage to the Otrubova home, yard and deck was diverted storm water from the leaking 48” concrete pipe eight feet to the

north of the appellants' residence. The gap in two segments of these pipes was not discovered until the plaintiffs' attorney was allowed to see the videotapes made of these pipes at the start of construction of the Meadowbrook Outfall Rehabilitation Project. Two distinct orders from Judge Michael Hayden, and a change of defendant's counsel, were required before plaintiffs were allowed to see this critical videotape documenting the actual cause of damages. In all deference to Judge González, the court erred in ordering that the discovery rule did not apply. The claim of inverse condemnation should have been allowed to stand.

The City of Seattle does not see that Washington case law holds it liable for inverse condemnation. The argument presented before Judge González is laid out in CP 1057-1069 and the Appellants' brief. Recent case law in California supports the assertion that the conduct of Seattle Public Utilities in the execution of the Meadowbrook Outfall Rehabilitation Project results in liability for inverse condemnation.

The decision from *Arreola v. County of Monterey, 99 Cal.4th 722 (2001)* invokes the performance of Seattle Public Utilities in rehabilitation of the Meadowbrook Outfall:

We conclude that in order to prove the type of governmental conduct that will support liability in inverse condemnation it is enough to show that the entity was aware of the risk posed by its public improvement and deliberately chose a course of action - or inaction - in the face of that known risk

Knowing that failure to properly maintain the Project channel posed a significant risk of flooding, Counties nevertheless permitted the channel to deteriorate over a long period of years by failing to take effective action to overcome the fiscal, regulatory, and environmental impediments to keeping the Project channel clear. This is

sufficient evidence to support the trial court's finding of a deliberate and unreasonable plan of maintenance.

State diversion or obstruction of surface water onto land "not historically subject to flooding" is not protected by reasonableness rule, but results in strict liability. The Meadowbrook Outfall is thousands of feet away from Thornton Creek and separated from the creek by the Sand Point Ridge. Seattle Public Utilities diverted a majority of storm water flows from Thornton Creek to Lake Washington at the Meadowbrook Outfall. In rehabilitating the Meadowbrook Outfall, the City evaluated design options that included replaced or lined concrete pipe, and a permanent wall to protect the property to south. The project team proposed, and the Asset Management Committed approved, construction plans that did not afford the same level of protection to Vitezslava Otrubova and Bruce Struthers. As a result, the Otrubova-Struthers residence continues to be subjected to flooding, so that residents adjacent to Thornton Creek, and downstream from Meadowbrook Pond, do not. The City of Seattle should be held liable for inverse condemnation.

The City's deliberate actions are similar to those of the City of Palo Alto in *California State Auto Assn. Inter-Insurance Bureau v. City of Palo Alto* (2006) 138 Cal. App. 4th 474.

Inverse condemnation lies where damages are caused by the deliberate design or construction of the public work; but the cause of action is distinguished from, and cannot be predicated on, general tort liability or a claim of negligence in the maintenance of a public improvement. (Citations.) But damage caused by the public improvement as deliberately conceived, altered or maintained may be recovered.

While the trial court found that neither tree roots nor inadequate slope caused the sewage backup into the McKennas' home, and that the City had a regular program

of maintenance for the sewer, it also found that the *blockage occurred in the main owned and operated by the City*. The purpose of the sanitary sewer is to carry wastewater *away* from the residence. The City's sanitary sewer failed to carry wastewater away from the McKennas' residence *because* of a blockage in the City's main, and therefore, failed to function as intended.

We believe that where, as here, there were three substantial factors in causing the sewage backup, namely, tree roots invading the porous clay pipe of the sewer main, inadequate slope, and standing water in the main, the burden should shift to the public entity to produced evidence that would show other forces alone produced the injury.

A recent analogous case is *Drake v. Walton County*, 6 So.3d 717 (2009) heard before the District Court of Appeal of Florida, First District. In this case, Walton County reconfigured drainage from an outflow of Oyster Lake and diverted water through the property of William R. Hembly and Patricia S. Hembly. This action was taken to alleviate flooding of other property caused by rising water in Oyster Lake. The appellate court stated:

Government cannot choose to act and protect one property owner by diverting floodwater onto the property of another without compensating that property owner.

and continues:

We have previously held that a county takes private property when it directs a concentrated flow of water from one property onto another, permanently depriving the owner of all beneficial enjoyment of their property. *Leon County v. Smith*, 397 So.2d 362, 364 (Fla. 1st DCA 1981); *Martin v. City of Monticello*, 632 So.2d 236, 237 (Fla. 1st DCA 1994). To assert an inverse condemnation claim based on such governmental action, the property owner must demonstrate that the government's action constitutes a substantial interference with her private property rights for more than a momentary period, and will be continuous or reasonably expected to continuously recur, resulting in a substantial deprivation of the beneficial use of her property. *See Elliott v. Hernando County*, 281 So.2d 395, 396 (Fla. 2d DCA 1973) (noting that "rain is a

condition that is reasonably expected to continually re-occur in the future)"; *Assoc. of Meadow Lake, Inc. v. City of Edgewater*, 706 So.2d 50 (Fla. 5th DCA 1998);

The same argument carries through to this case. The purpose of the rehabilitated Meadowbrook Outfall was to carry storm water away from Thornton Creek. By removing the weir in the control structure on Riviera Place (CP 1278), and not replacing it, Seattle Public Utilities caused all three concrete pipes to carry water that was to be carried by the 30" pipe (CP 1279) in the original design. By plugging the 30" pipe, Seattle Public Utilities ensured that more water would be flow through the 42" pipe, and the 48" pipe closest to the Otrubova-Struthers residence. By not lining or replacing the 48" pipe, after being presented with the videotaped evidence of breaks in this pipe and large "unanticipated" voids at the joint closest to their neighbor's residence, Seattle Public Utilities designed a system that was guaranteed to continue to damage that residence. One event of damages caused by the City's negligence sounds in tort. The City has not repaired the admitted source of exfiltration from concrete pipes that surcharge during storm events. As in Florida, rain is a condition that is likely to continually re-occur in the future. The burden shifts to Seattle Public Utilities to show what other forces could produce the sinkholes that continue to appear after each winter's heavy rains.

C. The Prejudicial Withdrawal of Karen Willie

To say that this litigation was contentious is an understatement. The very first motion filed by plaintiffs' attorney Karen Willie accused the City with spoliation. Discovery disputes dominated the proceedings throughout. Federal Civil Rule 26 was amended in December 1, 2006. Notes of the amending committee state:

Rule 26(f) is also amended to direct the parties to discuss any issues regarding preservation of discoverable information during their conference as they develop a discovery plan.

Rule 26(f) expands the list of issues that must be discussed as a part of the meet and confer process, and includes a requirement that parties develop a discovery plan that addresses issues relating to the discovery of electronically stored information – including the form or forms in which it will be produced. It also requires parties to discuss any issues relating to the preservation of discoverable information, and address issues relating to claims of privilege or work product protection.

This did not happen. The subsequent appointment of a discover master on August 23, 2007 did not produce a cooperative working relationship between opposing counsel that Federal Rule 26 recommends. Judge González did not intervene in the continuing discovery disputes and cross-allegations of spoliation that dominated these proceedings. The only party prejudiced by this melee in before Judge González' were the plaintiffs and the taxpayers of the City of Seattle, who incurred considerable legal fees. Even Defense Counsel David Bruce expressed concern for the plaintiffs:

This concern for the welfare and understanding of the client is particularly apt here, for two reasons. First, counsel proposes to withdraw a few weeks before a long-scheduled jury trial, creating the prospect that her clients may elect to proceed without representation.

This concern was well founded. The pro se plaintiffs had no understanding of what options were before them. Instead of filing for a continuance, an avenue they interpreted as blocked by the May 8th order, with no time or remaining financial resources to retain professional

representation, Vitezslava Otrubova and Robert Struthers proceeded to prepare for trial.

The City of Seattle cited the case of *Hansen v. Wightman*, 14 Wn. App. 78, 96 (1975):

Washington lawyers do not have an unfettered right to withdraw. To the contrary:

When a lawyer contracts to perform professional services for a client, he is required to carry the matter through to completion unless there is good cause for withdrawal. A decision to withdraw should be made only because of compelling circumstances and with consideration of the possibility of prejudice to the client as a result of the withdrawal.

Karen Willie did not present compelling circumstances for her withdrawal, but did indicate that these circumstances, including a “confidential discussion with counsel for the City” (CP 1673), would be prejudicial to her clients. She disavowed the existence of a fee dispute (CP 1679), yet insisted on being around to negotiate any possible pre-trial settlement (CP 1634). Judge González did not consider, or adequately weigh, the possibility of prejudice to the plaintiffs, and erred in allowing the untimely withdrawal of Karen Willie.

V. CONCLUSION

The claim of inverse condemnation against the City of Seattle should stand. The court also erred in granting the plaintiffs’ attorney’s motion for leave to withdraw, while prohibiting a continuance of trial. Robert B. Struthers and Vitezslava Otrubova respectfully request that:

- i) the inverse condemnation claim be restored,
- ii) summary judgment on inverse condemnation be awarded to Bruce Struthers and Vitezslava Otrubova,

- iii) compensation for damages resulting from diminution of value
be awarded to the appellants, and
- iv) attorney and expert fees be awarded to the appellants.

If this Court does not agree, the appellants respectfully request that this case be remanded back to trial.

DATED this 16th day of April, 2010.

By: *Robert B. Struthers*
Robert B. Struthers, pro se