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

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STATE OF WASH
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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.

OPENING BRIEF OF THE CITIES/CROSS-APPELLANTS

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I. INTRODUCTION

Through lay-witness testimony, Appellant asserts the Cities have unlawfully diverted the flow of surface water toward its neighbor's property (lot 8) and, supposedly via groundwater, ultimately to its property (lots 6 & 7). First, there is no admissible evidence to support these bare assertions. Declarations containing only conclusory statements of fact and legal conclusions are insufficient to defeat a motion for summary judgment. *Snohomish County v. Rugg*, 115 Wn. App. 218, 224, 61 P.3d 1184 (2002). Appellant is under the misapprehension that if it simply asserts a factual allegation in a declaration, then it has raised an issue of fact with regard to that statement. This is not true. A trial court may not consider inadmissible evidence when ruling on a summary judgment motion. *King County v. Housing Auth.*, 123 Wn.2d 819, 826, 872 P.2d 516 (1994). Thus, even if this Court decides that the Cities' motion to strike inadmissible evidence was properly denied (as will be discussed herein), the Cities' motion for summary judgment was properly granted and should be affirmed on appeal.

Second, the bottom line in this case is that even if this Court considers Appellants speculative and inadmissible evidence and views the facts in the light most favorable to Appellant as the non-moving party, Appellant still cannot meet the elements of inverse condemnation or intentional

trespass as a matter of law, and its lawsuit against the Cities was rightly dismissed. In sum, Appellant's claims against the Cities are based upon a theory of strict liability; Appellant has asserted that if stormwater discharged on lot 8 ultimately reaches lots 6 & 7 (Appellant's property) and causes flooding thereon, then the Cities are liable for that flooding, period. Appellant is incorrect. As an initial matter, 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. Further, it is undisputed that co-defendant Lake Forest Park does not own, operate, maintain, or control the system at all and is not a proper party defendant in this lawsuit under any set of circumstances.

In conclusion, Appellant cannot establish liability against the Cities as a matter of law and the Cities' motion to dismiss was properly granted. Accordingly, the Cities respectfully request that the trial court's order of dismissal be affirmed by this Court on appeal.

II. ASSIGNMENT OF ERROR ON CROSS APPEAL

Did the trial court err when it denied the City's Motion to Strike inadmissible evidence, in full, without explanation or entry of findings?

III. STATEMENT OF THE CASE

A. Undisputed Facts.

Appellant Crystal Lotus Enterprises Ltd. is a for profit corporation which has an ownership interest in the property at issue in this lawsuit, two lots commonly referred to as lots 6 and 7. *CP 1*. This property is located in Lake Forest Park, Washington (hereinafter referred to as the “Property” or “lots 6 and 7”). *CP 2*.

Appellant asserted two claims against the Cities: (1) continuing trespass, and (2) inverse condemnation. *CP 4-5*. Appellant specifically claimed the Cities “channeled and discharged [water] on the land of a private person which then went into the ground thereby raising the water table and adversely affecting plaintiff’s lots 6-7, to its injury.” *CP 54* (emphasis added). Significantly, the “private person” to whom Appellant refers is neighbor Eric Gorbman. Mr. Gorbman owns lot 8, an undeveloped lot adjacent to Appellant’s Property. *CP 17*. The source of the water is a 17-18 inch municipal storm water drainage pipe that daylights on Mr. Gorbman’s property. *CP 18*.

For purposes of the Cities’ summary judgment motion, the Cities agree the Court should view the facts in the light most favorable to Appellant. Here, each declaration filed by Appellant makes clear that: (1) the outfall of the pipe is located on its neighbor’s property (Mr. Eric

Gorbman) – not Appellant’s property; and (2) water from the pipe on its neighbor’s property has gone into the ground, thereby raising the water table and adversely affecting the ability of Appellant’s lots to drain. Specifically, Don Koler, president of Crystal Lotus, stated:

After reviewing the aforementioned maps from the City of Shoreline, I realized the source of the unnatural or non-natural water that was pooling on lots 6 & 7 was from the stormwater discharge that the City of Shoreline and the City of Lake Forest Park were collecting and channeling and which was being **dumped on a neighbor’s [Mr. Gorbman’s] private property and that these unnatural or non-natural waters then went into the groundwater near the neighbor’s property thereby raising the water table in the lowest topographical points downhill including lots 6 & 7.**

CP 78-79.

Consistent with the foregoing, Eric Gorbman, the neighboring landowner, acknowledges that the pipe at issue is indeed located on his property (not Appellant’s), and that the water at issue is being discharged onto the surface of his property (again not Appellant’s). Mr. Gorbman stated as follows:

Over the years, I had been in contact with the City of Shoreline Washington regarding the **dumping of public stormwater onto my lot 8**, in which the City of Shoreline Washington described how they would eliminate the flooding of my lot 8 by the public stormwater. . . and eliminate the problem from the public stormwaters, which are being **dumped onto my property [lot 8]** and ultimately affects lots and lots [sic] 5, 6, 7, & 8A.

CP 20.

The storm water drainage system at issue here was installed sometime before 1962. *Sub No. 29.*¹ It was not until 42 years later, in December 2004, that Appellant acquired an ownership interest in the Property. At that time, it acquired lot 6 by way of statutory warranty deed, and acquired a real estate contract interest in lot 7. *Sub No. 27.*²

The record shows that the only change made to this system occurred almost 20 years ago, in 1992, when King County installed a culvert identified as storm main (STMN) #16564. *Sub No. 29.*³ Since King County's installation of STMN #16564 in 1992, no changes have been made to this portion of the stormwater system. *Id.*, ¶5. Finally, in 2007, at Mr. Gorbman's request, the City of Shoreline installed a gabion weir on his property, lot 8, below the outfall of the pipe. *Id.*, ¶6. Although Appellant has not alleged any liability against the Cities based upon the installation and/or existence of the gabion weir, this device is explained in the record. Gabion weirs serve as energy dissipaters during storm events; they successfully dissipate storm water energy. *Id.* Here, the gabion weir installed in 2007 does not alter the flow of water in the stormwater system nor does it change the amount of water reaching lot 8. *Id.* It simply slows down and diffuses the flow of water to lot 8.

¹ *Decl. Gilmore, ¶3, Exhibit A.*

² *Decl. Butler, Exhibits A and B.*

³ *Decl. Gilmore, Exhibit B.*

As an additional matter, it is uncontested that codefendant Lake Forest Park does not own, operate, maintain, or control any of the stormwater system at issue in this lawsuit. *Sub No. 28.*⁴ Instead, the stormwater system at issue here is located almost wholly within the City of Shoreline. *Id.*, ¶10. It then crosses over Shoreline's right-of-way and enters directly onto private property owned by the Gorbmans, where it outfalls. *Id.* Although the outfall is located within the City limits of Lake Forest Park (as Mr. Gorbman's property is within Lake Forest Park), it is absolutely undisputed that none of the system is located on, across, or over property that is either owned or controlled by the City of Lake Forest Park. *Id.*

Finally, although no liability against the Cities has been alleged as a result of the gabion weir, it's undisputed that co-defendant Lake Forest Park does not own, operate or maintain the gabion weir and outfall located on Lot 8. *Id.*, ¶9. All Lake Forest Park did with regard to the weir is issue a Sensitive Areas Work Permit to Shoreline on June 27, 2007 for its construction. *Id.*, **Exhibit C.** Lake Forest Park issued that permit solely in its regulatory capacity, and the gabion weir was installed on private property owned by the Gorbmans and not on any property owned or controlled by the City of Lake Forest Park. *Id.*, ¶9.

⁴ *Decl. Halverson*, ¶4.

B. Procedural Status.

Appellants sued the Cities for damages and injunctive relief based upon the theories of intentional trespass and unconstitutional takings.⁵ *CP 1-15*. Appellants then filed a motion for summary judgment, but only on their intentional trespass claim. *CP 53-74*. The Cities responded and filed a cross-motion for summary judgment to dismiss the lawsuit in its entirety, including both the intentional trespass and takings claims. *Sub No. 26*. Appellants responded to the Cities' cross-motion, relying mainly on previously filed declarations and exhibits. *CP 114-120*. The Cities filed a motion to strike inadmissible evidence with its reply. *Sub Nos. 35 and 37*. The trial court denied Appellant's motion and denied the Cities' motion to strike (*CP 129*), but granted the Cities' cross-motion to dismiss the lawsuit in its entirety. *CP 128-134*. Appellants filed this appeal. The Cities filed a cross appeal of the trial court order denying its motion to strike.

⁵ Likely recognizing that all negligence claims would be barred under the public duty doctrine, they did not assert any negligence-based claim against the City.

IV. ARGUMENT IN SUPPORT OF ORDER GRANTING
CITIES' MOTION TO DISMISS

A. Appellant's Lawsuit Against The City Of Lake Forest Park Was Properly Dismissed.

1. The City of Lake Forest Park does not own or control the stormwater system at issue in this lawsuit.

The City of Lake Forest Park asserted an individual cross-motion against Appellant which supports its complete dismissal from this lawsuit. In sum, it is undisputed that Lake Forest Park does not own, operate, maintain, or control any of the stormwater system at issue in this lawsuit. *Sub No. 28.*⁶ Instead, the stormwater system is owned and operated solely by the City of Shoreline. *Id.* For instance, the system is physically located almost entirely within the City of Shoreline. *Id.*, ¶10. When it crosses over Shoreline's right-of-way, it enters directly onto private property owned by Appellant's neighbors, the Gorbmans, where it outfalls. *Id.* Although the outfall is located within the City limits of Lake Forest Park, it is absolutely undisputed that none of the system is located on, across, or over property that is either owned or controlled by the City of Lake Forest Park. *Id.* A review of Lake Forest Park's ordinances annexing Appellant's and their neighbor's properties proves this fact.⁷

⁶ *Decl. Halverson*, ¶4.

⁷ Lot 7 was annexed on January 5, 1994, per Ordinance No. 564. *Decl. Halverson, Exhibit A (Sub No. 28)*. As shown by the legal description and map attached to Ord. 564, the western boundary of Lake Forest Park is the east line of the western 40 feet of

Both of Appellant's claims in this lawsuit (intentional trespass and unconstitutional takings) are based upon the location, ownership, maintenance, and/or control of this stormwater system. Because Lake Forest Park plays no role in the ownership, operation, maintenance, or control of the system, Appellant's claims against the City of Lake Forest Park necessarily fail.

Furthermore, Lake Forest Park does not own, operate, maintain or control the gabion weir on lot 8. All Lake Forest Park did was issue a Sensitive Areas Work Permit to Shoreline for installation of the gabion weir. Lake Forest Park issued that permit solely in its regulatory capacity and no liability can have attached based solely on issuing and approving permits. *Phillips v. King County*, 136 Wn.2d 946, 960-65, 968 P.2d 871 (1998).

The only response made by Appellant to the City of Lake Forest Park's cross motion was its assertion that just because Lake Forest Park

Lot 7. *Id.*, ¶6. The City did not annex any part of the right-of-way of 25th Ave. NE adjacent to Lot 7, and in fact did not annex any part of the western 40 feet of Lot 7.

Lot 6 was annexed on April 19, 1995 per Ordinance No. 627. *Decl. Halverson, Exhibit B . (Sub No. 28)* As shown by the legal description and map attached to Ord. 627, the western boundary of Lake Forest Park runs "SOUTH ALONG THE EAST MARGIN OF 25TH AVENUE NE TO THE SOUTHWEST CORNER OF LOT 6..." *Id.* Given this legal description, the City did not annex any part of the right-of-way of 25th Ave. NE adjacent to Lot 6. *Id.*, ¶7. Because Lake Forest Park does not include the right-of-way of 25th Ave. NE, it does not own, operate, or control the stormwater drainage system located in the 25th Ave. NE right-of-way. *Id.*, ¶8.

“does not own or maintain any portion of the drainage system at issue here, does not resolve whether the City of Lake Forest Park has control or other rights to the drainage system[.]” *CP 118* (emphasis added). This comment, unsupported by evidence or testimony, is mere speculation. What “control?” What “other rights?” This speculation is insufficient to defeat the affirmative testimony, by Lake Forest Park’s Aaron Halverson, that the “City of Lake Forest Park does not own, operate or control any of the stormwater system...” *Sub No. 28*.⁸ See, e.g., *Something Sweet v. Nick-N-Willy’s*, 156 Wn. App. 817, 823-24 (2010), where Division I upheld dismissal of the plaintiff’s material omission claim on summary judgment when, after the defendant submitted evidence and affidavits in support of its motion to dismiss, the plaintiff “failed to offer any evidence beyond mere allegations” that the defendant had ulterior motives: “[Plaintiff] claims that [defendant] no longer provides meaningful marketing . . . , **but it fails to support this conclusory assertion with evidence in the record.**” *Something Sweet*, 156 Wn. App. at 824 n.3 (emphasis added).

In sum, the stormwater system is located wholly on private property and on land owned by the City of Shoreline. None of the components of the stormwater system are located on property owned by

⁸ *Decl. of Halverson*, ¶4.

the City of Lake Forest Park, nor on property over which Lake Forest Park has an easement. Finally, Lake Forest Park does not own, operate, maintain, or control any portion of the system. For these reasons, Appellant's lawsuit against Lake Forest Park was properly dismissed.

2. The City of Lake Forest Park is entitled to an award of fees and costs pursuant to RAP 18.9 for a frivolous appeal.

An appeal is frivolous if, considering the entire record and resolving all doubts in favor of the Appellant, the Court is convinced that the appeal presents no debatable issues upon which reasonable minds might differ, and that it is so devoid of merit that there is no possibility of reversal. *Boyles v. Dept. of Retirement Sys.*, 105 Wn.2d 499, 506-07, 716 P.2d 869 (1986); *Fidelity Mortgage Corp. v. Seattle Times Co.*, 131 Wn. App. 462, 473-74, 121 P.3d 621 (2005).

Here, once Appellant learned that Lake Forest Park did not have any ownership interest in the system, nor any maintenance responsibility for the system, it should have dismissed Lake Forest Park from this case. At a minimum, this appeal against Lake Forest Park should never have been filed, and Lake Forest Park is entitled to its fees and costs incurred in having to defend against this frivolous appeal.

B. The Trial Court Properly Dismissed Appellant's Inverse Condemnation Claim.

The Washington Constitution provides that “[n]o private property shall be taken or damaged for public or private use without just compensation having been first made.” *Art. I, Sec. 16*. An inverse condemnation claim is an action alleging a governmental “taking” or “damaging” that is brought to recover the value of property which has been appropriated in fact, but with no formal exercise of the power of eminent domain. *Phillips v. King County*, 136 Wn.2d 946, 957, 968 P.2d 871 (1998).

“Ordinarily a grantee or purchaser cannot sue for a taking or injury occurring prior to his acquisition of title, but he may sue for any new taking or injury.” *Hoover v. Pierce County*, 79 Wn. App. 427, 433, 903 P.2d 464 (1995) *rev. den.*, 129 Wn.2d 1007 (1996). Only the person who owns the property at the time of the governmental act or injury that constitutes a taking can be heard to complain. “Because the right to damages for an injury to property is a personal right belonging to the property owner, the right does not pass to a subsequent purchaser unless expressly conveyed.” *Hoover*, 79 Wn. App. at 434, *citing Gillam v. Centralia*, 14 Wn.2d 523, 530, 128 P.2d 661 (1942).

In the present case, it is factually undisputed that Shoreline's storm water drainage system was installed sometime before 1962. It was not until 42 years later, in December 2004, that Appellant acquired an ownership interest in the Property. The facts and holding in *Hoover v. Pierce County, supra*, demonstrate why Appellant's takings claim in this case is barred. *Hoover* involved the drainage system of a road that Pierce County had constructed in 1928. *Hoover*, 79 Wn. App. at 428. While water from a nine-acre drainage area would naturally flow across the low areas of the northern lots of the property, it is undisputed that in 1928, the road was constructed in such a way that it channeled an additional 12 acres of water across the area. *Id.*, at 429. In 1972, the County installed a culvert at the low point of the road to allow water to flow under the roadway. *Id.* Flooding problems caused by the road and culvert became evident in 1978 and 1986. *Id.*, at 429-30. Plaintiffs subsequently purchased the property in 1988. *Id.*, at 428. Then, in November 1990 and April 1991, several large storms resulted in new floods on the plaintiffs' property. *Id.*, at 429. Because of these floods, plaintiffs sued the County for damages based on inverse condemnation, claiming that every new flood was a new "act" or "injury" by the County resulting in a new cause of action for takings. The *Hoover* court disagreed, holding that the only governmental act that could result in a taking had occurred before the

plaintiffs had purchased the property, when the road and/or culvert were first installed. *Id.*, at 428. The court specifically held that each time the plaintiffs' property flooded did not result in a new cause of action for unconstitutional taking. *Id.*, at 433-34.

The same analysis applies in this case. Here, the storm water drainage system currently owned and operated by the City of Shoreline was installed sometime before 1962 – long before 2004, when Appellant first obtained an ownership interest in the Property. According to *Hoover v. Pierce County*, Appellant's inverse condemnation claim is barred because it bought the disputed property long after the stormwater drainage system was installed. This Court should note that Appellants have not even addressed the Hoover case; either at the trial court level or on appeal; a tacit agreement by Appellant that Hoover is indistinguishable.

The *Hoover* court acknowledged that a new takings cause of action could accrue, but only if additional governmental action occurs that results in a measurable or provable decline in market value of the property. *Hoover*, 79 Wn. App. at 434. Specifically, with regard to flooding allegedly caused by a municipal system, a plaintiff must prove that “a change in the drainage system occurred that resulted in increased flooding.” *Hoover*, 79 Wn. App. at 435, citing *Cereghino v. Hwy Comm'n*, 230 Or. 439, 445, 370 P.2d 694 (1962) (emphasis added).

The record in this case shows that the only change made to this system occurred almost 20 years ago, in 1992, when King County installed a culvert identified as storm main (STMN) #16564. Since King County's installation of STMN #16564 in 1992, no changes have been made to this portion of the stormwater system. There is no evidence in the record to support an argument that this storm main caused additional water to be directed to lot 8.⁹ Such evidence, however, even if it existed, would be irrelevant; because it is undisputed that this storm main was installed twelve years before Appellant obtained an ownership interest in the Property. As in *Hoover*, any "taking" by a local governmental entity could only have occurred when the original storm water drainage system and/or additional catch basin were installed, 1962 and 1992 respectively. Accordingly, Appellant has no standing to pursue a claim for inverse condemnation, and this claim was properly dismissed by the trial court.¹⁰

⁹ Nor is there any evidence or authority to suggest that the City would be liable for a system change made by King County.

¹⁰ Although not raised below, or in their opening brief to this Court, Appellant may attempt to argue that the installation of a gabion weir on its neighbor's private property in 2007 somehow constituted a new "taking" of Appellant's Property. However, this argument also fails under *Hoover*. It is uncontested that the gabion weir installed on lot 8 does not alter the flow of water in the stormwater system nor does it increase the amount of water reaching lot 8.

C. **The Trial Court Properly Dismissed Appellant’s Claim For Damages Based Upon Intentional Trespass.**

1. **Appellant’s intentional trespass claim is barred for the reasons set forth in *Grundy v. Brack Family Trust*.**

Because Appellant’s inverse condemnation claim is barred based upon lack of standing, as set forth above in Section IV B, the only cause of action remaining for review by this Court is Appellant’s claim of intentional trespass. Trespass is an interference with the right to exclusive possession of property. *Grundy v. Brack Family Trust*, 151 Wn. App. 557, 566, 213 P.3d 619 (2009). There are two types of trespass actions: intentional trespass and negligent trespass. *Grundy*, 151 Wn. App. at 566. In the present case, Appellant has not pled negligence, thus, we only address Appellant’s actual claim of intentional trespass.¹¹ *See, Grundy, id.* at 567: (“Grundy neither pleaded nor argued negligent trespass, and we, therefore, address only Grundy’s actual claim of intentional trespass.”).

Intentional trespass occurs only when there is “(1) an invasion of property affecting an interest in exclusive possession, (2) an intentional act, (3) reasonable foreseeability that the act would disturb the plaintiff’s possessory interest, and (4) actual and substantial damages.” *Id.*, at 567.

¹¹ In its Complaint, Appellant did not plead any cause of action based on negligence. Nor has it argued any negligence claims. In fact, Appellant has specifically reiterated that its Complaint and motion are not based upon negligence. *CP 56* (“[T]here was no pleading of negligence in Plaintiff’s Complaint, therefore, the negligence issue is moot.”); *CP 69* (arguing, again, that the Cities’ affirmative defense of the public duty doctrine is moot, because Appellants did not assert a negligence claim against a public entity).

Here, Appellant cannot prove, at a minimum, either the existence of an intentional act or reasonable foreseeability, and its intentional trespass claim was properly dismissed.

A review of the Washington Supreme Court's decision in *Grundy* is helpful to the analysis of this case. In *Grundy*, the plaintiff had resided at her waterfront property on Puget Sound since 1981. The defendants, her next-door neighbors, purchased their property in 1991. In 1999, defendants raised their bulkhead, making it, for the first time, higher than plaintiff's. After defendants raised their bulkhead, it was undisputed that during high tide (and, apparently, during storms), seawater and debris were directed by the bulkhead onto the plaintiff's property. After several motions and appeals, the plaintiff in *Grundy* asserted a claim for intentional trespass by water and requested abatement of the raised bulkhead. *Id.*, at 561.

The *Grundy* court noted that although the defendants had committed an intentional act (*i.e.*, they intentionally raised their bulkhead), that act alone was not enough to prove an intentional trespass under Washington law. Instead, the relevant question was whether defendants had knowledge that raising their bulkhead would, to a substantial certainty, result in the entry of seawater and debris onto the plaintiff's property. *Id.*, at 569. The court then held that plaintiff had failed to prove

“reasonable foreseeability” because she could not show that defendants “knew or should have known” that their actions would cause water to enter her property. *Id.* In sum, although defendants intended to build a seawall, and the seawall caused water to enter plaintiffs’ property, those facts alone create no liability under the doctrine of intentional trespass by water under Washington law. *Id.* at 569-570.

Here, a review of the record shows that the alleged evidence of intentional trespass by water against the Cities is even less than in *Grundy*. For instance, the evidence is undisputed that the municipal stormwater drainage system was installed some time before 1962, with a single catch basin being installed in 1992 by King County, and no further alterations or installations since that time. Unlike the defendant in *Grundy*, who constructed a new seawall that immediately started causing plaintiff damages that she had never suffered before, Appellant here cannot point to any new construction or “act” by the Cities that could meet the definition of “intentional act” under the theory of intentional trespass.

Finally, although the following argument regarding the 2007 gabion weir has not actually been raised by Appellant, the Cities address it as a hypothetical. Installation of the gabion weir on lot 8 (Appellant’s neighbor’s property) was not an “intentional act” that could result in liability. First, there is absolutely no evidence in the record to suggest that

the gabion weir causes any increase in the amount of water reaching the neighbor's property . . . much less Appellant's property. Thus, as in *Grundy*, the intentional trespass claim should be dismissed because Appellant cannot show the required element of "actual and substantial damages." *Grundy*, 151 Wn. App. at 568. Finally, even if the gabion weir had somehow caused an increased flow of water to the Property, there is no evidence in the record to show that Shoreline knew, with substantial certainty, this would happen. Accordingly, under any factual situation presented in this case, Appellant's intentional trespass claim is barred as a matter of law and was properly dismissed by the trial court.

2. Appellant's intentional trespass case is barred for the reasons set forth in *Borden v. Olympia*.

Washington courts have held that no cognizable cause of action exists for "trespass," either intentional or negligent, when the allegation is that a defendant has caused surrounding land to become "supercharged" with groundwater, which then prevents the plaintiff's property from draining. *See, Borden v. Olympia*, 113 Wn. App. 359, 373, 53 P.3d 1020 (2002). Almost the exact same situation alleged by Appellant here was alleged by the plaintiffs in *Borden v. Olympia*. It is undisputed that the water at issue in this case is not surface water, but groundwater. Appellant made clear that its trespass claim is based upon the alleged fact that the

Cities “collected public storm water by an artificial means, channeled and discharged it on the land of a private person, which then went into the ground thereby raising the water table and adversely affecting lots 6-7.” *CP 54* (emphasis added). As in *Borden*, Appellant’s intentional trespass claim was properly dismissed.

In *Borden*, plaintiffs claimed that additional water channeled to the area adjacent to their property by the City of Olympia had saturated (“supercharged”) the ground and raised the water table, thereby causing the ground not to accept stormwater that otherwise would have drained, resulting in surface water flooding on plaintiffs’ property. As here, the plaintiffs in *Borden* did not claim that water invaded their property on the surface. Instead, they claimed water went into the ground on the property adjacent to their own, allegedly raising the water table on both properties (their neighbor’s and their own). The *Borden* court held that because the water did not actually invade plaintiff’s property on the surface, the facts did not sustain their claim for trespass:

The Bordens assert a claim for trespass. . . . The Bordens do not claim that water from the 1995 drainage project actually invaded their property on the surface. As they themselves acknowledge, they can only show that water from the 1995 drainage project “supercharged” the ground so that water that would otherwise have drained from their property failed to do that. **These facts will not sustain their claim for trespass.** And the trial court did not err by dismissing it.

Id., at 373 (internal citations omitted) (emphasis added).

The alleged facts in this case mirror those in *Borden*, and thus compel the same result: dismissal of Appellant's intentional trespass claim. Appellant attempts to argue that its trespass claim is based upon the flow of surface water, because groundwater raises the water table in the area, causing puddles on the surface of its property. A plain reading of *Borden* confirms that when flooding on the surface is a result of oversaturated groundwater, then no claim for trespass by water can be stated.

As a matter of law, based upon the undisputed facts of this case – even if the Court views the facts and all inferences therefrom in the light most favorable to Appellant – the Cities' motion to dismiss Appellant's intentional trespass claim was properly granted and should be affirmed on appeal.

D. Municipalities Are Not Strictly Liable For Damages Caused By Flooding From A Public Stormwater Drainage System.

Appellant cannot sustain any claim of liability against the Cities for the simple reason that the Cities have not taken any action that has caused an increased flow of water to Appellant's Property. The Cities submitted the declaration of Eric Gilmore from the City of Shoreline. Mr. Gilmore indisputably testified that the City has not made any alterations to

the flow of stormwater in this area since at least 1962, and that the last “change” to the system was made in 1992 when King County installed a catch basin.¹² *Sub No. 29.*¹³ This testimony was not disputed in any manner.

The fact that Shoreline owns and maintains a public stormwater system does not make it strictly liable for damages allegedly caused by the system. *Hughes v. King Cty*, 42 Wn. App. 776, 714 P.2d 316, *rev. den.* 106 Wn.2d 1006 (1986) (local jurisdiction is not strictly liable for flooding caused by a stormwater drainage system based solely on its ownership of the system). When dismissing the plaintiffs’ claims against the County in *Hughes*, the court found that “no evidence suggests that King County has in any way materially altered the flow of water through the drainage system” in the past ten years (since it took over ownership and maintenance of the system), and that plaintiffs had failed to show any intentional or negligent “act” by the County that had caused the flooding on their property.

Here, there is no evidence that the City has in any way materially altered the flow of water through the drainage system since the 1960’s. Appellant’s entire theory of liability is based upon the fact that municipal

¹² Notably, there is also no evidence in the record to indicate this catch basin might have increased the flow of water to Appellant’s Property.

¹³ *Gilmore Decl.*, ¶¶ 3-4, Ex. B.

stormwater allegedly reaches their Property. But this would only be relevant under a theory of strict liability, which does not exist. Therefore, the Appellant's lawsuit was properly dismissed and the order of dismissal should be affirmed on appeal.

E. The Record Does Not Contain Any Evidence To Support A Finding Of Unclean Hands Against The Cities.

Appellant vaguely alleges that the Cities have unclean hands because they made "promises" to Appellant that they did not keep; specifically, Appellant claims the Cities promised to "make adequate provision for the outflow of the public stormwaters or abate the problem." *Appellant's brief, pp. 3-4.* First, there is no evidence in the record to support this allegation. Instead, the record demonstrates that the City of Shoreline, through employee Jesus Sanchez, worked diligently with Appellant and his neighbor to try to find a solution to the saturation problem on their properties. *CP 81-83; CP 94* (letter from Jesus Sanchez to Perry Gravelle, dated April 24, 2009). One possible solution might have been to reroute water through a pipe, but installation of this proposed pipe required permission from a state agency, the Department of Ecology. Unfortunately, Mr. Sanchez's attempts to convince the Department of Ecology to agree to issue a permit for this pipe failed. *CP 94.* These undisputed facts do not support Appellant's claim that the Cities refused to

follow through with specific promises and assurances to “fix” the saturation problem on Appellant’s Property.

Second, Appellant did not allege any negligence-based claim in this lawsuit.¹⁴ Thus, even if Mr. Sanchez had failed to follow through on a specific promise he made to Appellant, such failure would have no legal effect on Appellant’s claims of intentional trespass and unconstitutional takings.

Finally, Appellant’s contention that the Cities are not entitled to an award in “equity” because they have unclean hands is just a mystery. *Appellant’s brief*, pp. 25-28. The Cities have not pled any cause of action in this lawsuit, much less a cause of action in equity.

V. CITIES’ CROSS APPEAL

A. The Cities’ Motion To Strike Inadmissible Evidence Should Have Been Granted.

1. The Court cannot consider inadmissible evidence when ruling on a motion for summary judgment.

Here, the trial court abused its discretion when it failed to grant the Cities’ motion to strike inadmissible evidence, without any explanation or entry of written findings or conclusions, as the evidence and testimony

¹⁴ The Cities could have asserted the public duty doctrine as a defense to a negligence claim. Appellant could then have attempted to assert the special relationship exception to the public duty doctrine, by proving that the Cities made specific promises or assurances to Appellant and that Appellant relied on these specific promises or assurances to its detriment.

sought to be stricken clearly was – and is – inadmissible. A trial court’s decision to admit or exclude evidence lies within its sound discretion. *Int’l Ultimate v. St. Paul Fire & Marine*, 122 Wn. App. 736, 744, 87 P.3d 774 (2004). Although a “ruling on a motion to strike is discretionary with the trial court,” it is also true that a “court may not consider inadmissible evidence when ruling on a motion for summary judgment.” *King County Fire Prot. Dist. No. 16 v. Housing Authority*, 123 Wn.2d 819, 826, 872 P.2d 516 (1994).

Pursuant to CR 56, declarations in opposition to summary judgment must contain admissible evidence. Such declarations must set forth specific facts and be based on the affiant’s personal knowledge. Evidence that is speculative or conjectural is not admissible. *Grimwood v. UPS*, 110 Wn. 2d 335, 359, 753 P.2d 517 (1988). A “fact” is a reality, not a supposition or an opinion. *Grimwood*, 110 Wn.2d at 359. Furthermore, a party cannot rely on speculation or argumentative assertions in opposing a motion for summary judgment. *See Mithoug v. Apollo Radio*, 128 Wn.2d460, 463, 909 P.2d 291 (1996). Washington courts have held:

Affidavits submitted in support of, or in response to a motion for summary judgment must set forth such facts as would be admissible in evidence, must be made on personal knowledge, and must affirmatively show that the affiant is competent to testify as to his or her averments. An affidavit does not raise a genuine issue of fact unless it sets forth facts

evidentiary in nature, i.e., information as to what took place, an act, an incident, a reality as distinguished from supposition or opinion. Likewise, ultimate facts, conclusions of fact, conclusory statements of fact or legal conclusions are insufficient to raise a question of fact.

Snohomish County v. Rugg, 115 Wn. App. 218, 224, 61 P.3d 1184 (2002)

(citations omitted, emphasis added).

2. Opinions Requiring “Scientific, Technical, or Other Specialized Knowledge” Cannot be Rendered by Lay Witnesses.

Expert testimony is limited by Evidence Rules 702 and 703. ER

702 provides as follows:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. (Emphasis added.)

The admissibility of expert testimony under ER 702 depends upon two factors; first, whether the witness qualifies as an expert; and second, whether an expert opinion would be helpful to the trier of fact. *Queen City Farms v. Central Nat'l Ins. Co.*, 126 Wn.2d 50, 102, 882 P.2d 703 (1994). Washington case law holds that a proposed expert must actually establish they have expertise in the precise and specific area in which they are forming an opinion. *Queen City Farms*, 126 Wn.2d at 102-04.

Here, none of Appellant’s witnesses set forth any qualifications sufficient to certify them as engineers, stormwater system designers, hydrologists, or hydrogeologists. In fact, Appellant admits and stipulates that none of its witnesses purport to be “experts.” *CP 110* (“None of the [plaintiffs’] declarations assert that they are providing expert testimony regarding hydrology, *etc.*”). Instead, Appellant presented the nonsensical argument that it could simply file lay witness declarations containing expert opinions, so long as it did not *call* them “expert opinions” – although it did attempt to rely on them as expert opinions. This is not true. ER 701 is clear that lay witnesses may render “opinions” only in limited circumstances, *i.e.*, where the opinion is rationally based on the perception of the witness, and the opinion is *not* based on “scientific, technical, or other specialized knowledge.” ER 701.

Here, Appellant’s lay witnesses presented opinions and asserted facts and legal conclusions regarding issues that are well beyond the scope of their knowledge bases. *See, e.g.*, an actual expert declaration submitted by the Cities with their reply brief, the Declaration of Brian Landau dated September 24, 2010. *Sub No. 36*. Brian Landau is the Surface Water and Environmental Services Program Manager for the City of Shoreline. Mr. Landau has a degree in Geological Engineering and also has extensive experience in the surface water field. In his declaration, Mr. Landau states

that, based on his education and experience, the opinions proffered by Appellant's witnesses all require specialized knowledge in engineering, hydrology, and/or hydrogeology. *Id.*, ¶¶ 5-7. As none of the witnesses had such specialized knowledge, education, or training, their declarations should have been stricken by the trial court. Below is a summary of the Cities' motion to strike.

3. The Cities' motion to strike should have been granted.

a. Declaration of Eric Gorbman.

The Cities asked the trial court to strike paragraphs 7-8, 12, and 14-18 of Eric Gorbman's declaration dated August 22, 2010. *Sub No. 37.*¹⁵ Most of Mr. Gorbman's declaration was improper "opinion" testimony. For instance, he attempts to testify as to where the "natural public stormwaters drainway" would "flow" absent a "diversion point" that he claims exists in the City of Shoreline's system. *CP 18*. But Mr. Gorbman is not a stormwater engineer or a hydrologist. Plus, there are no exhibits attached to his declaration showing the historical and natural flow of water in the area. There is no evidence to substantiate that Mr. Gorbman, based upon his "actual perceptions," can render an opinion regarding the historical and natural flow of water within this drainage basin as it existed prior to 1962, when the drainage system was installed.

¹⁵ *Cities' Motion to Strike Inadmissible Evidence*, pp. 6-7.

Paragraph 12 of Mr. Gorbman's declaration states in part that the Cities have not "made any provision for the proper outflow of the public stormwaters which are collected concentrated and gathered...into artificial drains or channels and thrown...onto [his] land and the land of [his] neighbors, including Plaintiff's lots 6 & 7." *CP 19*. Mr. Gorbman is clearly not qualified to testify as to the "proper outflow" for public stormwaters; and his testimony on such matters is pure speculation.

In paragraphs 14-15 of his Declaration, Mr. Gorbman opines as to the flow of groundwater. *CP 19-20*. Yet he possesses no experience or credentials which would render him competent to testify on issues such as hydrology, hydrogeology, and the like.

At paragraphs 16 and 17, Mr. Gorbman proposes a change to the stormwater drainage system, which includes "blocking a pipe" and allowing "the public stormwaters to flow naturally downhill along the western side of 25th Avenue NE," which "would be neither difficult nor expensive." *CP 20*. This change could, of course, cause flooding of multiple other residential and commercial properties, not to mention public roads, all factors a stormwater engineer would consider before making such a suggestion. Clearly, Mr. Gorbman is not qualified to redesign the City of Shoreline's drainage system.

Mr. Gorbman goes on to state that because the soil on his property,

lot 8, is “almost all sand,” most of the water daylighting on lot 8 “disappears into the groundwater,” and “the groundwater then comes to the surface on the low-lying areas,” including on Appellant’s Property. *CP 19*. But Mr. Gorbman is not a geologist; nor is there any indication that he “tested” the soils on lot 8 to confirm their composition. Even if he could visually see (“perceive”) sand on the surface, he cannot testify as to the soil’s composition 8 inches down, or 2 feet down. Also, Mr. Gorbman is admittedly not a hydrogeologist and thus, he is not qualified to testify about the transmission of groundwater at all.

b. Declaration of Vinesh Gounder.

The Cities asked the trial court to strike paragraphs 2-8 of Vinesh Gounder’s declaration dated August 20, 2010 and Exhibit D thereto (the CD video). *CP 45-52*. Gounder is apparently a resident of the City of Shoreline who baldly claims he is “competent to be a witness in this case.” *CP 42*. But it is entirely unclear what makes Mr. Gounder “competent” to testify in this case. Instead, he appears to be a random Shoreline resident who volunteered to provide a declaration in support of Appellant’s motion and his declaration should have been stricken on multiple grounds.

In paragraphs 2-7, Mr. Gounder provides his “opinions” and interpretations of certain maps, which he represents were provided to him by Mr. Koler (the president of Crystal Lotus). *CP 42-45*. He opines as to

the collection, flow, and diversion of stormwater – an area in which Mr. Gounder lacks any relevant knowledge, education, or expertise. Mr. Gounder attempts to establish personal knowledge by stating that he has walked the Property. *CP 44*. Yet his personal observations of the site do not change the fact that he simply has no expertise to render expert witness opinions in the complex area of stormwater engineering.

Mr. Gounder (along with Mr. Gravelle and Mr. Koler) make the following speculative, unsupported legal conclusion:

“...the City of Lake Forest Park and the City of Shoreline have caused a continuous water trespass on Lots 6 and 7 by:

- i. diverting the natural flow of the collected and channeled public stormwaters...” *CP 44*.

These conclusory facts and legal conclusions should not be considered.

Finally, Mr. Gounder attaches (as Exhibit D to his Declaration) a CD containing video footage of himself and accompanying narration. The video itself and the narration should have been stricken. Not only does Mr. Gounder formulate opinions as to storm water diversion, flow, and the like, for which he is not qualified, but the CD is a blatant unsworn statement. An unsworn statement in a brief is not evidence that can be considered in a summary judgment proceeding. *Bravo v. Dolsen Companies*, 71 Wn. App. 769, 777, 862 P.2d 623 (1993).

c. Declaration of Perry Gravelle.

The Cities asked the trial court to strike paragraphs 4-5, 8-10, 13, 15, and 19-20 of Perry Gravelle's declaration dated August 21, 2010. *CP 24-31*. Paragraphs 8, 9, and 15 all contain inadmissible hearsay. *CP 27; 29-30*. For instance, Mr. Gravelle relates information supposedly provided to him by someone else (unidentified "consultant" as well as City employee, Jesus Sanchez) in an attempt to prove the truth of the matter asserted. Such patent hearsay is obviously inadmissible and should have been stricken.

In paragraphs 4, 5, 10, 19, and 20, Mr. Gravelle asserts unsupported opinions regarding stormwater flow and diversion; he goes as far as to make **legal conclusions** based on these assumptions. *CP 25-27; 31*. As set forth above, stormwater management requires a specialized knowledge (*see, e.g.*, the Declaration of Shoreline's Engineer, Brain Landau, *CP 28*) that Mr. Gravelle does not even purport to possess. Finally, in paragraph 13, Mr. Gravelle refers to the unsworn, hearsay CD video created by Mr. Gounder, which is inadmissible as set forth above. *CP 28*.

d. Declaration of Don Koler

The Cities asked the trial court to strike paragraphs 3, 6-7, 9, 11, 12, 15, 18, 20, 23, and 24 of Don Koler's declaration dated August 23,

2010. *CP 75-84.* Don Koler's Declaration suffers the same defects as discussed above with regard to Appellant's other declarations. For instance, paragraphs 3, 6, 20, 23, and 24 contain hearsay statements made by someone other than Mr. Koler, offered to prove the truth of the matter asserted. *CP 75-76; 81-84.* This inadmissible hearsay should have been stricken. In Paragraphs 7, 9, 11, 12, and 15, Mr. Koler offers his interpretations and opinions regarding stormwater collection and flow, the characteristics of groundwater, diversion, etc., even though he has no specialized knowledge, education, or training with regard to hydrology, hydrogeology, and design of storm water drainage systems. *CP 76-80.* As with other witnesses, Mr. Koler attempts to cure his inadmissible testimony by setting forth some personal observations, yet even if he could visually see ("perceive") surface water and its flow, he is admittedly not qualified to testify about how he thinks the water should be redirected to flow in the future, or how he thinks it might have historically flowed in the past. Additionally, he cannot "see" the alleged flow of groundwater. His testimony with regard to hydrology and hydrogeology is nothing but speculation and should have been stricken. Finally, in paragraph 18, Don Koler also attempts to rely on the video/narrative created by Vinesh Gounder, which is inadmissible as a matter of law. *CP 81.*

e. **Conclusion.**

In conclusion, the Cities' motion to strike inadmissible evidence was merited and fully supported. Therefore, the Cities respectfully request that the trial court's order denying the Cities' motion to strike be reversed on appeal.

V. CONCLUSION

Based on the foregoing, the Cities respectfully request the Court of Appeals to affirm the trial court's order granting the Cities' motion for summary judgment and dismissing Appellant's lawsuit in its entirety. The facts, viewed in the light most favorable to Appellant as the non-moving party, do not support Appellant's claims for either inverse condemnation or intentional trespass. Instead, Appellant's claims are based on a theory of strict liability. As a matter of law, however, the Cities are not strictly liable for flooding caused by a public stormwater drainage system. *See, Hughes v. King County, supra.*

With regard to Appellant's takings claim, it is undisputed Appellant purchased an ownership interest in lots 6 and 7 long after the alleged taking occurred. Thus, Appellant's takings claim is barred based on lack of standing. The Cities submitted evidence showing that the drainage system was installed before 1962; specifically, the evidence is uncontested that the pipe at issue here has discharged on lot 8 (the

suggest that the gabion weir causes any increase in the amount of water reaching the Appellant's property.

Furthermore, under the holding in *Borden v. Olympia, supra*, a trespass does not occur given the facts of this case, specifically, where a plaintiff alleges that an intrusion of groundwater causes the property of another to become saturated to the point where water can no longer drain away in the usual manner. As a matter of law, based upon the undisputed facts of this case – even if the Court views the facts and all inferences therefrom in the light most favorable to Appellant – the Cities' motion to dismiss Appellant's intentional trespass claim was properly granted.

Finally, the City of Lake Forest Park should unquestionably not be a defendant in this lawsuit. It is uncontested that the stormwater system is located wholly on properties owned by the City of Shoreline and private property owners; none of the components of the stormwater system are located on property owned by the City of Lake Forest Park, nor on property over which Lake Forest Park has an easement. It is also undisputed that Lake Forest Park does not own, operate, maintain, or control any portion of the system. Accordingly, the City of Lake Forest Park was properly dismissed below, and that order of dismissal should be affirmed on appeal.

DATED this 14th day of February, 2011.

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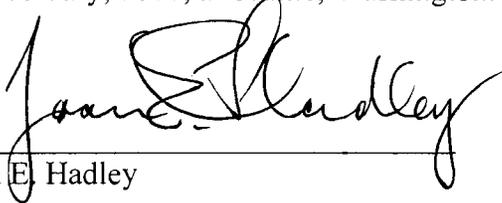
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DECLARATION OF SERVICE

I hereby declare under penalty of perjury under the laws of the State of Washington that the following is true and correct, that on February 14, 2011, I served the *Opening Brief of the Cities/Cross-Appellants* on the following party of record via email and hand delivery:

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