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

DONALD B. BURKHOLDER, a single person,

Appellant,

v.

CITY OF SAMMAMISH, a Washington
municipal corporation,

Respondent.

NO. 66368-2-1

BRIEF OF APPELLANT

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2 **1. Cases**

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11 *Hoover v. Pierce County*, 79 Wn. App. 427, 431, 903 P.2d 464 (1995).

12 *King County v. Boeing Company*, 62 Wn.2d 545, 552, 384 P.2d 122 (1963)..... 11

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18

19 **2. Statutes**

20 RCW § 4.24.630.

21

22 **3. Other Authorities**

23 Const. art. I §16

24

25

1 **STATEMENT OF THE CASE**

2 Mr. Burkholder owns real property located at 1601 East Lake Sammamish Parkway N.E.,
3 Sammamish, Washington 98074 (“the Property”).⁴ In 2004, Mr. Burkholder constructed a
4 private storm drainage system that directs storm water runoff through the Property and into Lake
5 Sammamish, which abuts the Property, where no such system previously existed. He obtained a
6 permit from the City of Sammamish (“the City”) and spent approximately \$50,000 to construct
7 the drainage system.⁵

8
9 The drainage system was originally designed to benefit both the Property and tax parcel
10 #2925069030, a neighboring property that Mr. Burkholder previously owned and sold to Scott
11 Walker in October 2004. As it turned out, however, the City of Sammamish did not allow Mr.
12 Walker to direct his storm drainage or water from his roof through the system, so an easement
13 was never created for such use.⁶

14 Before Mr. Burkholder constructed the drainage system, a culvert crossed Kokomo Place,
15 a private driveway located southeast of the Property on land owned since 8/16/2002 by King
16 County.⁷ On the south side of Kokomo Place, the culvert was situated above a ditch or
17 depression alongside the driveway and on the north side of the driveway, the culvert was above
18 grade. The culvert was almost completely blocked up with dirt and debris when Mr. Burkholder
19 purchased the Property, and essentially no water flowed through the culvert when the ditch filled
20

21
22 ⁴ CP 390.

23 ⁵ CP 390.

24 ⁶ CP 391.

25 ⁷ Kokomo Place is located on an easement for ingress, egress, and utilities on property owned by King County (Parcel No. 3575300340). Mr. Burkholder’s property is one of a limited number of dominant estates of the easement. CP 392..

1 up during extended periods of rainy weather.⁸ (“In both reports, the flow is mentioned as being
2 very slight, and the Kleinfelder report states: ‘The drainage pattern was characterized with a
3 maximum width less than 6 inches and depth less than two inches.’ . . . [S]urface erosion patterns
4 would be much larger than 6 inches wide and two inches deep if this flow was being discharged
5 regularly onto these parcels.”)⁹ When installing his system, Mr. Burkholder tied the north end of
6 the culvert into his catch basin, raising the grade of the surrounding area, to ensure that the small
7 amount of water from the culvert would be captured into the drainage system rather than flow
8 along the surface onto the Property.¹⁰

9
10 Since March 2009, the City has, without authorization and despite Mr. Burkholder’s
11 requests to cease and despite a previous oral agreement between Burkholder and the City of
12 Sammamish¹¹ collected and directed surface water runoff from East Lake Sammamish Parkway
13 (“ELSP”) and other areas onto and through Mr. Burkholder’s drainage system as part of its
14 recent improvements to ELSP.¹² The City cleared the culvert under Kokomo Place, sending dirt
15 and debris into the lake, when it tied into the drainage system.¹³ There have been numerous
16 plumes of sediment into the lake since that time, which has led to the growth of algae in the
17 immediate vicinity of the beach of the Property.¹⁴

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20 ⁸ CP 391, CP 29 – 30, CP 56.

21 ⁹ CP 74.

22 ¹⁰ CP 391, CP 30.

23 ¹¹ CP 391,

24 ¹² CP 391.

25 ¹³ CP 391.

¹⁴ CP 392, CP 30.

1 According to Mr. Burkholder's expert, Kelley Wrigg:

2 The ELSP project improvements have redirected and increased flow into the
3 privately owned drainage pipe system and out the Kokomo Outfall in the
4 following three ways:

- 5 1. The removal of the pipe blockages and the direct connection of the storm
6 drainage system from East Lake Sammamish Parkway have redirected
7 stormwater flows which previously drained into Lake Sammamish by
8 other pathways.
- 9 2. Project improvements associated with replacement of the ditches on the
10 east side of Lake Sammamish Parkway with a closed piping system, and
11 the replacement of landscaped or native areas with impermeable
12 pavements, have redirected stormwater which previously infiltrated into
13 the ground, evaporated, or were absorbed by plants.
- 14 3. Project improvements have redirected stormwater into the privately owned
15 drainage system and out the Kokomo Outfall from areas which previously
16 drained to Lake Sammamish by other pathways. These areas include:
 - 17 a. Parcel Nos. 3575300365, 3575300370, and 3575300260
 - 18 b. Portions of the stormwater flows from Basin 2A which previously
19 drained to another outfall to the north.¹⁵

20 As described by Mr. Wrigg,

21 [p]rior to the ELSP project improvements, the only flow into the Burkholder pipe
22 system was flow from the Burkholder Parcels (Nos. 2925069040 and
23 2925069030), and from Kokomo Lane which is collected at the bottom of the hill
24 by a trench drain that connects into the pipe system on the north side of Kokomo
25 Lane.¹⁶

26 Most of the water that now flows through Mr. Burkholder's drainage system previously flowed
27 into a drainage ditch on the east side of the East Lake Sammamish Trail (the Trail was built on
28 an abandoned railroad right of way) before being discharged into the lake to the south of Mr.
29 Burkholder's Property.¹⁷

30 ¹⁵ CP 59-60, CP 234-235.

31 ¹⁶ CP 54, CP 229.

32 ¹⁷ CP 54, CP 391.

1 As part of the improvements to ELSP, the City installed a “storm water filtration facility”
2 on the property owned by King County that includes Kokomo Place (Parcel No. 3575300340).¹⁸
3 The filtration facility only “intercepts the water that used to flow off of E.S.L.P., cleans it, and
4 then discharges it back into its previous drainage course.”¹⁹ It does not intercept and treat water
5 from other sources that the City has redirected through Mr. Burkholder’s private system.²⁰ As a
6 result of this lawsuit asserting claims for trespass, injunctive relief, and taking of private
7 property,²¹ the City has “reroute[ed] the discharge from the new filtration facility so that it does
8 not flow through the Kokomo Place culvert and the pipe/culvert across Mr. Burkholder’s
9 property.”²² However, the rerouting only removes about 26% of the flow which the City had
10 redirected to the Kokomo Outfall.²³ The change leaves the majority (74%) of the redirected
11 storm water flow connected to the Kokomo Outfall.²⁴ The smaller portion was the treated
12 (clean) storm water, while the larger portion is untreated (dirty) storm water.²⁵

14 Now that significantly more water is flowing through the private storm drainage system
15 and because the system was not designed to handle the City’s flow of offsite water, Mr.
16 Burkholder anticipates that water will back up on the Property when the culvert is submerged

19 ¹⁸ CP 427.

20 ¹⁹ CP 427.

21 ²⁰ CP 57, CP 232.

22 ²¹ CP 8.

23 ²² CP 57, CP 232, CP 429.

24 ²³ CP 57, CP 232.

25 ²⁴ CP 57.

²⁵ CP 57.

1 under water during a large rain event, or when it plugs up from debris caused by wave action.²⁶
2 Also, the City has no plans to clean all of the dirty water that it has redirected through Mr.
3 Burkholder's drainage system and into the lake in front of the Property. This will make the
4 Property less desirable to a potential purchaser when Mr. Burkholder decides to sell it.²⁷ In fact,
5 Mr. Burkholder hired an MAI appraiser to determine the negative financial impact of the City's
6 trespass on his Property.²⁸ The appraiser concluded that the fair market value of the Property has
7 been decreased by the amount of \$230,500 as a result of the City's unauthorized use of Mr.
8 Burkholder's storm drainage system.²⁹ The City's conduct has also substantially diminished
9 Mr. Burkholder's use and enjoyment of his beach and the Property as a whole.³⁰
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11 On September 30, 2010 the City filed the City of Sammamish's Motion for Summary
12 Judgment.³¹ This motion was granted on October 29, 2010.³²
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20 ²⁶ CP 392.

21 ²⁷ CP 392.

22 ²⁸ CP 392.

23 ²⁹ CP 392, CP 187.

24 ³⁰ CP 392.

25 ³¹ CP 138 – 148.

³² CP 375 -376.

1 **ARGUMENT**

2 **1. The trial court erred by granting summary judgment in favor of the City of**
3 **Sammamish on Mr. Burkholder’s claim for trespass in view of the fact that the City**
4 **of Sammamish intentionally trespassed, caused damage to Mr. Burkholder’s**
5 **property, and did not attempt to rectify the situation until Mr. Burkholder filed suit**
6 **and incurred substantial attorney fees and expert costs.**³³

7 RCW 4.24.630 provides, in pertinent part:

8
9 (1) Every person who goes onto the land of another and ... wrongfully causes waste or
10 injury to the land, or wrongfully injures personal property or improvements to real estate on the
11 land, is liable to the injured party for treble the amount of the damages caused by the ... For
12 purposes of this section, a person acts "wrongfully" if the person intentionally and unreasonably
13 commits the act or acts while knowing, or having reason to know, that he or she lacks
14 authorization to so act. Damages recoverable under this section include, but are not limited to,
15 damages for the market value ... for injury to the land, including the costs of restoration. In
16 addition, the person is liable for reimbursing the injured party for the party's reasonable costs,
17 including but not limited to investigative costs and reasonable attorneys' fees and other litigation-
18 related costs.

19 A recent a Washington decision that interprets this statute. In *Clipse v. Michels Pipeline*
20 *Const., Inc.*³⁴ the court determined that the statute and case law stand for the proposition that a
21 plaintiff may establish a claim for treble damages for wrongful trespass under RCW 4.24.630 by
22 showing that the defendant intentionally and unreasonably committed one or more acts for which
23 they knew or had reason to know they lacked authorization.

24 As the owner of the Property, Mr. Burkholder has an exclusive right of possession of the
25 Property.³⁵ The City has no easement rights to use the Property for discharging water runoff

26 _____
27 ³³ CP 176 – 177, CP 337.

28 ³⁴ 154 Wn.App. 573, 225 P.3d 492 (2010).

29 ³⁵ CP 459.

1 from East Lake Sammamish Parkway. Absent an easement or permission from the property
2 owner, a city “has no legal right to artificially collect and discharge surface water” onto another
3 property “in quantities greater than, or in a manner different from, the natural flow of such
4 surface waters.”³⁶

5
6 The city was well aware that it had no right to discharge water on Mr. Burkholder’s
7 property.³⁷ In fact, prior to commencement of the project, the project manager, Mr. Jeff Brauns,
8 was advised that permission would be required before the city could tie into the private system.³⁸
9 Mr. Brauns agreed the city would not connect into Mr. Burkholder’s private culvert system
10 without permission.³⁹ This fact in and of itself demands an award of treble damages for the
11 City’s intentional trespass which occurred prior to the redesign. Moreover, the property has
12 suffered and continues to suffer substantial damage.

13
14 The statute also provides for a “party’s reasonable costs, including but not limited to
15 investigative costs and reasonable attorneys’ fees and other litigation-related costs.” At the very
16 least Mr. Burkholder is entitled to be reimbursed for his costs and attorney’s fees incurred prior
17 to the City’s redesign.

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22 ³⁶ *King County v. Boeing Company*, 62 Wn.2d 545, 552, 384 P.2d 122 (1963); see also *DiBlasi*
23 *v. City of Seattle*, 136 Wn.2d 865, 874, 969 P.2d 10 (1998); *Buxel v. King County*, 60 Wn.2d 404, 374
P.2d 250 (1962).

24 ³⁷ CP 32.

25 ³⁸ CP 32.

³⁹ CP 32.

1 **2. The trial court erred by granting summary judgment in favor of the City of**
2 **Sammamish on Mr. Burkholder’s claim for trespass in view of the fact that an issue**
3 **of fact exists over the issues of continuing trespass and continuing damages.**

4 The function of a summary judgment motion is to determine if there are genuine issues of
5 material fact which require actual trial.⁴⁰ A material fact is one upon which the outcome of the
6 litigation depends.⁴¹ A motion for summary judgment should only be granted if, from the
7 evidence, reasonable persons could reach but one conclusion.⁴²

8 In a summary judgment motion, the moving party bears the initial burden of showing the
9 absence of a genuine issue of material fact.⁴³ A party seeking to avoid summary judgment cannot
10 rest upon the allegations of its pleadings; rather, the non-moving party must affirmatively present
11 admissible, factual evidence upon which it relies.⁴⁴ In this regard, that is exactly what occurred.

12 Since March 2009, the City has, without authorization and despite Mr. Burkholder’s
13 requests to cease and despite a previous oral agreement between Burkholder and the City of
14 Sammamish⁴⁵ collected and directed surface water runoff from East Lake Sammamish Parkway
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22 ⁴³ *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225 (Wash. 1989).

23 ⁴⁴ *Mackey v. Graham*, 99 Wn.2d 572, 576 (Wash. 1983).

24 ⁴⁵ CP 391,
25

1 recent improvements to ELSP.⁴⁶ The City cleared the culvert under Kokomo Place, sending dirt
2 and debris into the lake, when it tied into the drainage system.⁴⁷ There have been numerous
3 plumes of sediment into the lake since that time, which has led to the growth of algae in the
4 immediate vicinity of the beach of the Property.⁴⁸

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26 ⁴⁶ CP 391.

27 ⁴⁷ CP 391.

28 ⁴⁸ CP 392, CP 30.

29 ⁴⁹ CP 59-60, CP 234-235.

1 by a trench drain that connects into the pipe system on the north side of Kokomo
2 Lane.⁵⁰

3 Most of the water that now flows through Mr. Burkholder's drainage system previously flowed
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12 result of this lawsuit asserting claims for trespass, injunctive relief, and taking of private
13 property,⁵⁵ the City has "reroute[ed] the discharge from the new filtration facility so that it does
14 not flow through the Kokomo Place culvert and the pipe/culvert across Mr. Burkholder's
15 property."⁵⁶ However, the rerouting only removes about 26% of the flow which the City had
16 redirected to the Kokomo Outfall.⁵⁷ The change leaves the majority (74%) of the redirected
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19 ⁵⁰ CP 54, CP 229.

20 ⁵¹ CP 54, CP 391.

21 ⁵² CP 427.

22 ⁵³ CP 427.

23 ⁵⁴ CP 57, CP 232.

24 ⁵⁵ CP 8.

25 ⁵⁶ CP 57, CP 232, CP 429.

⁵⁷ CP 57, CP 232.

1 storm water flow connected to the Kokomo Outfall.⁵⁸ The smaller portion was the treated
2 (clean) storm water, while the larger portion is untreated (dirty) storm water.⁵⁹

3 Now that significantly more water is flowing through the private storm drainage system
4 and because the system was not designed to handle the City's flow of offsite water, Mr.
5 Burkholder anticipates that water will back up on the Property when the culvert is submerged
6 under water during a large rain event, or when it plugs up from debris caused by wave action.⁶⁰
7 Also, the City has no plans to clean all of the dirty water that it has redirected through Mr.
8 Burkholder's drainage system and into the lake in front of the Property. This will make the
9 Property less desirable to a potential purchaser when Mr. Burkholder decides to sell it.⁶¹ In fact,
10 Mr. Burkholder hired an MAI appraiser to determine the negative financial impact of the City's
11 trespass on his Property.⁶² The appraiser concluded that the fair market value of the Property has
12 been decreased by the amount of \$230,500 as a result of the City's unauthorized use of Mr.
13 Burkholder's storm drainage system.⁶³ The City's conduct has also substantially diminished
14 Mr. Burkholder's use and enjoyment of his beach and the Property as a whole.⁶⁴

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20 ⁵⁸ CP 57.

21 ⁵⁹ CP 57.

22 ⁶⁰ CP 392.

23 ⁶¹ CP 392.

24 ⁶² CP 392.

25 ⁶³ CP 392, CP 187.

⁶⁴ CP 392.

1 **3. The trial court erred by granting summary judgment in favor of the City of**
2 **Sammamish on Mr. Burkholder’s claim for taking private property for public use**
3 **in view of the fact that the City of Sammamish to divert water through Mr.**
4 **Burkholder’s property for public use without paying any compensation.**

5 The constitution of this state prohibits the state from taking private property for public
6 use without just compensation.⁶⁵ The measure of damage is the diminution in the fair market
7 value of the property caused by the taking.⁶⁶ “The term ‘inverse condemnation’ is used to
8 describe an action alleging a governmental ‘taking’ brought to recover the value of property
9 which has been appropriated in fact, but with no formal exercise of the power of eminent
10 domain.”⁶⁷ A party alleging inverse condemnation must establish the following elements: (1) a
11 taking or damaging (2) of private property (3) for public use (4) without just compensation being
12 paid (5) by a governmental entity that has not instituted formal proceedings.”⁶⁸

14 All five elements are satisfied in this case. By permanently diverting a substantial amount
15 of storm water onto Mr. Burkholder’s property the city has and continues to damage the private
16 property for the benefit of the public. The fair market value has been diminished by \$230,500 as
17 a result of the City’s unauthorized use of Mr. Burkholder’s storm drainage system.⁶⁹ No
18 compensation has been paid and there has been no formal eminent domain proceeding. Therefor
19 it was an error to grant summary judgment on this claim,

22 ⁶⁵ Const. art. I §16; *Phillips*, 136 Wn.2d at 956 (**FIX CITE**)

23 ⁶⁶ *Id.* at 956-57 (citing *Petersen v. Port of Seattle*, 94 Wn.2d 479, 482, 618 P.2d 67 (1980);
24 *Hoover v. Pierce County*, 79 Wn. App. 427, 431, 903 P.2d 464 (1995)).

25 ⁶⁷ *Phillips*, 136 Wn.2d. at 957.

⁶⁸ *Id.*

1 **CONCLUSION**

2 For the reasons of stated above, Mr. Burkholder respectfully requested that this Court
3 reverse the decision of the trial court and order further proceedings consistent with its opiion..
4

5 Respectfully submitted this February 6, 2012.

6 LAW OFFICES OF THOMAS L. HAUSE

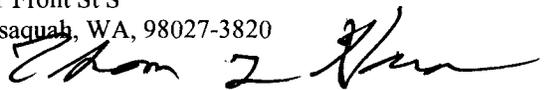
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15 Counsel for Appellant

16 **CERTIFICATE OF SERVICE**

17 I certify that on February 6, 2012 a copy of the
18 foregoing was mailed/hand-delivered to:

19 Michael R. Kenyon
20 Kari L Sand Shelley
21 Marie Kerslake
22 Kenyon Disend PLLC
23 11 Front St S
24 Issaquah, WA, 98027-3820

25 

Thomas L. Hause

⁶⁹ CP 392, CP 187.

1 **APPENDIX**

2

3 **RCW § 4.24.630. Liability for damage to land and property - Damages - Costs - Attorneys'**
4 **fees - Exceptions**

5 (1) Every person who goes onto the land of another and who removes timber, crops, minerals, or
6 other similar valuable property from the land, or wrongfully causes waste or injury to the land, or
7 wrongfully injures personal property or improvements to real estate on the land, is liable to the
8 injured party for treble the amount of the damages caused by the removal, waste, or injury. For
9 purposes of this section, a person acts "wrongfully" if the person intentionally and unreasonably
10 commits the act or acts while knowing, or having reason to know, that he or she lacks
11 authorization to so act. Damages recoverable under this section include, but are not limited to,
12 damages for the market value of the property removed or injured, and for injury to the land,
13 including the costs of restoration. In addition, the person is liable for reimbursing the injured
14 party for the party's reasonable costs, including but not limited to investigative costs and
15 reasonable attorneys' fees and other litigation-related costs.

16 (2) This section does not apply in any case where liability for damages is provided under RCW
17 64.12.030, *79.01.756, 79.01.760 , 79.40.070, or where there is immunity from liability under
18 RCW 64.12.035.
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