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NO. 66368-2-I

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

DONALD B. BURKHOLDER,

Plaintiff/Appellant,

v.

CITY OF SAMMAMISH, a Washington municipal corporation,

Defendant/Respondent.

BRIEF OF RESPONDENT CITY OF SAMMAMISH

Shelley M. Kerslake
WSBA No. 21820
Kari L. Sand
WSBA No. 27355
Kenyon Disend, PLLC
11 Front Street South
Issaquah, Washington 98027-3820
(425) 392-7090
Attorneys for Respondent
City of Sammamish

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I. INTRODUCTION

The crux of this appeal is a dispute about whether the City's surface water drainage system for improvements to the arterial known as East Lake Sammamish Parkway NE ("ELSP") impacts Burkholder's property. In response to concerns raised by Burkholder, the City redesigned the drainage system to completely avoid Burkholder's property and to eliminate the possibility of any damage to it.

The trial court dismissed this matter on the City's motion for summary judgment. Burkholder's appeal merely restates his unsuccessful briefing before the trial court. Burkholder's track record in this case now includes two failed attempts to obtain injunctive relief and, most recently, defeat in the face of the City's CR 56 motion and denial of his CR 59 motion.

All four of Burkholder's prior attempts to obtain relief have failed due to the absence of proof to support his claims. This fifth attempt is similarly flawed. He cannot prove any damage as a result of the City's redesigned drainage system. Summary judgment in the City's favor and denial of reconsideration were proper to avoid a useless trial. Because Burkholder has not – and cannot – overcome his proof problems, this appeal is likewise lacking, and dismissal remains the appropriate remedy.

II. RE-STATEMENT OF THE ISSUE

The uncontroverted evidence in the record demonstrates that the City redesigned its ELSP surface water drainage system to completely avoid Burkholder's property, and that Burkholder has not suffered any damages. Proof of damages is an essential element of both claims asserted against the City (intentional trespass and inverse condemnation). Did the trial court properly grant summary judgment in the City's favor, and properly deny Burkholder's motion for reconsideration, based on the complete absence of proof of damages in this record? Yes.

III. RE-STATEMENT OF THE CASE

In 2009, the City widened lanes and shoulder areas, and added curbs, gutters, sidewalks, turning lanes, bicycle lanes, street lighting and landscaping to ELSP (collectively, these improvements are referred to herein as "the ELSP Project" or "City Project"). CP 138. ELSP runs along the eastern shore of Lake Sammamish and passes through the City of Sammamish as it connects the cities of Redmond, Sammamish, and Issaquah. CP 151. The ELSP Project also included installation of a new surface water drainage treatment system to capture runoff from the improved ELSP and direct it into Lake Sammamish via a new outfall located on King County property. This outfall is approximately 450 feet (or about one and a

half football fields) away from and to the south of Burkholder's property. CP 139, 151, 163.

Burkholder's residence on Lake Sammamish has a private drainage system that was built prior to the City's ELSP Project. CP 152, 159. Under the City's original design for ELSP, surface water runoff from the improved ELSP was intended to be filtered and then diverted through Burkholder's private drainage system and into Lake Sammamish. CP 152, 161.

Burkholder expressed concern that the City's ELSP Project, specifically the City's plan to convey ELSP roadway runoff through the culvert that serves his residence, would increase the risk of flooding to his property. CP 167, 174-75. The City considered acquiring an easement for this purpose, and appraisals were done to estimate the cost. CP 429-30. The City's appraisal for the easement was \$30,000. *Id.* Burkholder's appraisal was \$230,500. CP 187.¹ Given this wide delta, the easement negotiations were unsuccessful, and the ELSP Project was redesigned. CP 153.

Thereafter, in order to fully alleviate Burkholder's concerns and to control Project costs, the City redesigned its drainage system to redirect the ELSP roadway runoff to a new outfall approximately 450 feet south of Burkholder's property. CP 153, 163. The redesign effort cost the City \$151,000.00. CP 153. Project runoff cannot enter Burkholder's property

¹ See also CP 169 (duplicate).

because the catch-basin and pipe that once connected the sand filtration vault to the Burkholder private drainage system has been plugged and abandoned.

Id.

Due to the City's Project redesign, the volume of storm water runoff flow directed to Burkholder's drainage pipe and outfall has actually been reduced. *Id.* This reduction is due to the fact that portions of ELSP that historically drained to Burkholder's property are now collected and routed through the sand filter vault and the new outfall on King County property. CP 154. Accordingly, not only is the storm water generated by the ELSP Project not impacting Burkholder's property in any manner, but a portion of the historical runoff from the road formerly collected and routed through Burkholder's drainage pipe and outfall is also being diverted away from the property. *Id.*

IV. ARGUMENT

A. Standard of Review on Appeal.

Appellate review of a decision to grant summary judgment is de novo. An appellate court engages in the same inquiry as the trial court, which is to determine whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Greater*

Harbor 2000 v. City of Seattle, 132 Wn.2d 267, 278, 937 P.2d 1082 (1997) (quoting CR 56(c)). A material fact is one on which the outcome of the case depends. *Atherton Condo. Ass'n. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990).

B. Burkholder Fails to Present a Cognizable Trespass Claim.

“Trespass” is an “interfere[nce] with the right to exclusive possession of property.” *Gaines v. Pierce County*, 66 Wn. App. 715, 719, 834 P.2d 631 (1992) (quoting *Bradley v. Am. Smelting & Ref. Co.*, 104 Wn.2d 677, 690, 709 P.2d 782 (1985)). The concept of trespass can also occur by means of water. *Phillips v. King County*, 136 Wn.2d 946, 957 n.4, 968 P.2d 871 (1998). A plaintiff may bring claims for both intentional and negligent trespass. *Gaines*, 66 Wn. App. at 719. Because Burkholder did not plead negligence in his amended complaint, only Burkholder’s actual claim of intentional trespass is at issue on appeal.

The tort of intentional trespass requires proof of four elements: “(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.” *Wallace v. Lewis County*, 134 Wn. App. 1, 15, 137 P.3d 101 (2006) (trial court properly dismissed claims for intentional trespass where plaintiff failed to establish requisite damage); *see also Bradley*, 104 Wn.2d

at 690-92; 16 David K. DeWolf & Keller W. Allen, WASHINGTON PRACTICE: TORT LAW AND PRACTICE § 13.31, at 145 (3d ed. Supp. 2009).

The necessary element of actual and substantial damages is determinative here. Sammamish accordingly addresses it first. In order to be found liable for intentional trespass, a person must cause “actual and substantial damage[]” to the property of another. *Wallace*, 134 Wn. App. at 15. Here, Burkholder’s amended complaint asserts no damages; rather, it provides:

[p]laintiff is not currently seeking damages through this complaint in order to seek injunctive relief while complying with the requirements of RCW 4.96.020. Plaintiff reserves the right to amend this complaint to assert damages if defendant denies his claim under RCW 4.96.020.

CP 2.

Burkholder never obtained leave of court to file a third amended complaint, and his failure to plead (let alone prove) damages is fatal to his trespass claim against the City. Moreover, even if he had plead a claim for damages, Burkholder cannot show any flooding or compensable damage of any kind to his property caused by surface water² runoff from ELSP

² Surface waters are defined as “waters produced by rain, melting snow, or springs.” *King County v. Boeing, Co.*, 62 Wn.2d 545, 550, 384 P.2d 122 (1963) (citing *Alexander v. Muenscher*, 7 Wn.2d 557, 110 P.2d 625 (1941)); see also, *Currens v. Sleek*, 138 Wn.2d 858, 861, 983 P.2d 626, 993 P.2d 900 (1999); *Grundy v. Thurston County*, 155 Wn.2d 1, 10, 117 P.3d 1089 (2005) (“The chief characteristic of surface water is its inability to maintain its identity and existence as a body of water.”) (quoting *Halverson v. Skagit County*, 139 Wn.2d 1, 15, 983 P.2d 643 (1999)).

following the City's completion of the ELSP Project. Burkholder cannot show the required damage because the redesigned Project specifically and intentionally diverts storm water runoff from ELSP to a new outfall on King County property 450 feet south of Burkholder's property. CP 153, 163. ELSP Project runoff completely avoids Burkholder's property. CP 152-53.

In an attempt to create a claim for damage to his property, Burkholder has consistently produced only a series of photographs showing one isolated, brief flooding incident occurring on October 17, 2009. This single incident was caused by a mechanical pump failure during construction of the ELSP Project, and not by any recurring impermissible diversion of surface water. CP 44, 84-89.³ Following completion of the City's Project utilizing the new outfall south of Burkholder's property, no similar incidents have occurred. CP 155. Burkholder produced no other evidence of any recurring flooding or any other damage to his property caused by storm water runoff from the ELSP Project.

In response to the City's interrogatory asking Burkholder to state with specificity the manner in which he claimed the City had damaged his property, Burkholder responded:

³ See also CP 260-265 (duplicate images).

The beach is covered with algae. The beach and surrounding areas are covered in sediment. I do not feel safe or enjoy swimming on my beach. The resale value of my property has decreased. I worry about the culvert backing up onto my property. After the City denied Walker's [the neighbor's] permit to drain his storm water through the culvert, I had the option to change or reduce the culvert size and/or location. Because of increased flows, this is no longer possible.

CP 164, 167.

To support his trespass claim against the City, Burkholder also relies on the testimony of his engineer, Kelly Wrigg, P.E. Wrigg's report (CP 53-70⁴), however, is dated December 2, 2009, and *pre-dates the City's redesign* which diverts surface water runoff 450 feet to the south of Burkholder's property. *Cf.* CP 161 (Ex. C, Original Design) and CP. 163 (Ex. D, Revised Design); *see also* CP 273. Even if Wrigg's report was relevant and admissible, however, Wrigg's testimony also fails to show damages. During his deposition, Wrigg confirmed that he (a) never conducted any field testing (CP 128), (b) did not perform any modeling work or any other capacity analysis to contradict the work done by the City's engineering firm (CP 130), (c) had not seen any of the City's plans redesigning the Project (CP 131-32), and (d) was not aware of Mr. Burkholder making any complaints about storm water runoff after

⁴ *See also*, CP 228-245 (duplicate images; note that the number references for these Clerk's Pages have been supplied through interpolation as a thick black line covered the number sequencing of several pages in the record).

completion of the City's Project (CP 129).

In other words, none of Burkholder's proffered proof is based on impacts claimed to be caused by the redesigned ELSP Project as it is actually constructed and functioning, nor does it demonstrate any legally compensable post-Project damages.

Burkholder offers no competent, admissible evidence to substantiate any damages based on his trespass claim. He offers instead only his biased perceptions, baseless assumptions, and unfounded concerns, all of which are insufficient to overcome summary judgment. *Guile v. Ballard Cmty. Hosp.*, 70 Wn. App. 18, 25, 851 P.2d 689 (1993).

C. The Court Should Reject Burkholder's Attempt to Raise a New Argument for the First Time on Appeal.

Finally, Burkholder improperly seeks to raise a new argument on appeal. In particular, Burkholder asserts that the City's claimed intentional trespass entitles him to treble damages under RCW 4.24.630 and *Clipse v. Michels Pipeline Const., Inc.*, 154 Wn. App. 573, 225 P.3d 492 (2010).⁵

This new argument should be rejected. Burkholder raised this argument for the first time in his unsuccessful Motion for

⁵ Brief of Appellant, at 10-11.

Reconsideration,⁶ and the trial court did not request responsive briefing on this new argument from the City. *See*, KCLCR 59(b) (“No response to a motion for reconsideration shall be filed unless requested by the court.”).

The City cannot be liable for trespass in the complete absence of any allegation, let alone proof, of actual and substantial damages. Burkholder’s failure to prove “actual and substantial damages” to his property is fatal to his trespass claim. Based on the City’s Project redesign – undertaken specifically to avoid any impact to Burkholder’s property in response to Burkholder’s specific concerns – reasonable minds must agree that Burkholder has failed to prove damages. The trial court’s order granting summary judgment in the City’s favor should be affirmed.

D. Burkholder Fails to Present a Cognizable Inverse Condemnation Claim.

The Washington Constitution prohibits governmental taking or damaging of private property for public use without first providing just compensation to the aggrieved property owner. Const. art. I, § 16 (amend. 9); *see Phillips*, 136 Wn.2d at 956. The measure of damage in a takings case is the diminution in the fair market value of the property caused by the governmental taking or damaging. *Phillips*, 136 Wn.2d at 956-57

⁶ CP 337-38 (again, the number references for these Clerk’s Pages have been supplied through interpolation as a thick black line covered the number sequencing of several pages in the record as they were received from the superior court).

(citing *Petersen v. Port of Seattle*, 94 Wn.2d 479, 482, 618 P.2d 67 (1980); *Hoover v. Pierce County*, 79 Wn. App. 427, 431, 903 P.2d 464 (1995)).

“The term ‘inverse condemnation’ is used to describe an action alleging a governmental ‘taking,’ 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*, 136 Wn.2d at 957; see also *Lambier v. City of Kennewick*, 56 Wn. App. 275, 279, 783 P.2d 596 (1989), rev. den’d, 114 Wn.2d 1016, 791 P.2d 535 (1990).

In order to establish a claim for inverse condemnation, a challenger must show: “(1) a taking or damaging (2) of private property (3) for public use (4) without just compensation being paid (5) by a governmental entity that has not instituted formal proceedings.” *Phillips*, 136 Wn.2d at 957. In order for damage to be compensable under a claim for inverse condemnation, the damage to the property must be permanent. *Hoover v. Pierce County*, 79 Wn. App. at 432 (citing *Wilson v. Key Tronic Corp.*, 40 Wn. App. 802, 816, 701 P.2d 518 (1985)); see also *Phillips*, 136 Wn.2d at 957, n.4 (“A trespass differs from a taking in that to constitute a taking, the intrusion [of water] must be chronic and not merely a temporary interference which is unlikely to recur.” (citing *Lambier*, 56 Wn. App. at 283) (other internal citations omitted)). Moreover, “While the constitution

guarantees recovery for a taking, not every trespass upon or tortious damaging of real property becomes a constitutional taking or damaging simply because the trespasser or tortfeasor is the state or one of its subdivisions.” *Hoover*, 79 Wn. App. at 431 (citing *Miotke v. City of Spokane*, 101 Wn.2d 307, 334, 678 P.2d 803 (1984) (citing *Olson v. King County*, 71 Wn.2d 279, 284, 428 P.2d 562 (1967))).

Here, Burkholder has failed to establish any damage, let alone the required permanent damage, caused by the increased flow of surface water runoff from the ELSP Project. Burkholder accordingly cannot establish even the first of the five elements required to prove an inverse condemnation claim. The City’s redesign of its ELSP Project causes for Burkholder the same fatal problems for the damages element of his inverse condemnation claim as it did for his trespass claim. *See, supra*, at 5-9; CP 50-54, 161, 163.

As with his trespass claim, Burkholder again offers no competent, admissible evidence to support his inverse condemnation claim, and accordingly cannot demonstrate any taking or damaging of his property. RP at 18-22. Instead, he offers again only his biased perceptions, baseless assumptions, and unfounded concerns, and reasonable minds can again reach only one conclusion. Summary judgment of dismissal is the appropriate remedy here.

E. The City Should Be Awarded Its Reasonable Attorney Fees on Appeal.

Under RAP 18.9(a), a party is entitled to recover reasonable attorney fees on appeal if a party files a frivolous appeal. “An appeal is frivolous if there are no debatable issues upon which reasonable minds might differ and it is so totally devoid of merit that there was no reasonable possibility of reversal.” *Reid v. Dalton*, 124 Wn. App. 113, 128, 100 P.3d 349 (2004) (citing *Fay v. N.W. Airlines*, 115 Wn.2d 194, 200-01, 796 P.2d 412 (1990)). Fees on appeal are appropriate here. Burkholder pursued a meritless claim through this appeal despite the City’s numerous attempts to alert him to the proof problems in his case based on the City’s redesign. *See, e.g., Manteufel v. Safeco Ins. Co. of Am.*, 117 Wn. App. 168, 178, 68 P.3d 1093 (2003), *rev. den’d*, 150 Wn.2d 1021 (2003).

The City should be awarded its reasonable attorney fees on appeal, and will file the necessary supporting affidavit promptly after issuance of the Court’s opinion granting fees.

V. CONCLUSION

Despite all of the City’s efforts to accommodate Burkholder, he continues to seek redress for no harm suffered. In the meantime, the City

continues to incur not insignificant legal fees defending Burkholder's meritless claims.

Put simply, Burkholder's claims against Sammamish are wholly unsubstantiated, both factually and legally. Based on the uncontradicted record here, reasonable minds can only reach one result – the trial court should be affirmed.

The City of Sammamish respectfully requests that this Court affirm the trial court's rulings in this matter and award Sammamish its reasonable attorney fees incurred in defense of this frivolous appeal.

RESPECTFULLY SUBMITTED this 5th day of April, 2012.

KENYON DISEND, PLLC

By



Shelley M. Kerslake
WSBA No. 21820
Kari L. Sand
WSBA No. 27355

DECLARATION OF SERVICE

I, Sheryl Loewen, declare and state:

1. I am a citizen of the State of Washington, over the age of eighteen years, not a party to this action, and competent to be a witness herein.

2. On the 5th day of April, 2012, I served a true copy of the foregoing *Brief of Respondent City of Sammamish* on the following counsel of record using the method of service indicated below:

Thomas L. Hause	<input checked="" type="checkbox"/>	First Class U.S. Mail, Postage
Law Offices of Thomas L. Hause	<input type="checkbox"/>	Prepaid
3405 211 th Avenue NE	<input type="checkbox"/>	Legal Messenger
Sammamish, WA 98074	<input type="checkbox"/>	Overnight Delivery
	<input type="checkbox"/>	Facsimile:
	<input checked="" type="checkbox"/>	E-Mail: lawofficesth@gmail.com

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 5th day of April, 2012, at Issaquah, Washington.



 Sheryl Loewen