

NO. 65201-0

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

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ROBERT B. STRUTHERS and VITEZSLAVA OTRUBOVA,

Appellant,

v.

CITY OF SEATTLE,

Respondent.

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**RESPONDENT'S BRIEF**

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## I. INTRODUCTION

Plaintiffs-appellants Vitezslava Otrubova and Robert Bruce Struthers appeal from the trial court's dismissal of a case in which they sought a second bite at the apple. In June 2009, Otrubova conducted a three week jury trial in her first case. That case was about a City storm water outfall on Lake Washington known as the Meadowbrook Outfall, which Otrubova claimed had caused damage to her neighboring property. Most of Otrubova's case concerned the Meadowbrook Outfall Rehabilitation Project, a \$3 million City project that was intended to fix leaks in the Meadowbrook Outfall. Otrubova claimed that the Outfall was not an adequate response to her complaints. That case ended in a defense verdict in favor of the City of Seattle. Although two of the trial court's rulings are the subject of a separate appeal now pending in this Court (No. 63943-9-I), Otrubova did not appeal the remainder of the trial court's many rulings or the jury's adverse verdict.

Otrubova instead sought, and seeks, to litigate the first case all over again: she seeks a trial on the same claim and the same fact issues resolved against her in the first case. The Superior Court properly denied Otrubova another chance, and this Court should affirm.

Otrubova's briefing on this appeal flatly ignores the distinction between the two cases. Otrubova's briefing on this appeal is largely a repeat of the briefing she submitted in the first appeal. She ignores the City's arguments for dismissal of her second case and the reasons the trial court entered summary judgment. Otrubova's first case resolved all issues and damages as of the June 2009 trial; the only issue possibly open in the second case was whether the City's \$3 million Rehabilitation Project had made things worse. Otrubova has no such evidence and instead simply seeks to re-litigate the first case. The law does not allow this.

The trial court correctly granted the City's motion for summary judgment. First, collateral estoppel bars litigation of the second action. In the first case, her inverse condemnation claim was dismissed on summary judgment. Further, the fact issues at trial in the first case centered on the Rehabilitation Project. Thus, any conceivable basis for Otrubova's inverse condemnation claim was fully and fairly litigated in the first case. Second, Otrubova presented no evidence to create a disputed issue of material fact regarding damages. Indeed, Otrubova's own expert agreed that the Rehabilitation Project improved the value of her property. Third, as in the first case, on the facts alleged and evidence presented on the subject motion, as a matter of law Otrubova cannot establish a claim for inverse

condemnation. Her inverse condemnation claim actually is a tort claim in disguise: she contends that the Rehabilitation Project did not fix the alleged problems. As noted, however, a King County jury already heard all the evidence on that claim and returned a verdict in favor of the City.

The whole point of the second case, for Otrubova, is to take a second shot at the same issues and arguments presented in the first case. In her opposition to the subject motion for summary judgment in this case, she failed to identify any new evidence to distinguish the second case from the first. Washington law does not permit her to use this case to achieve a do-over of the first.

## **II. ASSIGNMENTS OF ERROR**

In a prior action, Otrubova brought claims against the City for alleged damages to her property based on the City's maintenance of its stormwater drainage facility, the Meadowbrook Outfall, and an associated Rehabilitation Project. In that action, her inverse condemnation claim and portions of her tort claims were dismissed on summary judgment. The remainder of her tort claims, especially fact issues relating to the construction of the Rehabilitation Project, were tried to a jury. Following a three-week trial, the jury returned a defense verdict.

In this action, Otrubova brought a single claim against the City for

inverse condemnation based on the same facts alleged and/or tried in the first action. The City moved for summary judgment. In opposing the motion, Otrubova submitted no evidence to show that the Rehabilitation Project caused a decrease in the value of her property—i.e., no evidence of damages for inverse condemnation. She also submitted no evidence that interference with her property was intended by the design of the Rehabilitation Project or was a necessary incident to its construction or maintenance.

Under these circumstances, did the Superior Court properly grant the City’s Summary Judgment Motion?

Under these circumstances, did the Superior Court properly deny Otrubova’s motion for reconsideration?

### **III. STATEMENT OF THE CASE**

#### **A. The Otrubova Property and the City Property.**

In 1992, Otrubova<sup>1</sup> purchased property on Riviera Place NE in the City of Seattle. The City owns the lot immediately adjacent and to the

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<sup>1</sup> In the trial court, for simplicity, we referred to both plaintiffs as “Otrubova.” Plaintiffs-appellants are Vitezslava Otrubova and Bruce Struthers, who are a married couple. Ms. Otrubova purchased the property with a former husband. In 1997, Ms. Otrubova quitclaimed a one-half interest in the property to her current husband, Bruce Struthers.

north of the Otrubova property. Both properties are on the shore of Lake Washington. Breen Decl., Ex. A, ¶ 2.<sup>2</sup>

**B. The Meadowbrook Outfall.**

The Meadowbrook Outfall system is part of the City's stormwater drainage system. The Outfall directs excess stormwater from Meadowbrook Pond to Lake Washington by way of a series of pipelines. Breen Decl., Ex. A, ¶ 3. In certain storm conditions a ninety-inch diameter pipe conveys water from Meadowbrook Pond downhill to the east and into a concrete vault on Riviera Place NE. The vault is commonly referred to as a "diversion structure." Breen Decl., Ex. A, ¶ 3.

Underneath the City's lot, drainage pipes carry stormwater from the diversion structure into Lake Washington. The diversion structure and the underground pipes are commonly known as the "Meadowbrook Outfall." Breen Decl., Ex. A, ¶ 3.

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<sup>2</sup> The City timely designated the Declaration of Thomas J. Breen in Support of Motion for Summary Judgment, Sub. No. 49E ("Breen Declaration"), in its Supplemental Designation of Clerk's Papers, filed in King County Superior Court on June 2, 2010. The Superior Court Clerk's Office classified the Breen Declaration as un-scannable and converted it to the status of "File Exhibit." CP 469. The Clerk's Office has provided the Breen Declaration, FE 49E, to this Court. See correspondence, King Co. Superior Ct. Clerk to the Hon. Richard Johnson, Washington State Ct. of Appeals, Div. 1, July 1, 2010. However, as a result of the FE designation, the Breen Declaration, FE 49E, is not page-numbered within the CP, and thus we are unable to provide CP page cites to this portion of the record.

**C. The Meadowbrook Outfall Rehabilitation Project.**

In 2007-08, as part of a city-wide drainage assessment, the City (through the Seattle Public Utilities, or “SPU”) undertook a substantial construction project to rehabilitate the Meadowbrook Outfall (the “Rehabilitation Project” or “Project”). Breen Decl., Ex. A, ¶¶ 4, 6.

The major elements of the Rehabilitation Project were:

- Replacement of the underwater sections of the 42-inch diameter and 48-inch diameter corrugated metal outfall pipes with ductile iron pipes;
- Insertion of sleeves sealing the great majority of the joints of underground concrete sections of the 42-inch and 48-inch pipes;
- Removal of the third outfall pipe from service;
- Addition of fill material to the area east of the SPU seawall in Lake Washington to restore the lake bottom to a depth approximately the same as when the outfalls were originally installed in 1952;
- Repair of the SPU seawall; and,
- Repair of a section of asphalt pavement on Riviera Place NE.

Breen Decl., Ex. A, ¶ 6.

As of November 2008, the City had invested in excess of \$2.4 million on the Meadowbrook Outfall Rehabilitation Project. Breen Decl., Ex. A, ¶ 6.

**D. Otrubova's First Lawsuit against the City.**

An understanding of the claims, the procedural history, and the results of Otrubova's first lawsuit against the City is essential to understanding the issues on this appeal in her second lawsuit.

**1. Prior Administrative Claims.**

As early as 1993, Otrubova complained about the condition of the pipes at the Meadowbrook Outfall. See Opening Brief at p.4. In 1997 and 2004, Otrubova made formal administrative claims against the City alleging that the City's stormwater system had damaged her bulkhead, had caused sinkholes in her yard, and threatened her foundation. See Breen Decl., Exs. B, C.

**2. Claims in the First Lawsuit.**

Otrubova first filed an action against the City in 2007 (King Co. Sup. Ct. No. 07-2-21844-1 SEA). Two issues in the first action, including summary judgment dismissal of the inverse condemnation claim, are the subject of a separate appeal to this Court (No. 63493-9-I).

In the first action, Otrubova asserted broad and wide-reaching claims relating to the Meadowbrook Outfall. Her claims included:

- Continuing negligence;
- Various strict liability theories relating to the alleged diversion and channeling of surface water;
- Continuing nuisance;
- Continuing trespass;
- Overburdening of an easement;
- Inverse condemnation; and
- Injunction against continuing trespass and continuing nuisance.

Breen Decl., Ex. D, at ¶¶ 4.1-4.33. Significantly, in that first case,

Otrubova:

- Sought ongoing damages. See, e.g., Breen Decl., Ex. D, ¶¶ 3.10 & 3.12. Otrubova expressly and unequivocally sought to recover for any and all property damages suffered up to the June 1, 2009 trial date. See Breen Decl., Ex. E, at pp. 3-4.
- Litigated fully her claims regarding the Meadowbrook Outfall Rehabilitation Project. The Project necessarily was at issue because Otrubova was seeking to recover continuing damages up to the date of trial and the Project was undertaken and completed well before the trial date. In addition, however, Otrubova expressly complained of the alleged inadequacies of the Project in

the Amended Complaint. See Breen Decl., Ex. D, ¶ 3.8

(complaining that one pipe was to be abandoned and that the City abandoned plans to line the pipes).

➤ Sought damages for alleged diminution in the value of the property. Breen Decl., Ex. D, ¶¶ 3.12 and 4.29.

### **3. Pretrial Proceedings.**

In the first action, on motion for summary judgment by the City, the Superior Court dismissed Otrubova's inverse condemnation claim. See Breen Decl., Ex. F. The Superior Court also denied Otrubova's motion to amend her complaint to add a revised version of the inverse condemnation claim. See Breen Decl., Ex. G.

In the first action, the Superior Court also considered whether Otrubova's claims remaining after summary judgment would support an award of damages for reduced property value, or "stigma" damages, and ruled that Otrubova could not seek stigma damages. See Breen Decl., Ex. H. In the course of the briefing on this motion, submitted well after the Rehabilitation Project was completed, Otrubova argued vigorously that various alleged deficiencies of the Project were at issue and would support the claims that she eventually tried before the jury. See Breen Decl., Ex. E, at pp. 2-4. Otrubova argued that, even after the completion of the

Project, the pipes were still leaking, that the link sleeves were improper, and that the City should not have elected to use only two pipes in the rehabilitated Outfall. See Breen Decl., Ex. E, at pp. 2-4. Otrubova summarized:

Simply put, the capacity of the system is currently challenged, the infrastructure is over 50 years old, and the City reduced the number of pipes at the outfall. A jury could find that any number of these facts contribute to the continuing torts and water law claims.

Breen Decl., Ex. E, at p. 4.

**4. Trial Proceedings.**

**a. Otrubova's case.**

At jury trial in the first action, Otrubova focused her case on the Meadowbrook Outfall Rehabilitation Project and particularly on her allegations that the Project did not fully address the underlying causes that purportedly led to leaks in the City's pipes. Otrubova sought not only damages, but also an "order enjoining the City from perpetuating the continuing trespass and continuing nuisance." Breen Decl., Ex. I, at p. 11.

Otrubova put on trial the entire history of the Meadowbrook Outfall, including especially the Meadowbrook Rehabilitation Project. Multiple witnesses testified for Otrubova about the Project, as she attempted to provide evidentiary support for her argument that the Project

did not adequately address her concerns about the Outfall. Breen Declaration, ¶¶ 2-14 (regarding testimony of trial witnesses, including testimony by witnesses Ahern, Hasegawa, Schimek, Yesuwan, Cortez-Quinones, York, Mirabella, Thomas, Otrubova, and Struthers regarding the adequacy of the Project). Otrubova presented testimony from essentially everyone who had anything to do with the Meadowbrook Outfall Rehabilitation Project, from the SPU executives who approved and managed the project, to the design engineers, to the geotechnical engineer who did studies for the Project, to the project manager and the resident engineer. Id. These witnesses testified about the Project for nearly two weeks, on topics that included:

- Otrubova's expert's assessment of the adequacy of the design and construction of the Rehabilitation Project;
- All aspects of the planning for the project and investigations preliminary to the Project;
- All aspects of the design of the Project, including various design alternatives considered, and alleged risks relating to those design alternatives;
- The cost-benefit analysis performed by SPU with respect to the Project;

- The bidding and permitting for the Project;
- Details of the actual day-to-day construction of the Project and inspections of the work; and,
- Testimony from many different witnesses, including Otrubova, Struthers, and a number of City witnesses, about how the Meadowbrook Outfall is performing since the completion of the Rehabilitation Project.

Id. The parties also introduced exhibits. Many of these related primarily, if not exclusively, to the Meadowbrook Outfall Rehabilitation Project.

See Breen Decl., Exs. M - JJ.

**b. Jury instructions.**

At the close of the evidence, the parties submitted jury instructions based on the evidence that they had submitted. Otrubova's instructions included such claims as the following:

(1) The Plaintiffs claim that the City, by not adhering to industry standard best practices, including minimal basic research of as-built structural plans and supporting project documentation, proposed solutions to the Meadowbrook Outfall Rehabilitation Project that would not, and did not, resolve known problems in the pre-existing structure....

The Plaintiffs claim that the City, by not taking reasonable precautions to develop a basic understanding of site conditions in all seasons under

which the Meadowbrook Outfall would be required to operate, intentionally constructed an inadequate structure.

Breen Decl., Ex. J, at pp. 3-4.

Otrubova's proposed instructions demonstrate that in the first action she fully litigated (a) the adequacy of the Meadowbrook Outfall Rehabilitation Project, and in particular, (b) whether the Project resolved the alleged "known problems" in the pre-existing structure. Those are the same claims that Otrubova sought to re-try in the second action.

**c. Denial of injunctive relief.**

At the conclusion of Otrubova's case-in-chief in the first action, the City filed a Motion for Judgment as a Matter of Law. The City asked that, among other things, Otrubova's claims for injunctive relief be dismissed on grounds that Otrubova failed to introduce evidence sufficient to warrant injunctive relief.

Specifically, the City argued that Otrubova had failed to meet the three basic requirements for the granting of injunctive relief: (1) a clear legal or equitable right; (2) a well-grounded fear of immediate invasion of that right; and, (3) that the acts complained of are either resulting in or will result in actual and substantial injury. Breen Decl., Ex. K, at p. 12. The City argued further:

Plaintiffs failed to demonstrate that the City's pipes at the Meadowbrook Outfall have damaged the bulkhead or property since the Rehabilitation Project was completed in 2007. The only evidence introduced by plaintiffs is: a) that the City engaged in the Rehabilitation Project in 2007; and, b) testimony describing the nature of the Rehabilitation Project. Notwithstanding the Court's various orders in limine, the plaintiffs attempted in large measure to make this trial about the sufficiency of the Meadowbrook Outfall Project. Although granted considerable latitude by the Court, the plaintiffs have failed completely to provide competent evidence that the City's facility, since improvement, presents any material risk to plaintiffs....

Plaintiffs must demonstrate a well-grounded fear of immediate invasion of their property rights, *Kucera, supra*. Here, there is no evidence that the Meadowbrook Outfall pipes are continuing to leak or will leak in the future. For example: plaintiffs' pipe expert does not claim that the pipes are leaking now. And he concedes that portions of the Outfall are overbuilt. Conditions at the Meadowbrook Outfall have improved since the Rehabilitation Project was completed in 2007. The risk of invasion of plaintiffs' property rights no longer exists or has been substantially reduced such that there is not a well-founded basis to fear additional water leaks.

Plaintiffs have failed to show that the acts for which they seek injunctive relief have continued or will continue; and they have failed to demonstrate that actual or substantial injury to their property is likely to occur.

Breen Decl., Ex. K, at pp. 12-14.

The Court granted the City's motion to dismiss Otrubova's request for injunctive relief. Breen Decl., Ex. L, at p. 9; Ex. K, at [1, excerpt of clerk's minutes].

**d. The verdict.**

The jury returned a verdict in favor of the City on all Otrubova's remaining claims. CP 181.

**e. Facts litigated.**

To summarize the above: In the first action, Otrubova attempted to establish that the Meadowbrook Outfall caused damage to her property and that the Rehabilitation Project was a poor choice, did not fix the problem, was negligently implemented, and caused damage to her property.

As demonstrated above, Otrubova fully (albeit unsuccessfully) litigated all aspects of her claims concerning the Rehabilitation Project, including:

- All aspects of the planning for the project and investigations preliminary to the Project;
- All aspects of the design of the Project, including various design alternatives considered, and alleged risks relating to those design alternatives;
- The cost-benefit analysis performed by SPU with respect to the Project;
- The bidding and permitting for the Project;

- Details of the actual day-to-day construction of the Project and inspections of the work;
- The factual support (or lack thereof) for Otrubova’s theories about the adequacy of the design and construction of the Project, and in particular, whether the Outfall presents any material risks to her property now that the Project has been completed; and,
- The performance of the Meadowbrook Outfall since the completion of the Rehabilitation Project.

**E. Otrubova’s Second Lawsuit.**

**1. The Complaint.**

After dismissal of Otrubova’s inverse condemnation claim on summary judgment in the first action, and after the Superior Court’s denial of her motion to amend her complaint, she commenced a second action against the City – again for inverse condemnation. See Breen Decl., Exs. F, G; CP 1-10. She filed her second Complaint for Damages on May 27, 2008 (the “Complaint”), King County Superior Court case number 08-2-17862-5 SEA. See CP 3-9.

The Complaint contains virtually the same claim that Otrubova sought to add in the first action through her motion to amend. Specifically, the Complaint in the second action and the proposed second

amended complaint in the first action contain virtually identical substantive factual allegations regarding the Rehabilitation Project. Compare CP 1-7 (Complaint ¶¶ 3.1-3.6, 3.7, 3.8, 3.10, 3.11) with CP 362 (at ¶ 10), 407-13 (proposed second amended complaint [in first action] ¶¶ 3.1-3.6, 3.16-3.19). They also contain identical causes of action for inverse condemnation based on the Rehabilitation Project. Compare CP 8-9 (Complaint ¶¶ 4.1-4.7) with CP 416-417 (proposed second amended complaint [in first action] ¶¶ 4.23-4.29).

Like the complaint in the first action, the Complaint in this action sounds in tort. It contains a single cause of action, which is labeled a claim for inverse condemnation, but is actually a claim for negligence. The gravamen of the Complaint is (a) that the Otrubova property has suffered damage as a result of the City's alleged failure to maintain the Meadowbrook Outfall, and (b) that the City was negligent in its implementation of the Rehabilitation Project. Specifically, the Complaint alleges that the Meadowbrook Outfall is designed to direct storm water overflow from Meadowbrook Pond through City property and into Lake Washington. CP 5 (Complaint at ¶ 3.3, lines 1-6). It alleges that the outfall was negligently maintained. CP 5 (Complaint at ¶ 3.6). And it alleges that the Rehabilitation Project was negligently performed, to wit:

3.7 ...As part of the remediation, the City removed the decayed CMP pipes and replaced only two of them...with ductile iron pipes....[A] temporary metal wall was pounded into place and later removed. The City also had wooden slats that acted to protect its bulkhead removed as part of the remediation. It deleted from the plan a carbon lining for the concrete pipes. It also attempted to secure the joints inside the concrete outfall pipes ... through the use of epoxy and joint sleeves....The City's bulkhead was not addressed and its undermined condition was not remedied....Nothing was done to remediate the area under the cement pipes....

3.8 Following the remediation of the Outfall, the pipes continue to "surcharge"....The bubbling up of water in Riviera Place NE at a point directly over the 48 inch pipe has not been addressed. On information and belief, the City simply filled the area, took no photographs of the sinkhole in the street and performed no testing....

3.9 ...On May 16, 2008,...a diver inspected the City's pipes finding separation in the first joint....The 48 inch ductile iron pipe...had a hole in it.

See CP 6-7. In sum, according to the Complaint:

3.10 Defendant City failed to use ordinary care in its design, construction, and implementation of the storm water conveyance system and of the recent remediation. The City has, and on a continuing basis, failed to exercise ordinary care in operating, maintaining and repairing the Outfall facility.

See CP 7.

## **2. The City's First Summary Judgment Motion.**

The City filed a Motion for Summary Judgment on November 7, 2008, prior to trial in the first action. See CP 11-22. The City sought

dismissal of the Complaint in its entirety on grounds that (1) the second action constituted an improper end-run around Judge Gonzales' orders refusing to allow Otrubova to add to the first action a claim nearly identically to the claim advanced in the second action, (2) the second action constituted improper claim splitting, and/or (3) as a matter of law, the Rehabilitation Plan as alleged did not constitute an unconstitutional taking without just compensation. See CP 11-22, 422-28. Otrubova opposed the motion. See CP 127-49.

On December 5, 2008, the case was re-assigned to Judge Inveen. CP 162-63.

By Order entered January 9, 2009, the Superior Court, McBroom, J., denied the City's motion. See CP 164-65. The January 9, 2009 Order states only that "[t]he Court finds that genuine issues of material fact exist, and Defendant City of Seattle is not entitled to judgment as a matter of law[.]" CP 165.

**3. The Granting of the City's Second Summary Judgment Motion (the Subject of This Appeal).**

**a. The motion.**

On September 4, 2009, the City filed a second motion for summary judgment (the "Summary Judgment Motion"). See CP 178-202. This second summary judgment motion, granted by the Superior Court, is the

subject of this appeal.

The circumstances of the second summary judgment motion differed radically from those of the first. First, in the interim, the jury trial in the first action had been conducted and concluded: Facts and issues relating to the Rehabilitation Project had been fully litigated and resolved in favor of the City. See above at pp. 11-17.

Second, after the jury trial in the first action, but before the second motion in the second action was heard, the City conducted discovery regarding Otrubova's damages claim. In deposition, Mr. Struthers did not argue that he would have been better off without the Rehabilitation Project, conceded that there had been no new physical damage to his property since completion of the Project, and declined to attribute problems with his property to the Project. See CP 733-34, 749, 753, 760, 761.

Further, Otrubova's expert appraiser agreed in his deposition that the Rehabilitation Project "actually improves the value" of the Otrubova property. See CP 734-35, 770-71.

In the Summary Judgment Motion, the City sought dismissal of the Complaint in its entirety, on grounds that (1) Otrubova could not prove actual damages, (2) the doctrine of collateral estoppel barred Otrubova's

inverse condemnation claim, and/or (3) as a matter of law and on the facts alleged, Otrubova could not recover for inverse condemnation. See CP 190-202, 737-42; RP 1-40. The City supported the Summary Judgment Motion with declarations and documentary exhibits. See Breen Decl. and Exs. thereto; CP 361-418, 749-835, 836-39.

**b. Otrubova's opposition and the City's reply.**

Otrubova opposed the Summary Judgment Motion. See CP 206-30. In support of the opposition, Otrubova submitted a Declaration of Robert B. Struthers with substantial documentary exhibits. See CP 470-729.

In her opposition, Otrubova did not dispute the core material facts underlying the Summary Judgment Motion. Specifically, Otrubova did not dispute the following facts: (1) in the first action she had a full and fair opportunity to litigate the entire history of the Meadowbrook Outfall, including especially the Rehabilitation Project; (2) she focused her case at trial in the first action on the Rehabilitation Project; and (3) in the first trial, she expressly and unequivocally sought to recover for any and all property damages suffered up to the June 1, 2009 trial date. See CP 127-49, 731. Otrubova identified no new evidence that would distinguish the second case from the first. See CP 731; see generally CP 127-49. She did

not dispute that she could only prevail in the second case if she proved that the Rehabilitation Project made things worse for her property. She presented no evidence that the Rehabilitation Project caused a diminution in her property value. See CP 732; see generally CP 127-49.

The City filed its Reply on September 28, 2009. See CP 730-45.

**c. The Superior Court grants summary judgment.**

On October 2, 2009, the Superior Court granted the Summary Judgment Motion, dismissing the case in its entirety with prejudice. See RP 1-40; CP 231-32.

The October 2, 2009 Order Granting City of Seattle's Motion for Summary Judgment stated the following grounds for granting the Summary Judgment Motion:

Collateral estoppel bars the re-litigation of the issues resolved in *Otrubova v. City of Seattle*, King County Superior Court No. 07-2-21844-1 SEA. That trial involved the same parties and parcel of land, and was resolved in favor of the city after a full trial on the merits in June, 2009. The only claim pled in this matter is the inverse condemnation claim based upon the Meadowbrook Outfall Rehabilitation Project. Plaintiffs have not provided admissible evidence of damages to support this claim. Plaintiffs' expert Hagar has testified that the project has improved the value of Plaintiffs' property. The allegation of fear alone, without actual substantiation of a diminution of property value based upon reasonable fear, is insufficient to establish damages. General statements of concern about potential failure of the project do not rise to the level of evidence necessary to support that substantiation.

CP 232. The October 2, 2009 Order also identified the record called to the attention of the Superior Court on the Summary Judgment Motion.

CP 231.

**4. The Superior Court Denies Otrubova's Motions to Reconsider.**

Otrubova filed Plaintiffs' Motion for Reconsideration, pursuant to CR 59, on October 12, 2009. See CP 233-44. In support of the motion, Otrubova submitted (1) the declaration of her expert, Richard Hagar (CP 245-48), (2) a Declaration of Robert B. Struthers (CP 249-324), and (3) a Declaration of Vitezslava Otrubova (CP 325-49).

Otrubova filed Plaintiff's Supplementary Motion for Reconsideration on October 19, 2009. See CP 350-53.

On March 8, 2010, the Superior Court entered an Order Denying Plaintiffs' Motion and Supplementary Motion for Reconsideration. See CP 354-55. The March 8, 2010 Order provided the basis for denying Otrubova's motions for reconsideration: "The Court does not find legal grounds to reconsider the October 2, 2009 Order Granting Summary Judgment." CP 355.

#### IV. ARGUMENT

##### A. Standards of Review Regarding Summary Judgment.

###### 1. This Court reviews de novo the granting of summary judgment.

This Court reviews de novo a trial court decision to grant summary judgment. Michak v. Transnation Title Ins. Co., 148 Wn.2d 788, 794, 64 P.3d 22 (2003) (reviewing trial court summary judgment dismissal of breach of contract claim). Pursuant to CR 56(c), “[a] motion for summary judgment is properly granted where ‘there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law.’” 148 Wn.2d at 794-95 (ellipsis in original).

Like the trial court, this Court must view “the facts and the reasonable inferences from those facts in the light most favorable to the nonmoving party.” Id. at 794. When, however, the moving party submits admissible evidence in support of its motion, the nonmoving party “may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in [CR 56], must set forth specific facts showing that there is a genuine issue for trial.” Id. at 795 (emphasis in original) (quoting CR 56(e)).

**a. This Court may consider only issues and evidence called to the attention of the Superior Court on the Motion for Summary Judgment.**

The Washington Rules of Appellate Procedure strictly limit the scope of this Court's review of an order granting a motion for summary judgment: "[T]he appellate court will consider only evidence and issues called to the attention of the trial court" as set forth in the order granting the motion. RAP 9.12 (emphasis added); Kaplan v. Northwestern Mut. Life Ins. Co., 115 Wn. App. 791, 799, 65 P.3d 16 (2003). "The purpose of this limitation is to effectuate the rule that the appellate court engages in the same inquiry as the trial court." Washington Fed'n of State Employees v. Office of Financial Mgmt., 121 Wn.2d 152, 157, 849 P.2d 1201 (1993).

The October 2, 2009 Order identified the record called to the attention of the Superior Court on the Summary Judgment Motion:

(a) the City of Seattle's Motion for Summary Judgment and the Declaration of Thomas J. Breen and Exhibits A-JJ attached thereto; (b) Plaintiffs' opposition memorandum and exhibits attached thereto; (c) the City of Seattle's reply memorandum, the accompanying Declaration of Glenn Hasegawa and Exhibit 1 attached thereto, and the accompanying Declaration of David N. Bruce and Exhibits 1-9 attached thereto; and, (d) the oral argument by the parties and/or their counsel on October 2, 2009.

CP 231. In other words, pursuant to RAP 9.12, this Court's review of the granting of the Summary Judgment Motion is limited to the following

portions of the Clerk's Papers:

<b>Document identified in Oct.2, 2009 Order</b>	<b>Clerk's Papers pages or Report of Proceedings pages</b>
City of Seattle's Motion for Summary Judgment	CP 178-202
Declaration of Thomas J. Breen and Exs. A-JJ thereto	CP 469 & Breen Declaration (see footnote 2 above at p. 6)
Plaintiffs' opposition memorandum	CP 206-30
Plaintiffs' declarations in support of opposition and exhibits thereto	CP 470-729
City of Seattle's reply memorandum	CP 730-45
Declaration of Glenn Hasegawa and Exhibit thereto	CP 836-42
Declaration of David N. Bruce and exhibits thereto	CP 749-835
Oral argument on October 2, 2009	RP 1-40

The RAP 9.12 limitation on the scope of review is important here. First, Otrubova has submitted new evidence with her Opening Brief. The City has moved to strike this improper evidence under separate motion filed herewith.

Second, inspection of the citations to the record in Otrubova's Opening Brief reveals that the majority of her fact assertions are supported by material that was not called to the attention of the trial court on the motion at issue. To highlight only two of many improper citations in the Opening Brief:

(1) From pages 7-8 of the Opening Brief:

Further problems and damage presented themselves during construction in the summer of 2007. CP 155-56, 239. Sinkholes appeared in the Otrubova-Struthers yard during excavation. CP 239. The shared bulkhead began to sag at its eastern corner. CP 239. The full extent of the damage inflicted upon the subject property during construction is found in the Plaintiff's Opposition to Defendant's Motion for Summary Judgment. CP 127-152.

The citation to CP 127-52 is to Otrubova's opposition to the City's first motion for summary judgment, which was denied and to which there is no assignment of error. The citations to CP 155-56 are to the Struthers Declaration in support of that opposition to the first motion. The citation to CP 239 is to Otrubova's motion for reconsideration after the subject Summary Judgment Motion was granted. None of these materials were called to the attention of the trial court on the Summary Judgment Motion. See CP 231. Under RAP 9.12 none of these materials can be considered on review of the granting of the Summary Judgment Motion.

(2) From page 8 of the Opening Brief:

A severe storm on October 17, 2009, produced a familiar pattern of geysers and bubbling from the replaced outfall pipes. CP 325-349. More disturbingly, sinkholes reappeared at the same locations as in the past the day after this storm event. CP 327. Professional real estate appraiser Richard Hagar has stated these problems experienced from long-standing and recurring issues has caused a diminution in value of the Otrubova-Struthers property. CP 130, 247.

The citations to CP 325-349 are to the Otrubova Declaration in support of her motion for reconsideration, filed after the Summary Judgment Motion was granted. CP 247 is a citation to the Hagar Declaration in support of that motion for reconsideration. CP 130 is a citation to Otrubova's opposition to the first motion for summary judgment. None of these materials were called to the attention of the trial court on the Summary Judgment Motion, see CP 231, and under RAP 9.12 none of these materials can be considered on review of the granting of the Summary Judgment Motion.

Otrubova seeks in this appeal to obscure the critical distinction between the first and second actions, because the scope of the second action, from which she has taken this appeal, is extremely narrow, and what she really wants is a do-over of the entire litigation. Obscuring the record on this appeal furthers that agenda, but the Court should not allow itself to be misled: The grant of the Summary Judgment Motion that is the specific subject of this appeal presents a discrete legal issue based on a narrow set of facts. The trial court was explicit in identifying the limited set of materials called to its attention on the Motion. Pursuant to RAP 9.12, this Court should carefully limit its scope of review on the grant of the Summary Judgment Motion.

**B. The Superior Court Properly Granted Summary Judgment.**

Given the issues, rulings, trial, and verdict in the first case, the only argument Otrubova could make in this case was that the Rehabilitation Project made things worse. In opposition to the Summary Judgment Motion, she offered no such evidence. Indeed, she offered no evidence to establish damages on any issue properly within the scope of this case. Her own expert testified in deposition that the Rehabilitation Project improved the value of her property. CP 734-35, 770-71.

The Superior Court properly granted the City's motion for summary judgment dismissal of Otrubova's claim for inverse condemnation: First, collateral estoppel barred her claim in this second action. The issues supporting her sole claim were fully and fairly litigated in the first action, which resulted in a defense verdict. Second, Otrubova created no disputed issue of material fact as to damages and in any event could not prove damages. Third, as a matter of law, Otrubova could not establish a claim for inverse condemnation. The inverse condemnation claim is actually a tort claim in disguise, which was fully and fairly litigated in the first case.

**1. Collateral Estoppel Precludes Otrubova's Claim.**

In this second action, Otrubova sought below to re-litigate the

issues that were fully and finally litigated and resolved in the first action. The Superior Court granted the Summary Judgment Motion in part on grounds of collateral estoppel. CP 232. Granting the Summary Judgment Motion based on the doctrine of collateral estoppel was proper.

**a. Collateral estoppel prohibits re-litigation of litigated, resolved issues.**

“The doctrine of collateral estoppel prevents re-litigation of an issue after the party estopped has had a full and fair opportunity to present its case.” Hanson v. City of Snohomish, 121 Wn. 2d 552, 561, 852 P. 2d 295 (1993). “The purpose of the doctrine is to promote the policy of ending disputes, to promote judicial economy and to prevent harassment of and inconvenience to litigants.” Id.

Application of the doctrine of collateral estoppel requires that (1) the prior issue is identical to an issue adjudicated in a prior litigation, (2) the prior adjudication ended in a final judgment, (3) the party against whom the issue is now raised was a party or in privity to the prior adjudication, and (4) application of the doctrine would not work an injustice. Nielsen v. Spanaway Gen. Med. Clinic Inc., 135 Wn. 2d 255, 262-263, 956 P. 2d 312 (1998). These four requirements essentially require a determination whether the party to be estopped had a full and fair opportunity to litigate the issues in the earlier proceeding. State Farm

Mut. Automobile Ins. Co. v. Avery, 114 Wn. App. 299, 304, 57 P. 3d 300 (2002).

A change in legal theory on the same fact issues cannot justify successive actions, and the availability of alternative remedies does not create separate claims. Philip A. Trautman, Claim and Issue Preclusion in Civil Litigation in Washington, 60 Wash. L. Rev. 805 (1985). A judgment as to one remedy will have preclusive effect in subsequent actions seeking other remedies. Id. at 815 (citing Bill v. Gattavara, 34 Wn. 2d 645, 209 P. 2d 457 (1949)). Washington courts also have made clear their strong preference for finality, even over correcting an erroneous result. State Farm Mut. Automobile Ins. Co. v. Avery, 114 Wn. App. at 306.

**b. The inverse condemnation claim was fully and fairly litigated and resolved in the first case.**

Otrubova commenced this second action against the City—for inverse condemnation—after dismissal of her inverse condemnation claim on summary judgment in the first action, and after the Superior Court denied her subsequent motion to file a second amended complaint in that first action. See Breen Decl., Exs. F, G; CP 1-10. The Complaint in this second case contains virtually the same claim that Otrubova sought to add in the first action through her motion to amend, including virtually identical substantive factual allegations regarding the Rehabilitation

Project. Compare CP 1-9 (Complaint ¶¶ 3.1-3.6, 3.7, 3.8, 3.10, 3.11, 4.1-4.7) with CP 362 (at ¶ 10), 407-13, 416-17 (proposed second amended complaint [in first action] ¶¶ 3.1-3.6, 3.16-3.19, 4.23-4.29). The dismissal of the inverse condemnation claim in the first action is the subject of a separate Otrubova appeal to this Court, case no. 63943-9-1. She did not appeal the denial of her motion to file the second amended complaint in that case. See Amended Statement in lieu of Statement of Arrangements, Ct. App. case no. 63943-9-1 (identifying issues on appeal).

Otrubova's inverse condemnation claim in the first case asserted that her property had been inversely condemned by virtue of the property damage that allegedly had been caused by the Outfall prior to the Rehabilitation Project. See Breen Decl., Ex. D. The Superior Court dismissed that claim on summary judgment, see Breen Decl., Ex. F, and that dismissal now is final and the subject of a separate appeal. See Ct. App. case no. 63943-9-1. Both res judicata and collateral estoppel prevent Otrubova from pursuing that claim again. Otrubova cannot re-litigate in this action any claim that her property was inversely condemned by any act or omission of the City prior to July 31, 2007 (the date on which she filed her complaint in the first action, see Breen Decl., Ex. D).

**c. Any claim for damage stemming from alleged failure of the Rehabilitation Project was fully and fairly resolved in the first case.**

In the first action, certain of Otrubova's continuing tort claims survived summary judgment. See Breen Decl., Ex. F. These remaining claims were tried to a jury. At the three-week trial, Otrubova attempted to establish that the Meadowbrook Outfall caused damage to her property and that the Rehabilitation Project was a poor choice, did not fix the problem, was negligently implemented, and caused damage to her property. See above at pages 11-17 and record cited therein. At that trial, she fully litigated all fact issues relating to her claims concerning the Rehabilitation Project, including:

- All aspects of the planning for the project and investigations preliminary to the Project;
- All aspects of the design of the Project, including various design alternatives considered, and alleged risks relating to those design alternatives;
- The cost-benefit analysis performed by SPU with respect to the Project;
- The bidding and permitting for the Project;

- Details of the actual day-to-day construction of the Project and inspections of the work;
- The factual support (or lack thereof) for Otrubova's theories about the adequacy of the design and construction of the Project, and in particular, whether the Outfall presents any material risks to her property now that the Project has been completed; and,
- The performance of the Meadowbrook Outfall since the completion of the Rehabilitation Project.

See id.

After the trial and entry of judgment in the first action, there remained nothing in the second action to litigate. The City filed the subject Summary Judgment Motion approximately three months after the close of the trial in the first action, after Otrubova filed her Notice of Appeal in the first action, and at the close of discovery in the second case, see CP [--] (Case Scheduling Order setting discovery cutoff of September 21, 2009) (designated for Clerk's Papers by Respondent on July 30, 2010).

In opposition to the Motion, Otrubova stated that "substantial volumes of new evidence are available that will make the distinction between the two cases clear," CP 207, but she did not identify even one item of such "new evidence," much less explain the difference between the

two cases. See generally CP 206-30. To the contrary, Otrubova sought in the second action to re-try exactly the issues that she had tried in the first case. Compare Breen Decl., Ex. I (Plaintiffs' Trial Brief in first action), Breen Decl., ¶¶ 2-13 (summarizing testimony presented by Otrubova at trial in first action), with CP 3-9 (Complaint in second action), CP 206-11 (Opposition to City's Summary Judgment Motion in second action).

A plaintiff seeking damages for a continuing tort may recover those damages that occurred up to the date of trial. See, e.g., Woldson v. Woodhead, 159 Wn. 2d 215 (2006) (holding in a continuing tort context that recoverable damages include damages incurred up to the time of trial). In the first case, Otrubova pursued continuing tort theories and expressly and unequivocally sought to recover for any and all property damages suffered up to the June 1, 2009 trial date. Breen Decl., Ex. E, at 3-4. She fully and fairly litigated her claim for damages up to the time of trial, June 1, 2009, including those damages allegedly relating to not only the construction of the Meadowbrook Outfall Rehabilitation Project, but also her claim that even after the Project, the Outfall was continuing to cause damage to her property. See, e.g., Breen Decl. at ¶¶ 2-13 (summarizing testimony presented by plaintiffs at first trial). As reflected in the jury's defense verdict, Otrubova failed to prove that she was entitled to recover

any damages that occurred on or before June 1, 2009. Under the doctrine of collateral estoppel, because those issues were fully and fairly litigated and finally resolved, she cannot relit iGATE them. Hanson, 121 Wn.2d 552 (holding collateral estoppel doctrine precludes re-litigation of issues fully and fairly litigated in previous action).

In sum, all the requirements for application of the doctrine apply: (1) The prior case ended in a final judgment. (2) The parties are the same in both actions. (3) Certainly the application of the doctrine works no injustice if it operates only to prevent plaintiffs from litigating the same issues over and over again. (4) As demonstrated, all of the issues that plaintiffs seeks to litigate in the second action were fully and fairly litigated in the first action. Accordingly, dismissal of this action based on collateral estoppel is proper. Nielsen v. Spanaway Gen. Med. Clinic Inc., 135 Wn. 2d 255 (affirming trial court partial summary judgment applying collateral estoppel, where all four factors were established).

**2. Otrubova Did Not Create a Disputed Issue of Material Fact Regarding Damages.**

Even if this second case were not wholly duplicative of the facts and issues litigated and fully resolved in the first case, the Superior Court properly granted the Summary Judgment Motion for a separate reason: Otrubova failed to present any admissible evidence setting forth specific

facts to create a genuine issue for trial on damages. See CR 206-30.

An inverse condemnation claim requires proof of damages. Phillips v. King County, 136 Wn.2d 946, 957, 968 P.2d 871 (1998) (elements of inverse condemnation claim include “taking or damaging” of property). The measure of damages for inverse condemnation is the decrease in the market value of the property at issue, and that remedy is exclusive. Phillips v. King County, 136 Wn.2d 946, 958 (1998) (“[t]he remedy for a taking is the difference in market value”); Miotke v. Spokane, 101 Wn.2d 307, 334 (1984) (in an inverse condemnation action, “the extent of recovery is limited to the decrease in the market value of the property”) (emphasis added); Martin v. Port of Seattle, 64 Wn.2d 309, 319 (1964) (“in inverse condemnation, the measure of recovery is the injury to market value, and that alone”) (emphasis added).

If the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to her case then the trial court should grant summary judgment. Hines v. Data Line Sys., 114 Wn.2d 127, 148 (1990). Under CR 56(e), to defeat the subject summary judgment motion, Otrubova was obligated to present affidavits or other evidence establishing a genuine issue of material fact for trial on damages. Michak 148 Wn.2d at 795. She failed to do so.

**a. In opposition to the Motion, Otrubova offered no evidence of damages.**

Preliminarily, the scope of Otrubova's damages claim was sharply curtailed by the result of the first case. As noted above, Otrubova expressly and unequivocally sought to recover for any and all property damages suffered up to the June 1, 2009 trial date. She failed to prove at trial that she was entitled to recover any damages that occurred on or before June 1, 2009. *See* above at p. 35.

The subject Summary Judgment Motion in this action pointed out that, given the process and result in the first case, Otrubova's only possible argument in this case was that the Rehabilitation Project made things worse for her. CR 193-94. The City's Motion also argued that Otrubova's claim is "preposterous on its face" and that she could offer no facts supporting the relief she sought, pointing out that no reasonable trier of fact could conclude that the City's multi-million-dollar project had made things worse, and requested summary judgment on this basis alone. CR 193-94.

Otrubova's opposition to the City's Summary Judgment Motion did not dispute the city's argument that she needed to show the Rehabilitation Project made things worse. And she presented no evidence that the Rehabilitation Project caused a diminution in her property value—

that is, she provided no evidence that she has been damaged. See CP 206-30; 733-36. Her opposition “Statement of Facts” is devoted to facts relating to alleged problems with the Meadowbrook Outfall and the Rehabilitation Project construction—i.e., to fact issues that were the subject of the first case. See CP 207-11. Only one item cited in her opposition “Statement of Facts” refers to anything that post-dates the completion of the Rehabilitation Project—a quotation from the September 2009 City All-Hazards Mitigation Plan—but that item does not create a disputed issue of material fact on damages. See CP 209-10.

Indeed, the evidence on the Motion established that the Project improved the value of her property: Her own expert appraiser agreed in deposition that the Project “actually *improves* the value” of her property. See CP 734-35, 770-71 (emphasis added).

As the City’s Motion argued, Otrubova’s claim that the Project itself has diminished the value of her property simply makes no sense. Because no reasonable jury could enter judgment for her on that claim, the granting of summary judgment for the City below was proper on that basis alone. Otrubova’s Response did not even attempt to show that she had been damaged. In fact, as noted, she has benefited from the Project. Dismissal on summary judgment was proper, because she failed to raise a

genuine fact issue regarding damages, and damages are an essential element of her claim. Brown v. Park Place Homes Realty, Inc., 48 Wn. App. 554, 558 (1987).

**b. Fear of loss cannot support a claim for inverse condemnation.**

Granting summary judgment was also proper because fear about possible future damage cannot support an inverse condemnation claim. In Bodin v. City of Stanwood, 79 Wn. App. 313, 314 (1995), this Court held in clear and unequivocal language that, as a matter of law, continuing fear of risk cannot give rise to inverse condemnation.

This appeal also presents the issue of whether a continuing fear of flooding gives rise to an inverse condemnation cause of action. We hold that a continuing fear does not meet the physical invasion requirement of inverse condemnation and affirm the dismissal as a matter of law.

In Bodin, property owners adjacent to a city sewage lagoon brought an inverse condemnation claim against the City based on sewage that spilled over onto the adjacent property after severe flooding. The trial court dismissed plaintiffs' inverse condemnation claim and the Court of Appeals affirmed. Id. at 314.

Bodin is squarely on point. Otrubova's allegations regarding the Rehabilitation Project focus on the same fear of flooding that Bodin specifically rejected. Specifically, the Complaint focuses on risks and

possibilities, not damages:

The undermined bulkhead is at risk for further movement which could lead to loss of more of the yard and presents a danger to the house. The concrete pipes, which had high flows discharging out of the joints likely moved the materials they were seated upon which caused the original joint distress. Nothing was done to remediate the area under the cement pipes and it is likely that there will be problems in the future.

CP 6 at ¶ 3.7 (emphasis added).

Even if the Meadowbrook Outfall Rehabilitation Project were actionable, no cause of action would lie in the absence of actual actionable damage caused by the new project. Otrubova argues that the Rehabilitation Project was not good enough because risk of future harm purportedly continues, but the argument does not create a disputed material issue sufficient to avoid summary judgment. Otrubova's allegations fail as a matter of law to support an inverse condemnation claim. Bodin, 79 Wn. App. at 314.

**3. As a Matter of Law, Otrubova Cannot Establish a Claim for Inverse Condemnation on the Facts Alleged.**

Granting the Summary Judgment Motion was proper for a third, independent reason as well: on the allegations of the Complaint and the (lack of) facts presented in opposition, Otrubova could not establish an inverse condemnation claim as a matter of law. At most, Otrubova alleged

a tort claim, but, as discussed above, her tort claim was already fully and fairly litigated in the first case.

The law in Washington distinguishes between a taking and a tort. An inverse condemnation claimant must prove that the state's interference with his or her property is "contemplated by the plan of work" or "a necessary incident in the building or maintenance" of the public use project. Olson v. King County, 71 Wn.2d 279, 285, 428 P.2d 562 (1967) (emphasis added). By contrast a tort claimant need only prove, inter alia, a breach of a duty. Smith v. Safeco Ins. Co., 150 Wn.2d 478, 485, 78 P.3d 1274 (2003) (stating elements of tort).

In other words, under Washington law, a party seeking recovery on an inverse condemnation claim must prove more than is sufficient to establish a tort violation. Pande Cameron and Co. v. Central Puget Sound Reg'l Transit Auth., 610 F. Supp. 2d 1288, 1300 (W.D. Wa. 2009). He or she must prove more than the mere absence of due care. Olson, 71 Wn.2d at 285. Also, "governmental torts do not become takings simply because the alleged tortfeasor is the government." Dickgieser v. State, 153 Wn.2d 530, 541, 105 P.3d 26 (2005).

As laid out more fully above at pages 17-20, the Complaint in this second action contains one cause of action, labeled "inverse

condemnation,” that is actually a negligence claim. It alleges that the Outfall was negligently maintained. CP 5 (Complaint at ¶ 3.6). It also alleges that the Rehabilitation Project was negligently performed. CP 6-7 (Complaint at ¶¶ 3.7-3.9). In sum, according to the Complaint:

3.10 Defendant City failed to use ordinary care in its design, construction, and implementation of the storm water conveyance system and of the recent remediation. The City has, and on a continuing basis, failed to exercise ordinary care in operating, maintaining and repairing the Outfall facility.

See CP 7. This is plainly a negligence claim. The Complaint does not allege that the intent or design of the Rehabilitation Project is to interfere with Otrubova’s property—rather, it specifically alleges that the intent of the outfall is to direct stormwater across the City’s property into Lake Washington. CP 5 (Complaint at ¶ 3.3, lines 1-6). It also does not allege that interference with her property is a necessary incident to the Rehabilitation Project.

In sum, even if she could prove the factual allegations in the Complaint, which she cannot, the proof would not amount to a taking. Olson, 71 Wn.2d 729 (holding that damage neither contemplated by design of nor necessary incident to government project could only constitute negligence, not taking); Peterson v. King County, 41 Wn.2d 907, 915, 252 P.2d 797 (1953) (same); Seal v. Naches-Selah Irrigation

Dist., 51 Wn. App. 1, 751 P.2d 873 (1988) (same); Songstad v. Municipality of Metrop. Seattle, 2 Wn. App. 680, 682, 472 P.2d 574 (1970) (same).

On the evidence presented on the Summary Judgment Motion, Otrubova also failed to create a dispute issue of material fact regarding a taking as opposed to negligence (regarding which she also offered no evidence). In opposition to the Summary Judgment Motion, Otrubova submitted no evidence that the Rehabilitation Project was intended or designed to interfere with her property or that interference with her property is a necessary incident to the Rehabilitation Project. See CP 206-230. Where a party opposing a motion for summary judgment fails to create a disputed issue on an essential element of her claim, granting the motion is proper. Hines v. Data Line Sys., 114 Wn.2d at 148.

**4. Authorities Relied Upon by Otrubova Are Inapposite.**

Otrubova has elected not to brief the distinct issues presented in this case and this appeal. Instead, the Argument section of Otrubova's Opening Brief is identical to the Argument she submitted in the opening brief for her appeal in the first action (No. 63493-9-I). Accordingly, and for this Court's convenience, the City provides here the same response to the authorities cited by Otrubova that it provided in response to her

Argument in the first appeal, with appropriate page references:

Otrubova's lengthy narrative interpretation of Washington decisions regarding inverse condemnation, see Appellants' Opening Brief at 13-30, is misleading. Indeed, the authorities cited by Otrubova demonstrate that, on the facts before the Superior Court on the City's Summary Judgment Motion, Otrubova's inverse condemnation claim fails.

Otrubova relies most heavily on Wong Kee Jun v. Seattle, 143 Wn. 479, 255 P. 645 (1927), for the proposition that the sole test for a taking is whether the government interference with private property is permanent. See Appellants' Opening Brief at 16-18. The City fully agrees that temporary interference cannot support a takings claim (except in certain regulatory contexts, not applicable here), but permanence is not the sole test: the permanence requirement is a product of the requirement of a greater degree of interference than failure of due care. See Olson, 71 Wn.2d at 285. Otrubova's argument is not even supported by Wong Kee Jun itself. The holding in the case is as follows:

[W]henver property is thus taken [in the exercise of eminent domain], voluntarily or involuntarily, by the sovereign state or by those to whom it has delegated this sovereign power, the courts must look only to the taking, and not to the manner in which the taking was consummated. A mere temporary interference with a private property right in the progress of the work, especially such as might have been avoided by due care, would

probably be tortious only. Improper blasting, causing debris to be cast upon the adjacent property, would seem to be tortious, and not a taking or damaging under the Constitution, but the removal of lateral support, causing slides or any permanent invasion of private property, must be held to come within the constitutional inhibition.

143 Wn. at 505. This holding does not state that the sole test for a taking is whether the government interference with private property is permanent. The Court also maintained a distinction between a tort and a taking.

The Washington Supreme Court itself later refuted Otrubova's argument in Olson. In Olson, the Washington Supreme Court expressly acknowledged Wong Kee Jun and Boitano v. Snohomish County, 11 Wn.2d 664, in noting the occasional difficulty in distinguishing between a tort and a taking. 71 Wn.2d at 284. The Court then proceeded directly to apply the rule that inverse condemnation cannot be supported by interference that is neither contemplated by the plan nor a necessary incident to the building or maintenance of the project. Id. at 284-85. It held that the negligent conduct of the county in that case "falls into the category referred to in Wong Kee Jun as a 'mere temporary interference with a private property right...such as might have been avoided by due care.'" Id. at 285 (emphasis added). In other words, the Court affirmed that proof of more than a mere tort violation is required to establish an inverse condemnation claim. Olson thus harmonizes prior holdings by the

Court, including, expressly, Wong Kee Jun and Boitano.

Other cases cited by Otrubova in support of her argument are distinguishable on a variety of grounds. To address only the most relevant cases cited by Otrubova and not already discussed herein:

DiBlasi v. City of Seattle, 136 Wn.2d 865, 969 P.2d 10 (1998), Appellants' Opening Brief at 27-29; Wilber Dev. Corp. v. Rowland Construction, Inc., 83 Wn.2d 871, 523 P.2d 186 (1974), Opening Brief at 22-23; and B & W Construction, Inc. v. City of Lacey, 19 Wn. App. 220, 222-223, 577 P.2d 583 (1978), Opening Brief at 24-25, are all distinguishable on a critical fact: in each of those cases, the government constructed a facility that by design dumped stormwater directly onto plaintiff's property. Further, Wilber does not hold that the compensable injury in that case is necessarily a taking: the interference with plaintiff's property may be merely a trespass. 83 Wn.2d at 876.

Otrubova's reliance on Dickgieser v. State, 153 Wn.2d 530, Opening Brief at 29-30, makes no sense. The issue in Dickgieser—whether logging by the State for purposes of producing income and managing assets constitutes a public use—is not relevant to the issues in this case. Further, in reversing summary judgment dismissal of plaintiff's inverse condemnation claim, the Court applied the very standard that

Otrubova claims the Court has abandoned: whether the damage to plaintiff's property is reasonably necessary for the construction or maintenance of the project (i.e., a "necessary incident"). Id. at 542.

Otrubova incorrectly asserts that Seal v. Naches-Selah Irrigation Dist., 51 Wn. App. 1, was disavowed in Lambier v. Kennewick, 56 Wn. App. 275, 783 P.2d 596 (1989). See Opening Brief at 26. Lambier distinguished Seal on a crucial point of fact: in Lambier, unlike in Seal, the government affirmatively undertook the construction project that directly resulted in plaintiff's damages. 56 Wn. App. at 280. The present case is analogous to Seal, not Lambier, because here the government construction of the facility predated the Otrubova's purchase of the property by decades. If damage to the Otrubova property is attributable to the facility, it is not because the facility was or is designed to direct outfall onto the Otrubova property. Lambier also completely ignores Olson, which applied the "contemplated by the plan" / "necessary incident" standard.

**C. The Superior Court Properly Denied the Motions for Reconsideration.**

**1. Standard of Review.**

"The denial of a motion for reconsideration is reviewed for abuse of discretion." Graham v. Findahl, 122 Wn. App. 461, 465 n.3, 93 P.2d 977 (2004).

## **2. Otrubova Provides No Argument.**

Otrubova assigns error to the denial of her two motions for reconsideration, see CP 233-44, 350-53, 354-55, but offers no independent factual basis or argument in her Opening Brief as to why such denial was an abuse of discretion. An appellant's brief "must include arguments supporting the issues presented for review and citations to legal authority." Bercier v. Kiga, 127 Wn. App. 809, 824, 103 P.3d 232 (2004); see also, Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992)(arguments not supported by authority not considered) and RAP 10.3(a)(6). This Court "need not consider arguments that are not developed in the briefs for which a party has not cited authority." Bercier, 127 Wn. App. at 824.

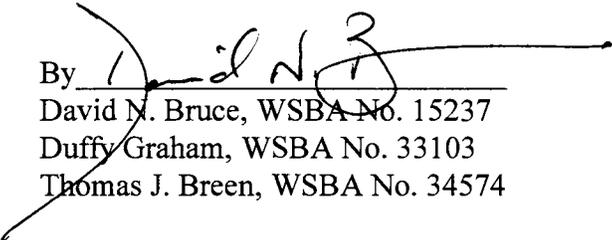
Perhaps Otrubova relies on the same fact assertions and argument that she advances with respect to the granting of the Summary Judgment Motion. See generally Otrubova's Opening Brief. If so, the City submits that for the same reasons discussed above that the Superior Court properly granted the Summary Judgment Motion, it properly denied Otrubova's motions for reconsideration.

**V. CONCLUSION**

The City respectfully submits that, for all the reasons stated herein, this Court should (1) affirm the Superior Court summary judgment dismissal of the Complaint in its entirety and (2) affirm the Superior Court denial of Otrubova's motions to reconsider.

Respectfully submitted this 3rd day of August, 2010.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date I caused a copy of the attached document to be served via hand delivery to the parties listed below:

Appellants:

Bruce Struthers and Vitezslava Otrubova  
10514 Riviera Place NE  
Seattle, WA 98125-6739

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

DATED this 3<sup>rd</sup> day of August, 2010, at Seattle, Washington.



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Katherine Riley