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No. 70220-3-I

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

KEBEDE ADMASU, et al.,

Appellants,

vs.

THE PORT OF SEATTLE,
a Washington municipal corporation,

Respondent.

APPELLANTS' REPLY BRIEF

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I. REPLY ARGUMENT

A. The Trial Court Erred in Denying Appellants' Second Amended Motion for Class Certification

1. The Port Misstates the Standard of Review

Respondent The Port of Seattle ("Port") suggests that, simply because the trial court considered extensive briefing and lengthy argument below, this court is bound to affirm its denial of class certification.[1] But this court has previously made clear that it does not simply rubberstamp a trial court's decision regarding class certification. *See Oda v. State*, 111 Wn. App. 79, 44 P.3d 8 (2002) (appellate court does not affirm trial court's decision regarding class certification merely because trial court considered CR 23 criteria on the record). Instead, the trial court's decision to deny class certification is reviewed for abuse of discretion. *Schnall v. AT&T Wireless Servs., Inc.*, 171 Wn.2d 260, 266, 259 P.3d 129 (2011).

A trial court abuses its discretion if its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 668-69, 230 P.3d 583 (2010). "'A discretionary decision is based on untenable grounds or made for untenable reasons if it rests on facts unsupported in the record or was reached by applying the wrong legal standard.'" *McCoy v. Kent Nursery*, 163 Wn. App. 744, 758, 260 P.3d 967 (2011) (internal quotation marks omitted) (quoting *State v. Quismundo*, 164 Wn.2d 499, 504, 192 P.3d 342 (2008)). Specific to the class action certification context, this court will

[1] Respondent's Brief at 18.

affirm the trial court's decision only "'if the record indicates the court ***properly*** considered all CR 23 criteria.'" *Schnall*, 171 Wn.2d at 266 (emphasis added) (quoting *Nelson v. Appleway Chevrolet, Inc.*, 160 Wn.2d 173, 188, 157 P.3d 847 (2007)).

Here, neither the facts nor law applying the CR 23 criteria supported the following conclusions that the trial court reached: (1) the potential presence of individual issues regarding causation and damages precluded class certification under CR 23(b)(3)'s "predominance" criterion, (2) a class action was not a superior mechanism for resolving Appellants' claims were not supported by either the facts or applicable law, and (3) Appellants' proposed class representatives inadequately represented the interests of absent class members. Accordingly, the trial court abused its discretion in denying class certification on these grounds.[2]

(a) The trial court abused its discretion in concluding the potential presence of individual issues regarding causation and damages precluded class certification

The trial court abused its discretion in concluding that the potential presence of individual issues regarding causation and damages prevented certification of Appellants' class for two reasons: (1) the record

[2] The trial court ruled that Appellants met the CR 23 numerosity, commonality, and typicality criteria. CP at 2062-2065. The Port, with only a passing reference to its trial court briefing, contends that this court may affirm the trial court's ultimate denial of class certification because the trial court erroneously ruled that Appellants met these criteria. Respondent's Br. at 20 n. 3. Because the Port did not cross-appeal from these trial court rulings, however, this court may not review and reverse these rulings. RAP 2.4(a). Moreover, even were this court able to review these rulings, the Port may not incorporate its trial court briefing into its appellate brief by reference, *Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290 (1998), and the Port's passing treatment of the issues is insufficient to warrant appellate review. RAP 10.3(a)(6); RAP 10.3(g); *West v. Thurston County*, 168 Wn. App. 162, 187, 275 P.3d 1200 (2012) (passing treatment of an issue is insufficient to merit appellate review).

demonstrates that the diminution in value caused by the Third Runway's operations could have been modeled without "hundreds, if not thousands of individual property appraisals,"[3] the Port's chief complaint; and (2) even the actual presence of individualized issues regarding causation and damages was not fatal to class certification.

First, and contrary to the Port's representations, Appellants' experts did not testify that "for any valuation model actually created, 'hundreds,' if not 'thousands,' of individual property assessments would be needed."[4] Appellants' valuation expert Dr. Ronald Throupe testified in his deposition that Appellants' valuation model ***might*** use individual appraisals, not that it ***would***.[5] However, Appellants' other valuation expert, Wayne Hunsperger, testified that individual property characteristics would not affect their proposed methodology and, in any event, such characteristics would be accounted for as independent variables in the methodology and could be analyzed en masse, such as applying the county assessor's ratio to subareas.[6]

Second, even if individualized issues of causation or damages existed in this case, such issues were not fatal to Appellants' ability to meet CR 23's "predominance" requirement. As this court has previously explained:

> CR 23 (b) (3) requires that common legal and factual issues

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[3] Respondent's Br. at 30-31.

[4] Respondent's Br. at 34.

[5] Clerk's Papers (CP) at 1690-1691.

[6] CP at 1153, 1861-1862, 1893.

> predominate over any individual issues. ***But the predominance requirement is not defeated merely because individual factual or legal issues exist***; rather, the relevant inquiry is whether the issue shared by the class members is the dominant, central, or overriding issue shared by the class. 1 [Herbet B. Newberg & Alba Conte, *Newberg on Class Actions*,] § 4.25, at 4-85 [(3d. ed. 1992)]. Further, ***"[a] single common issue may be the overriding one in the litigation, despite the fact that the suit also entails numerous remaining individual questions."*** 1 *Newberg, supra,* § 4.25, at 4-84. ***And the fact that those individual issues might take some time to resolve does not defeat predominance because courts have a number of methods for dealing with individual issues in class litigation.*** *See* 1 *Newberg, supra,* § 4.25, at 4-83 (noting that "the predominance test does not involve a comparison of court time needed to adjudicate common issues weighed against time needed to dispose of individual issues.") (footnote omitted); *see also* 1 *Newberg, supra,* § 4.26, at 4-98-4-106 (discussing methods trial courts use to resolve individual issues rather than denying class certification at outset).

Miller v. Farmer Bros. Co., 115 Wn. App. 815, 825-26, 64 P.3d 49, 56 (2003) (emphasis added); *see also Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 660-661 (7th Cir. 2004) (class certification still proper even where 17 million plaintiffs were required to show reliance).

Indeed, this court has specifically addressed whether "the presence of individual issues regarding causation . . . or damages precludes certification." *Sitton v. State Farm. Mut. Auto. Ins. Co.*, 116 Wn. App. 245, 254, 63 P.3d 198 (2003). In *Sitton*, the respondent argued that, because "the claims of each class member [would have] necessarily require[d] litigation regarding the facts of each accident, . . . individual causation, and individual damages," class certification was inappropriate

under CR 23 (b)'s "predominance" criterion. *Sitton*, 116 Wn. App. at 254. This court rejected those arguments, reasoning that

> In deciding whether common issues predominate over individual ones, the court is engaged in a "'pragmatic' inquiry into whether there is a 'common nucleus of operative facts' to each class member's claim." That class members may eventually have to make an individual showing of damages does not preclude class certification.

Id. at 255 (quoting *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 323, 54 P.3d 665 (2002)).

Like the respondent in *Sitton*, here the Port argued (and the trial court erroneously agreed) that the presence of individual issues regarding causation and damages precluded class certification. But all Washington law required Appellants to assert, in order to meet the "predominance" criterion, was "'a common nucleus of operative facts' to each class member's claim." *Sitton*, 116 Wn. App. at 255 (quoting *Behr*, 113 Wn. App. at 323). Appellants asserted exactly such a common nucleus:

> As a direct and proximate result of the increased airport operations at Sea-Tac Airport, including the use of the third runway following its construction . . . Defendant has caused a diminution in the fair market value of the Plaintiffs' and Class Members' properties and has taken and/or damaged the Plaintiffs' and Class Members' properties without the payment of just compensation and without due process of law.

And the evidence in the record, including Dr. Sanford Fidell's social survey, demonstrated the existence of this common nucleus.[7]

[7] CP at 1086 (social survey respondents reported negative effects of airport operations after Third Runway operations began0, including noise, vibrations, soot, and fumes); 1895, 1903-1904 (Appellants' valuation model would demonstrate diminishment in value of Appellants' properties attributable to Third Runway and would further quantify the Third Runway's effects through usage of social survey data).

Accordingly, the trial court abused its discretion in concluding that Appellants failed to meet CR 23 (b)(3)'s "predominance" criterion.

(b) The trial court abused its discretion in concluding that a class action was not a superior method for adjudicating the controversy

The trial court also reasoned that a class action was not superior to other methods of adjudicating Appellants' claims, again because of the potential presence of individualized causation and damages issues.[8] Like the "predominance" criterion, the potential presence of such issues did not preclude Appellants from meeting the "superiority" criterion. As this court observed in *Sitton*, a trial court has "a variety of procedural options to reduce the burden of resolving" individual issues in class actions, "including bifurcated trials, use of subclasses or masters, pilot or test cases with selected class members, or even class decertification after liability is determined." 116 Wn. App. at 255. Indeed, Appellants and their experts proposed the usage of subclasses to address any individualized issues.[9]

Furthermore, as this court reasoned in *Sitton*,

> Even with the myriad of management devices available, the management of any complex class action is likely to present a challenge. But forcing numerous plaintiffs to litigate the [common nucleus of operative facts] in repeated individual trials runs counter to the very purpose of a class action.

Id. at 256-57. Here, the trial court's decision to deny class certification

[8] CP at 2068.

[9] CP at 1262, 1710. Indeed, after denying class certification, the trial court demonstrated it was readily capable of addressing individualized issues affecting members of the proposes class when it dismissed on summary judgment the claims of hundreds of the Appellants affected by avigation easements or noise exposure maps.

despite a common nucleus of operative facts ripe for collective adjudication ran contrary to this court's reasoning in *Sitton.*[10]

(c) The trial court abused its discretion in concluding that Appellants' proposed class representatives inadequately represented the interests of absent class members

Finally, the trial court abused its discretion in concluding that Appellants' proposed class representatives inadequately represented absent class members' interests because Appellants engaged in impermissible "claim splitting" by bringing only inverse condemnation claims, thus bringing them into conflict with absent class members who might later bring personal injury claims and find them barred by *res judicta.*[11]

First, contrary to the Port's representations, in federal courts, a class action "of course, is one of the recognized exceptions to the rule against claim splitting." James Wm. Moore, et al., 18 MOORE'S FEDERAL PRACTICE § 131.40(3)(e)(iii) (2002) (citing RESTATEMENT (SECOND) OF JUDGMENTS § 26(1)(c) (1982)).

Moreover, as federal courts have observed, any claim preclusive effect of a class action is mitigated by Fed. R. Civ. P. 23(c)(2), which "permits members of a class maintained under section (b)(3) to opt out of a class, providing an option for those [p]laintiffs who wish to pursue

[10] Appellants decision to attempt to pursue the consolidated claims of 291 individual plaintiffs after the trial court denied class certification does not vitiate the superiority of a class action in adjudicating Appellants' claims. That Appellants chose to pursue the only option left to them after the trial court's ruling does not demonstrate that such an option was not inferior and inadequate when compared to a class action.

[11] CP at 2065-2066.

claims . . . requiring more individualized inquiry." *Gunnels v. Healthplan Servs. Inc.*, 348 F.3d 417, 432 (4th Cir. 2003). The same reasoning applies to Washington's CR 23 (c)(2), as it is materially identical to its federal counterpart. Accordingly, any class members who wished to assert personal injury claims were adequately protected, and Appellants' "claim splitting," if any, was not a proper basis for denying class certification.

Finally, Appellants were not required to bring personal injury claims that could have defeated class certification. *See In re Conseco Life Ins. Co. Lifetrend Ins. Sales and Marketing Litig.*, 270 F.R.D. 521, 532 (N.D. Cal. Oct. 6, 2010); *In re Universal Serv. Fund Tel. Billing Prac. Litig.*, 219 F.R.D. 661, 669 (D. Kan. 2004); *Kennedy v. Jackson Nat'l Life Ins. Co.*, No. 07-0371-CW, 2010 WL 2524360, at *5 (N.D. Cal. June 23, 2010). The trial court's and the Port's positions demonstrate the wisdom of this rule. According to the trial court, the presence of individualized issues is enough to preclude class certification, but Appellants were required to bring personal injury claims on behalf of the class, which would have injected highly individualized issues into the case.[12] Because the trial court's reasoning placed Appellants into an unreasonable Catch-22, it abused its discretion in concluding that Appellants' proposed class representatives inadequately represented absent class members due to their decision not to bring personal injury claims. Thus, for all the above reasons, the trial court abused its discretion when it denied Appellants' motion for class certification.

[12] CP at 2065-2066.

B. The Trial Court Erred in Dismissing the NEM Appellants' Claims

The trial court misapplied the summary judgment standard and erred in dismissing the claims of Appellants whose properties were affected by Noise Exposure Maps (NEM) for two reasons: (1) passing, conclusory requests for dismissal of Appellants' vibrations and other non-noise (e.g., soot and fumes) damages claims are insufficient to subject those claims to summary judgment and (2) the Port failed to submit affidavits or evidence in its opening brief supporting the absence of issues of material fact regarding the non-noise claims, thereby shifting the burden on summary judgment to Appellants.

First, "It is the responsibility of the moving party to raise in its summary judgment motion all of the issues on which it believes it is entitled to summary judgment." *White v. Kent Med. Center, Inc., P.S.*, 61 Wn. App. 163, 168, 810 P.2d 4 (1991). Furthermore, "It is incumbent upon the moving party to determine what issues are susceptible to resolution by summary judgment, and to clearly state in its opening papers those issues upon which summary judgment is sought." *Id.*

Here, the Port's opening brief for its summary judgment motion made only **one passing reference** to vibrations.[13] Likewise, the Port's opening brief made only scant, passing references to dismissing all of

[13] CP at 3848-3849 ("("Their causes of action (inverse condemnation, nuisance, and trespass) each depend on this alleged increase in operations and the alleged "heightened noise pollution" and vibrations (i.e., low frequency noise) caused by those operations.").

Appellants' claims.[14] In all other respects, the ***entirety*** of the Port's opening brief argued only that Appellants failed to make a threshold showing of increased airport ***noise*** under a federal statute preempting claims for damages attributable to airport ***noise***.[15]

Passing references to "vibrations" or dismissal of "all claims" cannot change the fact that the only argument and authority the Port's opening summary judgment brief presented to the trial court pertained to dismissal of noise claims. Such passing treatment was insufficient to inform either the trial court or Appellants as to ***how*** or ***why*** Appellants' non-noise claims were "susceptible to summary judgment," *id.*, or that the Port considered "vibrations" equivalent to "noise."

Furthermore, Appellants were entitled in their summary judgment response brief to point out to the trial court that—as framed by the entirety of the Port's opening argument and authority—only the dismissal of Appellants' noise claims was at issue, and, thus, the trial court should not dismiss Appellants' non-noise claims. Under Washington law, such a response was not and should not have been construed as an invitation for the Port—for the first time in its reply brief—to submit argument, authority, and evidence as to why Appellants' non-noise claims were susceptible to summary judgment. To hold otherwise would subject non-moving parties to an impossible dilemma in summary judgment proceedings: (1) respond to a moving party's opening, unsupported,

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[14] *See*, e.g., CP at 3848, 3861.

[15] CP at 3856-3861; *see also* 49 U.S.C. § 47506.

conclusory statements that certain claims should be dismissed, at the risk of a trial court allowing the moving party to provide its justifications for dismissal for the first time in its reply brief; or (2) do not respond to such statements, at the risk that the moving party will, in reply, assert that the non-moving party failed to meet its burden on those claims. Accordingly, the trial court erred in granting summary judgment on Appellants' non-noise claims.

Second, and in a similar vein, the trial court's and the Port's positions turn the summary judgment process entirely on its head. "Summary judgment is subject to a burden-shifting scheme." *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008). Contrary to the Port's and the trial court's interpretation of Washington law, this burden shifting does not automatically occur when a moving party makes blanket, conclusory statements that some or all claims are subject to summary dismissal. "***After the moving party submits adequate affidavits*** [demonstrating the absence of issues of material fact], the nonmoving party must set forth specific facts which sufficiently rebut the moving party's contentions and disclose the existence of a genuine issue of material fact." *Meyer v. Univ. of Wash.*, 105 Wn.2d 847, 852, 719 P.2d 98 (1986) (emphasis added); *see also Ranger*, 164 Wn.2d at 552 (moving party shifts burden by submitting "affidavits establishing it is entitled to judgment as a matter of law.").

Here, had the Port wished to subject Appellants' non-noise claims to summary judgment, the Port bore the initial burden on summary

judgment of demonstrating the absence of issues of material fact—with affidavits—regarding those claims. Instead, it submitted ***no*** affidavits (or even argument) that those claims were subject to summary dismissal. Accordingly, the summary judgment burden on those issues ***never shifted*** to Appellants.[16] *Meyer*, 105 Wn.2d at 852; *see also Ranger*, 164 Wn.2d at 552.

To hold otherwise would allow a party moving for summary judgment to shift the burden merely by making blanket, unsupported, unexplained assertions that some or all claims should be dismissed. Instead of the moving party bearing the initial burden of demonstrating why a claim or claims should be summarily dismissed, non-moving parties would effectively bear the initial burden of anticipating, articulating, and disproving any and all reasons the moving party ***might*** claim it is entitled to summary judgment, allowing the moving party to punish the non-moving party for a lack of omniscience by injecting new theories and evidence into the proceedings through its reply brief. This is not the purpose of reply briefs[17], *White*, 61 Wn. App. at 163, 169, and is a

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[16] Contrary to the trial court's and the Port's positions, Appellants did not assume the burden on those issues simply by pointing out that an opening brief dedicated to the legal issue of whether a federal statute preempted noise claims under state law did not put ***non-noise*** claims at issue. Again, given the Port's failure to show an absence of issues of material fact regarding those claims, Appellants had no burden to demonstrate the presence of issues of material fact.

[17] In an attempt to argue waiver, the Port misrepresents Appellants argument as being that the trial court improperly considered the Port's reply brief. Respondent's Br. at 59. But Appellants' argument is not that the trial court improperly considered the Port's reply brief; Appellants argument is that submitting supporting argument, authority, and evidence for the first time in a summary judgment reply brief is insufficient to raise an issue on summary judgment or to shift the burden to the non-moving party. Despite the Port's suggestions, under Washington's summary judgment burden-shifting scheme, there is no requirement for a non-moving party to seek a continuance to obtain further

complete inversion of Washington's summary judgment burden-shifting scheme. Accordingly, the trial court erred in dismissing Appellants' vibrations and other non-noise claims on summary judgment.

C. The trial Court Erred in Dismissing the Avigation Easement Appellants' Claims

1. <u>The Port Again Misstates the Standard of Review Applicable to Waiver of Constitutional Rights</u>

The Port contends that the constitutional waiver standard applied by the trial court[18]—the "voluntary, knowing, and intelligent" standard—and argued by Appellants on appeal, is improper.[19] However, the "knowing, voluntary, and intelligent" standard applies to issues of waiver of fundamental rights. *State v. Thomas*, 128 Wn.2d 553, 558, 910 P.2d 475 (1996). Indeed, Washington Courts have recognized that, even outside the criminal context, application of this standard to issues of waiver of a fundamental right is appropriate. *Godfrey v. Hartford Cas. Ins. Co.*, 142 Wn.2d 885, 898, 16 P.3d 617 (2001) (waiver of right to jury trial must be voluntary, knowing, and intelligent); *Yakima County (W. Valley) Fire Prot. Dist. No. 12 v. City of Yakima*, 122 Wn.2d 371, 395, 858 P.2d 245 (1993) (waiver of First Amendment right must at least be

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declarations, request leave to file a sur-reply, or file a motion to strike when the moving party fails to properly raise an issue or shift the burden on summary judgment. Again, the trial court's and the Port's positions would effectively shift the initial burden to the non-moving party, converts the moving party's reply brief into a response, and imposes additional motions practice requirements on parties opposing summary judgment. This is neither the scheme nor the requirements embodied in Washington law.

[18] The Port did not cross-appeal from either the trial court's order applying this standard or the issue of the trial court's application of this standard. Again, the Port attempts to improperly inject into this appeal issues for which a cross-appeal was required. RAP. 2.4 (a).

[19] Respondent's Br. at 44.

knowing); *Bering v. SHARE*, 106 Wn.2d 212, 221, 721 P.2d 918 (1986) (First Amendment rights of free speech and peaceable assembly are "fundamental rights"); *In re Dependency of J.M.R.*, 160 Wn. App. 929, 942, 249 P.3d 193 (2011) (because termination of parental rights indicates fundamental right of parents in care and custody of child, stipulation to terminate rights must be knowing, intelligent, and voluntary); *Vanderpol v. Schotzko*, 136 Wn. App. 504, 510, 150 P.3d 120 (2007) (right to jury trial is a fundamental right).

Thus, this court should apply a "knowing, voluntary, and intelligent" standard to waiver of a fundamental right. In *Paulson v. Pierce County*, 99 Wn.2d 645, 652, 664 P.2d 1202 (1983), our Supreme Court held that RCW 86.12.037 does not affect "fundamental rights" because it does not prohibit recovery for an inverse condemnation claim under article 1, section 16 of the Washington Constitution. *See also Fitzpatrick v. Okanogan County*, 169 Wn.2d 598, 606, 238 P.3d 1129 (2010) (recognizing the same); *McPherson Bros. Co. v. Douglas County*, 150 Wn. 221, 224-225, 272 P. 983 (1928) (recognizing right to be free from a taking without just compensation is a fundamental right). Thus, our Supreme Court had recognized that the rights protected by article 1, section 16—and vindicated by an inverse condemnation action—***are*** fundamental rights. And, as stated above, Washington courts have repeatedly recognized that the right to jury trial is a fundamental right. Accordingly, the trial court applied a proper "knowing, intelligent, and voluntary" standard to the waiver of fundamental constitutional rights

issues present in this case.[20]

2. Appellants did not knowingly, intelligently, or voluntarily waive their rights to a jury trial or compensation for the Port's takings

Although the trial court generally applied the ***correct*** standard, it ***improperly*** applied that standard. Washington courts "must indulge every reasonable presumption against waiver of fundamental rights." *City of Bellevue v. Acrey*, 103 Wn.2d 203, 207, 691 P.2d 957 (1984); *accord Ohio Bell Tel. Co. v. Pub. Util. Comm'n*, 301 U.S. 292, 307, 57 S. Ct. 724, 81 L. Ed. 1093 (1937) ("[W]e do not presume acquiescence in the loss of fundamental rights.").

When viewed through this lens, Appellants did not validly waive their fundamental rights to a jury trial or to compensation for the Port's takings through executing the avigation easements. When viewed in the light most favorable to Appellants, the record demonstrated genuine issues of material fact regarding whether Appellants voluntarily executed the avigation easements. Appellants were faced with the Hobson's choice of accepting some relief from the obnoxious aircraft noise or foregoing any relief from planes that would fly regardless.[21] Furthermore, when viewed

[20] As a result, the vast majority of the Port's briefing regarding the avigation easements issue is entirely off-point. The Port's briefing applies what it concedes is a "garden variety" contractual analysis to the issue, but such an analysis is incompatible with and inapplicable to this issue, given its constitutional dimensions. Respondent's Br. at 51-52.

[21] *See*, e.g., CP at 3567, 3599. The Port's own briefing demonstrates the lack of meaningful choice possessed by Appellants. "[I]f [Appellants] chose not to participate or chose to withdraw from the [avigation easement] program, they were free to pursue claims against the Port for any alleged taking from airport noise." Respondent's Br. at 48. In the Port's version of the facts and law, Appellants were "free" to suffer unabated airport noise and vibrations—potentially for years—while being required to bring ***individual*** lawsuits against the Port and its resources. Viewed in this light, the Port has a

in the light most favorable to Appellants, the record demonstrated genuine issues of material fact regarding whether Appellants knowingly and intelligently waived either constitutional right. Nothing in the Initial Authorization or Final Approval documents signed in executing the avigation easements informed Appellants that they had a constitutional right to compensation for diminished property values, much less that they were waiving that right or the right to have such compensation determined by a jury. Additionally, nothing in these documents informed Appellants that they were waiving these rights as to ***further*** takings, such as the Third Runway's operations. Quite simply, there is nothing in the record (because none exists) to show that the Port obtained informed consent from Appellants that they were waiving constitutional rights by accepting the avigation easements. A general waiver of "damages" does not meet the heightened scrutiny that our constitution demands. Accordingly, when viewed under a constitutional standard and in the light most favorable to Appellants, the trial court erred in granting summary judgment against the Appellants whose properties were affected by the avigation easements.

II. CONCLUSION

For the reasons stated herein, Appellants respectfully ask this court to reverse the trial court's order denying their Second Amended Motion for Class Certification and its orders summarily dismissing the claims of Appellants to whose property the NEMs and avigation easements applied.

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very curious definition of "free," indeed.

RESPECTFULLY SUBMITTED this 21st day of March, 2014.

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CERTIFICATE OF SERVICE

Laura Neal, being first duly sworn upon oath, deposes and says:

I am a citizen of the United States of America and of the State of Washington, over the age of twenty-one years, not a party to the above-entitled matter and competent to be a witness therein.

That on March 21, 2014, I delivered via Email / U.S. Mail a true and correct copy of the above document, directed to:

Tim J. Filer
Patrick J. Mullaney
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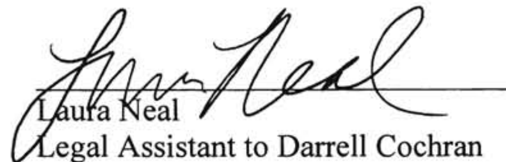
DATED this 21st day of March, 2014.



Laura Neal
Legal Assistant to Darrell Cochran

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