

**NO. 66156-6
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON,
DIVISION I**

**CRYSTAL LOTUS ENTERPRISES, LTD.,
a Washington State Corporation,**

Appellant/Respondent,

v.

**CITY OF SHORELINE, a municipality organized under the laws of
the State of Washington, and CITY OF LAKE FOREST PARK, a
municipality organized under the laws of the State of Washington,**

Cross-Appellants/Respondents.

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REPLY BRIEF OF THE CITIES/CROSS-APPELLANTS

**Stephanie E. Croll, WSBA #18005
Keating, Bucklin & McCormack, Inc., P.S.
800 Fifth Avenue, Suite 4141
Seattle, WA 98104
(206) 623-8861
Attorneys for Appellants/Respondents
City of Shoreline and City of Lake Forest Park**

**Flannary P. Collins, WSBA #32939
Assistant City Attorney, City of Shoreline
17500 Midvale Avenue North
Shoreline, WA 98133-4905
(206) 801-222**

Attorneys for Cross-Appellant/Respondent City of Shoreline

**Bob C. Sterbank, WSBA #19514
Kenyon Disend PLLC
11 Front Street South
Issaquah, WA 98027-3820
(206) 392-7090**

Attorneys for Cross-Appellant/Respondent City of Lake Forest Park

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I. INTRODUCTION

The Cities filed a cross appeal of the trial court's decision to deny their Motion to Strike Inadmissible Evidence.¹ CP 129. Whether denominated as a motion to strike or objection to admissibility of evidence, it is clear that a court may not consider inadmissible evidence when ruling on a motion for summary judgment. *King County v. Housing Auth.*, 123 Wn.2d 819, 826, 872 P.2d 516 (1994). Because Appellant Crystal Lotus has based its appeal on the same inadmissible evidence it submitted to the trial court, the Cities filed this cross appeal to preserve their continuing objection to such evidence.

II. DISCUSSION

Appellant responded to the Cities' cross appeal by arguing that even if its declarations and attached exhibits are technically inadmissible, the Appellate Court (and presumably the trial court) can take "judicial notice" that "water flows downhill."² Because of this, Appellant claims,

¹ The Cities acknowledge that their motion might be more properly characterized as an objection to the admissibility of evidence, as it was raised in connection with a motion for summary judgment. *See, e.g., Cameron v. Murray*, 151 Wn. App. 646, 658, 214 P.3d 150 (2009). Allowing parties to preserve evidentiary objections by asserting them in responsive pleadings, instead of by filing separate motions, is currently proposed as a welcome change to King County Local Rule 7(b)(6). When the Cities filed their motion, however, they were working with the processes and procedures available to them at the time.

² Appellant's Reply, p. 11.

its motion for summary judgment should have been granted and the Cities' motion for summary judgment should have been denied.

Pursuant to ER 201(a)-(d), courts can take judicial notice of certain adjudicative facts, but only when strict criteria are met. *Cameron v. Murray*, 151 Wn. App. 646, 658, 214 P.3d 150 (2009). Here, Appellant did not meet this criteria; Appellant did not even analyze this criteria in an effort to make this showing. For instance, ER 201 provides as follows:

A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

ER 201(b) (emphasis added).

Here, Appellant wants the court to take judicial notice of practically every fact asserted by it, including the ultimate facts at issue in this case. (Appellant's Reply, pp. 11-15.) But these facts are clearly "subject to reasonable dispute" and are not "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." For instance, Appellant asserts that after the court reviews "the video attached as Exhibit D to the declaration of Vinish Gounder," then the court can take judicial notice of a "diversion point" in the City of

Shoreline's storm water drainage system.³ But the video itself is inadmissible hearsay. The court cannot take judicial notice of the video, as Vinish Gounder's unsworn testimony does not fit the definition of a "source whose accuracy cannot reasonably be questioned" as required under ER 201(b). Accordingly, the court cannot take judicial notice of any information contained in the video, either.

Furthermore, even if the video were admissible, whether or not there is a "diversion point" (as this term is used by Appellant) is disputed in this case; *i.e.*, did the Cities ever unlawfully "divert" surface water from its natural flow onto the Appellant's property? The video does not answer this question. The video does not show the historical flow of water in the area, and it does not show that the Cities ever "diverted" the flow of water (much less diverted it within the past 10 years); both of which Appellant would be required to prove – as an initial matter – to establish liability against the Cities under either inverse condemnation or intentional trespass.

What's more, although Appellant has asserted claims against the Cities for damages based upon inverse condemnation and intentional trespass, its arguments for liability are all improperly based upon a theory of "strict liability." For instance, Appellant asserts that simply because

³ As set forth in the Cities' first brief, the City of Lake Forest Park does not own, operate, or control the drainage system at issue in this lawsuit.

municipal water is flooding its property, the Cities must be liable for all damages caused thereby. But this assertion is not correct. The fact that a City owns and maintains a stormwater drainage system does not make it strictly liable for damages allegedly caused by flooding from the system. *Hughes v. King County*, 42 Wn. App. at 781-82. In sum, Appellant has not proven the elements necessary to establish liability under either inverse condemnation or intentional trespass by water.

With regard to Appellant's claim for inverse condemnation, it is undisputed that the stormwater drainage system was installed by King County some time before 1962, and has not been materially or substantively altered since that time. CPs 202-210. It is also undisputed that Appellant did not obtain an ownership interest in its property until 2004. CPs 162-186. Thus, Appellant obtained an interest in its property at least 42 years after the pipe at issue in this case was installed on its neighbor's property. Based upon *Hoover v. Pierce County*, 79 Wn. App. 427 (1995), Appellant's takings claim is barred as a matter of law. Appellant has failed to address, much less distinguish, *Hoover*. Even if the court views all of Appellant's evidence as admissible, in the light most favorable to Appellant, its takings claim is barred as a matter of law.

The undisputed facts cited in the paragraph above also dispose of Appellant's intentional trespass claim. First, it is undisputed that the

Cities have taken no affirmative act to direct water toward Appellant's property. The most Appellant can allege is that the Cities have not blocked the flow of water onto its neighbor's property (a flow that has existed for half a century). But failure to act cannot support a claim for intentional trespass. *Price v. Seattle*, 106 Wn. App. 647, 660, 24 P.3d 1098 (2001).

Finally, we reach the proximate cause issue. Even if the court takes judicial notice of the fact that water runs downhill, this case is not about surface water, but groundwater. And groundwater does not always run downhill. For instance, it is also true that water will travel along the path of least resistance. If water flowing downhill hits a wall (or some other impermeable surface), then it may stop or travel along the wall – which may, in fact, cause it to run uphill – but it will not go through the wall. Appellant does nothing more than speculate when it asserts, via lay witness declarations, that water from its neighbor's property (lot 8) travels to Appellant's property (lots 6 and 7) underground, then floods Appellant's property on the surface. Only a person with expertise in groundwater transmission who, in addition, has performed an examination of the site, can accurately state whether any water from lot 8 travels underground to lots 6 and 7. Appellant's speculative comments otherwise

are inadmissible and cannot be used to support Appellant's request for entry of an order of summary judgment against the City.

III. CONCLUSION

As an initial matter, the Cities respectfully ask the Court of Appeals to affirm the trial court's order granting the Cities' cross-motion for summary judgment and dismissing this lawsuit with prejudice. In rendering that order after denying the Cities Motion to Strike, the trial court implied that even viewing all the facts alleged by Appellants in the light most favorable to them, the Cities were still entitled to judgment of dismissal as a matter of law.

On the other hand, Appellant has appealed the trial court's order of dismissal, and based its appeal on the same inadmissible evidence it submitted to the trial court. The Cities continue to object to Appellant's inadmissible evidence. In conclusion, the Cities request that the trial court's order dismissing the lawsuit be affirmed and that the City's Motion to Strike Inadmissible Evidence be granted.

DATED this 15th day of April, 2011.

KEATING, BUCKLIN & McCORMACK,
INC., P.S.

Stephanie Croll

Stephanie E. Croll, WSBA #18005
Attorneys for Cross-Appellants/Respondent

CITY OF SHORELINE

Flannery Collins, sec per approval

Flannery P. Collins, WSBA #32939
Assistant City Attorney, City of Shoreline
Attorney for Cross-Appellant/Respondent
City of Shoreline

KENYON DISEND, PLLC

Bob Sterbank, sec per approval

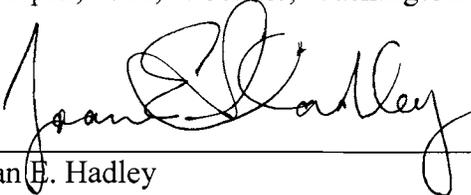
Bob C. Sterbank, WSBA #19514
City Attorney, City of Lake Forest Park
Attorneys for Cross-Appellant/Respondent
City of Lake Forest Park

DECLARATION OF SERVICE

I hereby declare under penalty of perjury under the laws of the State of Washington that the following is true and correct, that on April 15, 2011, I served the *Reply Brief of the Cities/Cross-Appellants* on the following party of record via email and hand delivery:

Rand L. Koler
Rand L. Koler & Associates, P.S.
The Broderick Building, Penthouse Suite
615 Second Ave.
Seattle, WA 98104-2303
rand@kolerlaw.com

DATED this 15th day of April, 2011, at Seattle, Washington.



Joan E. Hadley