73528-4

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CASE NO. 73528-4-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

HOLDEN-McDANIEL PARTNERS, LLC,

Plaintiff/Appellant.

v.

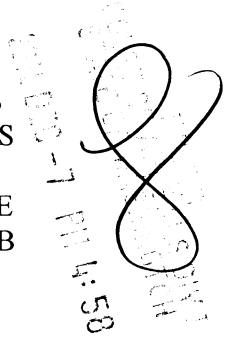
CITY OF ARLINGTON, a municipal corporation; WOODLAND RIDGE, a joint venture; KAJIMA DEVELOPMENT CORP., a joint venture; ARLINGTON COUNTRY CLUB, INC., a joint venture; BNSF RAILWAY COMPANY, a Delaware corporation,

Defendants/Respondents,

v.

HOMESTREET BANK, formerly known as CONTINENTAL SAVINGS BANK; BANNER CORPORATION, formerly known as FIRST SAVINGS BANK OF WASHINGTON; VINE STREET FUND, LLC; U.S. BANK NATIONAL ASSOCIATION, a subsidiary of U.S. BANCORP; SEATTLE MORTGAGE COMPANY; PBW, LLC; GLENEAGLE COUNTRY CLUB ASSOCIATION,

Other Defendants.



BRIEF OF RESPONDENT CITY OF ARLINGTON

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

STATE CASES

FEDERAL CASES

STATE STATUTES

RULES

I. INTRODUCTION

"Peace is the only battle worth waging".

Albert Camus, *Combat*, Aug. 8, 1945, at 78.

Defendant-Respondent, the City of Arlington ("the City"), respectfully submits this brief in support of the trial court's rulings – and asks that they be affirmed. The parties disagree on much, but the City does agree with one sentiment expressed by Holden-McDaniel Partners, LLC ("the Partnership"): it is time for this dispute to end. Br. at 2.

This is the second identical lawsuit brought by the Partnership. The first one, brought in 1995, alleged that the City "negligently approved the storm water collection, retention, and discharge system," which the Partnership claims caused periodic flooding. After three years of extensive litigation, the City paid three quarters of a million dollars to "buy its peace." The Partnership, in return, executed a release of all claims, including those "in any way growing out of any and all known and unknown… injuries and/or property damage," and acknowledging that they "are or may be permanent and progressive." This ended the dispute—until the economy collapsed, when an identical lawsuit was brought.

The Partnership's CR 30(b)(6) representative was very clear about this. Its lawsuit was based upon "the same flooding problem ... from the same sources." It was the "same claim."

The issue, therefore, is whether a party may bring a lawsuit challenging certain conduct, execute a release, accept a large cash payment based upon repair costs and future injury, make no repairs at all, and then file suit all over again. The answer is no, as it should be.

As a threshold matter, the Partnership's interpretation of the release is untenable. Not only does it require the Court to disregard plain language, but it renders the remaining language nonsensical. One certainly wonders, for example, how a dispute over a building permit could cause "property damage" or be "permanent and progressive." What is more, the express purpose of the settlement was to "buy peace"; yet, according to the Partnership's principal, Joe Holden, he would have been within his rights to sue the City the day after the check cleared. The Partnership then compounds interpretative error with legal error, claiming *res judicata* cannot apply. This is belied by nearly a century of precedent holding that *res judicata* applies when, as here, a release concludes litigation—so long as the outcome is "not tentative, provisional, or contingent and represents the completion of all steps in the adjudication of the claim by the court." *See, e.g., Rasmussan v. Allstate Ins. Co.*, 45 Wn.

App. 635, 637, 726 P.2d 1251 (1986) ("This compromise agreement constitutes a merger and bar of all existing claims and causes of action and is as binding and effective as a final judgment itself .... It is *res judicata* of all matters relating to the subject matter of the dispute.") Our case, if anything, illustrates exactly why the law developed that way.

As Judge Appel recognized, "this is a case about a settlement." The Partnership got the benefit of its bargain, but the City has not. It instead spent four years fighting for its peace. It now asks this Court to grant it, and affirm summary judgment.

II. STATEMENT OF THE CASE

A. The Partnership Litigates The Water Issue From 1995 to 1998

In the mid-1990s, two development projects were simultaneously underway in Arlington. The first was on the Partnership's steel manufacturing property. It sought to add a 65,000 square foot engineered metal building. CP V: 2008-2009. The second was the ongoing Gleneagle development on the hill adjacent to the Partnership's property. CP V: 2032; CP IV: 1875.[1]

To address increased stormwater runoff—associated with the private Gleneagle development—the City suggested that the Partnership

[1] Topographically, the Partnership's property lies within a "gutter" of sorts, sandwiched between a hill and a raised railroad track along on the other. CP IV:1875. As the Partnership's own experts would ultimately admit, this property had a flooding problem that long-predated the defendants. *See, e.g.*, CP V:1904 (Holz Dep. Tr. 129:9-14).

place a larger pipe under its property to ensure the increased flows were directed into the ditch on the western side of its property. The Partnership refused, and the permits for its large building stalled. CP V: 2008-10; *see also* CP III: 1364 (hold harmless related to undersized pipe).

On May 5, 1995, the Partnership sued the City in Snohomish Superior Court Cause No. 95-2-03498-3 alleging the City's refusal to grant permits had caused business losses, violated its civil rights, and amounted to an unconstitutional taking. CP V:2008-11.

Significantly, the complaint had an exhibit stapled to it, entitled "CLAIM FOR DAMAGES AGAINST THE CITY OF ARLINGTON." It outlined an additional claim:

> The City of Arlington negligently approved the storm water collection, retention and discharge system for the Eagle Ridge Development which conduct has resulted in damages to HCI Steel Products, Inc. in that its property located at 18520 – 67th Avenue NE, Arlington, Washington has been flooded and will flood in the future unless and until the surface waters which reach HCI's property as above described are otherwise disposed of.

CP V:2008-12-13 (faxed copy with continuous pagination); *see also* CP I:63-65 (discussing physical attachment and service of process).

The Partnership claims that this was only to "comply with then-RCW 4.96.020" (claim filing) and "provide notice … of Holden-McDaniel's intent to allege tort claims…." Br. at 22-23. This may well

have been the Partnership's subjective intention, but it was objectively doing something else. Nothing in the tort claims statute—then or now—required the Partnership to file a tort claim *in superior court, in another matter* (here, Snohomish Cause No. 95-2-03498-3). This was inappropriate from the perspective of claim-filing. Nor did serving the City's attorney, Steve Peiffle, constitute "presenting a claim" for purposes of RCW 4.96.020(4). The Partnership's decision to physically attach[2] a purported "notice of claim" to original service of process in a separate case made no sense for purposes of the claim filing statute.[3]

A few days after the complaint was filed, the Partnership sued the private Gleneagle developers in Snohomish Cause No. 95-2-03599-8. CP V:2015-18. It named Arlington Country Club, Inc. and Kajima Development (doing business as the Woodland Ridge Joint Venture), and alleged negligent stormwater retention claims against them as well. *Id.*

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[2] The Partnership discusses the "official copy" filed with the superior court. It is undisputed; however, that nobody actually saw what was in the court file until after 2011. The 1998 settlement was based upon the documents exchanged by the parties (not what the Partnership sent to the superior court, the original state of which is unknown). *See* CP V:2008-12-13.

[3] Even affording the Partnership the benefit of the doubt, and assuming that it was attempting to comply with claim filing—by unnecessarily filing the claim with a superior court, presenting it to the wrong person, and physically attaching it to another lawsuit—there is no evidence it was received as such. The City simply received a complaint with an exhibit physically attached to it, which, as discussed below, was considered a part of the complaint under Washington law.

The cases were consolidated (*Id.* at 2020-21), and all of the Partnership's claims—for permitting and flooding—were litigated for three years.

B. The Partnership Accepts $750,000 In Return For A Broad Release Of Claims That Expressly Contemplates Future Flooding

Just prior to trial, the parties settled. CP III: 1366-67. The City paid the Partnership $750,000, and in return, the Partnership—inclusive of its successors and assigns[4]—released the City from:

> ... any and all claims, actions, expenses and compensation whatsoever, which the undersigned now has an account of or in any way growing out of any and all known and unknown, foreseen and unforeseen bodily, and/or personal injuries and/or property damage, and/or any financial loss of any kind and the consequences thereof relating to all claims set forth in and described in Plaintiff's Complaint and Amended Complaints....

CP III: 1366. The Partnership acknowledged in the release that "the injuries sustained are or may be permanent and progressive." *Id.*

The release of liability included an exception for future claims related to flooding, to be sure. But it also included an "exception to the exception," which *did* release the City from prospective claims "aris[ing] out of the conduct described in the Complaint ... in Snohomish County Cause No. 95-2-03498-3." *Id.* Thus, the question was whether "the

[4] The settlement was with HCI; though, there has never been a dispute that Holden-McDaniel Partners was its assignee, and bound by the release.

complaint" included "conduct causing flooding." By operation of Washington law, it did. *See* infra Section III, C, 5.

Also of note, the $750,000 number was not arbitrary. The claim exhibit specifically provided that "the total claim ... against the City of Arlington is $750,000 ..." CP V:2012-13 (based upon "additional expenses in the design and construction of its building").

Unfortunately, the Partnership spent zero dollars for that purpose:

> Q. ... Apart from bringing this litigation, has Holden-McDaniel invested any money in addressing flooding and storm water issues, other than litigation and other than the infiltration system?
>
> A. Invested? Have we invested money in --
>
> Q. Resolving flooding?
>
> A. A lot of legal fees.
>
> Q. I appreciate that. So, other than legal fees and the infiltration system, has Holden-McDaniel put any money into addressing the flooding problem?
>
> A. I don't know what we've addressed. I guess the answer is no. I don't know what you would do.

CP VII: 2179.

The problem was accurately summarized by appraiser and real estate expert, Dr. John Kilpatrick. He explained—without contradiction—

that Partnership effectively "monetized" its flooding claims, and no longer had any fair entitlement to "the full amount" of prospective losses:

> ... consider a property that was worth $100,000 with a home and a garage, and when the garage burned down, the insurance company gave the homeowner $10,000. If the homeowner then tries to sell the house without rebuilding the garage, the home is only worth $90,000. The homeowner wouldn't receive the full $100,000 pie when it's missing a $10,000 slice. In this case, [the Partnership] already received their hypothetical $10,000 in damages and now expects their property to still be worth the full amount.

CP IV: 1925.

C. The Economy Turns, And the Partnership Brings a Second Lawsuit for Conduct It Admittedly Litigated—And Settled—In The 1990's

The Partnership re-sued in 2011 alleging the very same wrongdoing. Almost exactly tracking the language of the 1995 Complaint, the Partnership articulated its claim against the City during its CR 30(b)(6) deposition:

> They failed to control the stormwater from the -- from other entities, in the development across the street, and caused me years of flooding and grief.

CP IV:1872 (247:1-16). It insisted that "the City should have controlled the Gleneagle developer's discharge of water better." *Id.*

When asked whether this was, in effect, the same as the 1995 lawsuit, the Partnership's 30(b)(6) representative agreed it was:

> Q. Is that the same as your claim against the Gleneagle developers in this lawsuit today?

A. Yeah. We're still wrestling with the same flooding problem, if that's your question. … And they're from the same sources, it appears…

Q. Is it the same claim that Holden-McDaniel is asserting against the Gleneagle developers today, that you're [sic] problems arise out of the design and construction of the stormwater system on the Gleneagle development?

A. Yes. They're not -- right. It's not -- yeah, the system doesn't work and so it floods us.

Q. All right…

A. And they're from the same sources, it appears.

Id (73:22-74:22).

As it turned out, the Partnership was even more cavalier outside of the litigation. As the City discovered, Mr. Holden had not only acknowledged that he was re-litigating the same flooding issue, but "bragging" about how much he had been paid the first time. CP IV: 1894.

D. The Evidence Establishes That The Flooding Problem Only *Improved* Since 1995

According to the Partnership, throughout the late 1980s and 1990s, there were floods roughly every two to three years. CP IV: 1878-79. This was generally consistent with the findings of its expert, Malcolm Leytham, who found a frequency of every three years in 1995. CP III:1183-1186. However, by the time the Gleneagle development was complete, the frequency improved to every 15 years. *Id.*

Later, in 2002, the City installed a regional stormwater facility. Contrary to the Partnership's claim, this was *not* done because the City was "on the hook" for the Partnership's flooding problem, nor to specially benefit Gleneagle. *See* Br. at 13. The City's Public Works Director made it clear (without dispute) that the improvements were part of a larger effort along 67th Avenue. CP I: 215-16. The stormwater facility was constructed to address water overtopping the roadway and creating a safety hazard *for vehicles*. *Id.*

In its CR 30(b)(6) deposition—testifying on a delineated topic, without objection—the Partnership conceded that these improvements appeared to have *made things better*:

> Q. Can you and I agree that the 2002 improvements made flooding better, that it improved or reduced flooding as a general matter?
>
> A. It appears to have.
>
> * * *
>
> Q. And it had the effect of reducing flooding on your property?
>
> A. It appears to.

CP IV: 1861-62 (topics); CP IV: 1872 (Dep. Tr. 248:24-249:19). Discovery also confirmed that the Partnership's manager, Joe Holden,

when negotiating with a tenant, minimized the flooding. CP IV: 1894 (two minor events causing no damage).

This was hardly revelatory, however. The 2002 improvements included an entirely new retention pond (the "Triangle Pond"), which spanned a city block. CP I: 222. Prior to its construction, the Partnership had flooding every two to three years. CP IV: 1878-79. Afterwards, there were zero floods for almost a decade. *Id.* Then, according to the Partnership there were only "two more events… causing no interruption to business or damage." CP IV: 1894.

So the Partnership did what many litigants facing undeniable facts would do: it began hiring experts. The first was Hydrologist Tom Holz. When asked several times whether the City's improvements had improved the flooding condition, he testified that he "didn't know," but acknowledged "it's possible." CP IV: 1907-911 (Tr. 47:12-17; 47:18-22; 50:17-25; 103:6-15; 104:12-105:1; 154:21-23).

The Partnership then hired a second, more promising expert, Malcolm Leytham. He generated a litigation report comparing the pre-2002 condition and present; and opined that the flooding did get worse. However, Dr. Leytham's unlikely conclusion did not withstand straightforward questions:

Q. Okay. Based on your analysis, are you in a position to say that the creation of the triangle pond improvements have made things worse for Holden-McDaniel?

A. I'm sorry. Worse than what?

Q. Worse than they were before?

A. I don't know that I can say.

Q. Do you have any opinion regarding the extent to which there's additional damage to the Holden-McDaniel property attributable to the 2002 improvements?

A. No.

Q. Do you have -- are you able to quantify the additional severity of any particular flooding event attributable to the 2002 improvements?

A. We haven't done that.

* * *

Q. Are you in the position to say whether there have been any exceedance events since 2009 that would not have happened had the 67th Avenue project never happened?

A. No.

CP II: 516 (Tr. 109:1-23). As Dr. Leytham, in this regard, also conceded the obvious: *increased capacity* in a stormwater system *does not* lead to more flooding. Water from Gleneagle that ended up in the City's

Triangle Pond was water that would have otherwise been flooding the Partnership. *Id.* at 517-18 (Tr. 111:25-112:14).[5]

Indeed, Dr. Leytham ultimately testified that the current system—inclusive of the City's 2002 improvements—was reducing flooding to a 25-year frequency. CP I: 174. This 25-year frequency was precisely the amount of flooding that occurred before *any* development. CP III: 1183-1186. In other words, the City's good public works completely negated the impact of private development on the Partnership.

In the end, to be fair, it became less than clear what Dr. Leytham's opinion actually was – at least after his report, inconsistent sworn testimony, and subsequent sham declaration.[6] Thus, there was some debate about how he actually felt about the 2002 improvements. But there was *no* debate that the current conditions were an improvement over the repetitive flooding days of 1995.

E. The Partnership's "BlueScope Theory of Damages" Also Comes Undone

Not unlike its liability case, the Partnership's damages case proved untenable. Initially, it claimed that it lost a tenant, BlueScope Steel, due to flooding. It hired two more experts, both of which articulated

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[5] The Partnership also claimed (and seemingly, still does, Br. at 14) that "lowering 67th Avenue" had a "fatal" impact. But Dr. Leytham conceded that he could not connect it to a meaningful impact on flooding. CP II: 518.

[6] *See* CP I:411 (claiming he was tired and did not have his report, which was odd since it was a marked exhibit).

multimillion dollar claims against the defendants. However, discovery proved not only that BlueScope *did not* leave because of flooding, but that the damage numbers were corrupt.

As for BlueScope's motives, documents confirmed that the Global Financial Crisis hit hard.[7] Internal memoranda confirmed that closure of the Arlington facility—the production from which would be absorbed by a California plant—would save more than $3 million per year. CP VI: 2137-40. BlueScope's CR 30(b)(6) representative confirmed as much. CP VI: 2142-52 (Dep. Tr. 30:12-31:8; 34:8-35:9; 35:10-24; 37:14-16; 50:6-9). Its decision to close the plant was memorialized in a company-wide email and memoranda from the president, Dan Kumm:

> The decision to close the BlueScope plant in Arlington is due to the ability of the other BlueScope facilities to efficiently absorb the additional volume, and is not a reflection of local performance.

CP VI: 2167-68. This was consistent with its statements to local media, attributing the closure to the economy. *See, e.g.*, CP IV: 1988 ("[a]lthough we are seeing an improvement in overall BlueScope Buildings' business volume, the global financial crisis has been a significant challenge...").

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[7] According to its 2010 and 2011 Annual Reports, BlueScope's North American operations were hemorrhaging money and it was doing everything it could to cut capital costs. It lost $93 million in its North American Building Products division in 2009 and an additional $21 million in 2010. CP IV: 1985-86. Overall, revenues dropped over a billion dollars in 2010. *Id.*

BlueScope referred to its lease with the Partnership as "onerous," CP VI: 2156, and its CFO noted that they would "seek to negotiate an early exit with the landlord" (CP VI: 2161) - and that is precisely what they did. BlueScope paid the Partnership $2.6 million to buy out the remainder of the term. CP IV: 1993-96.

BlueScope's representative confirmed that it had no documentation of offsite water being an issue, CP VI: 2151-52, and *refused* to say that they broke the lease because of water—even when pressed:

> Q. Fair to say that but for the flooding issues you would have continued making the lease payments?
>
> A. I can't say for sure.
>
> Q. More likely than not?
>
> A. Maybe.
>
> [Objection from BlueScope's counsel]
>
> A. I don't know how to answer that.
>
> [Objection from BlueScope's counsel]
>
> A. I don't know.

CP II: 703 (Tr. 59:10-20).[8]

[8] The Partnership has consistently cited an excerpt from the BlueScope deposition in which the witness was unaware of all of his *legal grounds* to break the lease. This proves only that a nonlawyer witness could not readily cite a universe of legal options. Not only does this fail to establish a breach due to water, the excerpt was later clarified that

The damage claim in this case was little more than an attempt at double-recovery.[9]

The expert opinions flowing from this unavailing theory were equally bankrupt. The first expert, Barrett Keitges, an appraiser, wasted no time distancing himself from the substantive opinions:

> Q. You're prepared to testify to your final opinions in this matter?
>
> A. I wouldn't characterize the report as opinions.
>
> Q. How would you characterize Exhibit 135?
>
> A. Mathematical calculation.
>
> Q. Okay. And why would you draw that distinction? Why do you think that's an important distinction to draw?
>
> A. I believe for an appraiser opinions imply that an appraisal's been done, and I don't believe there's any valuation opinions in this report.

CP IV: 1999 (Tr. 15:22-16:14). It turned out that Mr. Keitges's decision to do an abstract calculation was not accidental. When asked why he did not perform an appraisal or offer a damages opinion, he explained that this

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BlueScope could have broken the lease and negotiated based upon the Partnership's duty to mitigate its losses. CP I: 194-95.

[9] To the extent that water came up at all in negotiation with BlueScope, the sole (nonhearsay) reference came from a former Arlington plant employee named Shane "Buzz" Tompkins. He detailed chronic water conditions—caused by poor drainage, ***not*** external flooding. Tompkins had zero recollection of water *ever* coming from offsite. The issue was simply poor drainage, an issue the Partnership was repeatedly made aware of (but ignored). CP IV: 1837 (attaching prior declaration, CP IV: 1840-42).

would be "misleading" to the point of violating U.S. Appraisal Guidelines. CP V: 2003 (Tr. 55:19-56:16).

The other expert was Don Moody, a local real estate broker, who issued a "broker's opinion of value" that the property had lost approximately $9 million on account of flooding—which he prefaced with "not to be used for litigation purposes" (CP IV: 1931-32). Disclaimers aside, Mr. Moody's opinion was based upon a fictitious view of the case. He was not told the property had a history of flooding, why BlueScope actually left, or that the Partnership had already been compensated for the broken lease. By the end, Mr. Moody's testimony was:

> Q. You prepared two reports in this case, right?—
>
> A. Yes.
>
> Q. -- the loss study and the broker opinion of value?
>
> A. Yes.
>
> Q. And through the course of this deposition, we've learned that both, in light of what we know now, are inaccurate?
>
> A. That's correct.
>
> Q. And you're not in a position right now to give an alternative number to the broker opinion of value?
>
> A. That's correct.

CP IV: 1918 (Tr. 122:7-20).

F. The Trial Court Enters Summary Judgment

The parties filed cross motions for summary judgment. At no point did the Partnership advance any of the following:

- a "competing view" of the purpose of the release. The Partnership's new explanation—buried in Footnote 10 of its brief—was offered for the first time on reconsideration;
- a claim that stormwater conditions *worsened* with every improvement. This was argued for the first time on reconsideration; or
- its primary argument on appeal, that interpretation of the release constituted an issue of fact.

The parties did, however, submit copious amounts of briefing and evidence, some of which was stricken.[10] The City, for its part, moved for summary judgment on the issues of the release, certain other claims and theories, as well as the absence of provable damages. The parties then spent a full day arguing the motions to the Honorable George Appel.

After careful consideration, he issued a detailed 22-page written Order. In it, he found that the release did contemplate future flooding – any other result would be inconsistent with its plain language and purpose. CP I: 21-22. And in exchange for $750,000, the Partnership effectively monetized its damage (*i.e.*, flooding as frequent as every three years). CP

[10] For example, Don Moody—having had his first opinion thoroughly discredited—sought to offer a new opinion related to "stigma damages." The Court struck it as untimely and inappropriate. CP I: 15-18.

I: 24. Because this settlement resolved the litigation, *res judicata* attached. CP I: 22-23.

This Order is not only consistent with the case law and supported by the record, it is just plain right. It should be affirmed.

III. ARGUMENT

This wrongdoing alleged by the Partnership was litigated and resolved in 1998, then the Partnership re-filed, and the issues were re-litigated. The only differences between 1995 and 2011 are (a) $750,000 and (b) an improvement in the flooding condition. The trial court was right to disallow this second bite at the apple.

The Partnership betrays its problematic position at the outset by sandbagging on appeal. The Court can search the record high and low; it will not find a single instance in which the Partnership suggested to the trial court that interpretation of the release was a factual issue. Rather, it consistently argued that interpretation was an *issue of law* for the trial court. The all-or-nothing argument having not panned out, the Partnership now repeatedly argues "triable issue." Br. at 19-20, 22, 27. It is unfair to the parties and the trial court for the Partnership to claim the superior court erred "[b]y taking these issues away from the jury," (Br. at 27), when the Partnership never wanted a jury in the first place. *See* RAP 2.5.

Even if the Court reaches the un-ripened issue—though, it should not—the outcome would be the same. The Partnership claims that the exhibit attached to the 1995 complaint is "extrinsic evidence" (*i.e.*, its "factual issue"). But, according to Civil Rule 10 and Supreme Court precedent, this is just plain wrong. The exhibit was part of the complaint itself. *See P.E. Sys., LLC v. CPI Corp.*, 176 Wn.2d 198, 204, 289 P.3d 638 (2012) ("the contract does become part of the [complaint] by simply attaching it.").[11] It follows that the conduct described in it *was* conduct described in the complaint for purposes of the release, especially when considered in light of Washington's "strong presumption of finality as to the settlement," *Niven v. E.J. Bartells Co.*, 97 Wn. App. 507, 512-13, 983 P.2d 1193, 1196 (1999), and express purpose of the release: "to buy peace." CP III: 1366.

Nor did the trial court err in applying *res judicata*. It was, rather, applying settled law. *See, e.g., In re Phillips' Estate*, 46 Wn.2d 1, 13-14, 278 P.2d 627 (1955) ("A compromise or settlement is res judicata of all matters relating to the subject matter of the dispute.") (citing *McClure v. Calispell Duck Club*, 157 Wash. 136, 288 P. 217 (1930)). Finality, in the context of *res judicata*, requires only that an outcome be "not tentative, provisional, or contingent and represent the completion of all steps in the

[11] The Partnership cites *P.E. Systems* for boilerplate (Br. at 29), but curiously omits the relevant portion.

adjudication of the claim by the court." *Ensley v. Pitcher*, 152 Wn. App. 891, 900-901, 222 P.3d 99 (2009).[12] As the trial court correctly found, the outcome of the 1995 litigation was final; the parties *could have* had their suit disposed of if they had "presented and managed their respective cases." CP I: 22-23 (citing *Pederson v. Potter*, 103 Wn, App. 62, 68-70, 11 P.3d 833 (2000)). Instead, the Partnership accepted money, settled, and the case was dismissed. There was nothing unfair about the trial court precluding it from starting all over again. This is why *res judicata* exists.

This outcome is only supported by the fact that conditions since 1995 have improved; a fact acknowledged by the Partnership and its experts to varying degrees. Moreover, none have causally linked anything the City did to any particular event, increase in severity, or damage to the property. Thus, any damages the Partnership would be seeking now are speculative, compensated in the first lawsuit, or both.

Summary judgment should be affirmed.

A. Standard of Review

Summary judgment is reviewed *de novo*. *See, e.g., Roger Crane & Associates v. Felice*, 74 Wn. App. 769, 773, 875 P.2d 705 (1994). The judgment of the trial court will not be reversed when it can be sustained on

[12] The Partnership wholly omits this body of law.

any basis fairly supported by the record. *See Sprague v. Sumitomo Forestry Co.*, 194 Wn.2d 751, 758, 709 P.2d 1200 (1985).

The trial court's decisions to strike a hearsay document and deny a reconsideration motion are reviewed for abuse of discretion. *Engstrom v. Goodman*, 166 Wn. App. 905, 910, 271 P.3d 959 (2012) (affirming motion to strike); *Davies v. Holy Family Hosp.*, 144 Wn. App. 483, 497, 183 P.3d 283, 290 (2008) (affirming denial of reconsideration).

B. The Partnership's Newly-Minted Suggestion That Interpretation Of The Release Constitutes A "Jury Question" Should Not Be Considered For The First Time On Appeal

RAP 2.5(a) provides that the Court of Appeals may refuse to review any claim of error which was not raised in the trial court first. *See also Martin v. Johnson*, 141 Wn. App. 611, 617, 170 P.3d 1198 (2007) (refusing to review issue that trial court did not have opportunity to rule on first); *Re v. Tenney*, 56 Wn. App. 394, 400, 783 P.2d 632 (1989) (same); *see also McPhail v. Municipality of Culebra*, 598 F.2d 603, 607 (1st Cir. 1979) ("party may not 'sandbag' his case by presenting one theory to the trial court and then arguing for another on appeal.").

Here, there can be—and will be—no dispute that the Partnership is rewriting its position on appeal. Below, it swung for the fences, agreeing with the City that interpretation of the settlement was an issue of law to be decided by the court. In fact, the Partnership brought its own summary

judgment motion on that basis, never arguing that there was extrinsic evidence, conflicting inferences, or a material fact. That strategy having failed, the Partnership now cites error in taking the issue away from a jury it never asked for. *See* Br. at 27.

There are several problems. **First**, this deprives the other parties of an opportunity to marshal a factual record. Had the Partnership claimed below that the "circumstances" of the attached exhibit constituted a factual question, the other parties could have tried to pin it down through (1) written and oral discovery to the Partnership, (2) a deposition of the attorney who attached the exhibit, and (3) exploration of whether the Partnership may put the motives and intent its 1998 counsel at issue and still maintain privilege. None of these stones may be uncovered now, on a closed-record appeal. **Second**, new arguments on appeal are unfair to the trial court. Judge Appel accepted thousands of pages of briefing and submittals, and gave the parties an entire court day to argue their case. He then carefully reviewed it all before crafting a detailed order.[13] To now ask the appellate to reverse the trial court on a ground never even presented does it a great disservice. *See Haslund v. City of Seattle*, 86 Wn.2d 607, 614, 547 P.2d 1221 (1976) ("The trial court, in our view, should have had the benefit of vigorous and detailed objections... giving it

[13] The rules would have permitted Judge Appel to limit the parties briefing, decline oral argument, and enter a form order with no analysis.

an opportunity to correct the error, if any."). **Third**, permitting this practice creates an undeniable opening for gamesmanship—with our case presenting a good illustration. The Partnership took a categorical position: the settlement should be interpreted in its favor, and the City's affirmative defense should be struck. This was a reasonable tactical choice, to be sure. The Partnership did not have to dilute its arguments with counterproductive claims about "factual issues," and, had it prevailed, the entire defense would have been out of the case. But the trial court went the other way. An appeal is not an appropriate time to march out new arguments to replace old one. And ***lastly***, even if the Partnership was correct about a "jury question"—though, it is not—the trial court could have rendered that conclusion if given the opportunity. This would have spared the parties (and this Court) the considerable time and resources of an appeal. It also would have avoided the inevitable prejudice of lost witnesses, diminished memory, and disappearing evidence.

In short, the Partnership's new argument on appeal is not "no harm, no foul." It is harmful, and this Court should decline to analyze for "issues of material fact" for that reason. The inquiry should instead be the same as that of the trial court, *Roger Crane & Associates v. Felice*, 74 Wn. App. 769, 773, 875 P.2d 705 (1994), which is a binary decision between two competing interpretations of the settlement agreement.

C. The Partnership's Proposed Interpretation Of The Release Violates Nearly Every Canon Known To The Case Law

Settlements are construed broadly:

> [W]hen a person signs a release knowing that he has been injured he assumes some risk that his condition may worsen.... He knowingly takes a gamble in agreeing to a settlement. This risk that circumstances will change is inherent in the settlement process. If we allowed a challenge to the validity of the releases in these cases, we would severely impair the policy favoring private settlements and promoting their finality. In every case where the known circumstances of the injury changed after settlement, the validity of the release would be open to question...

Bennett v. Shinoda Floral, Inc., 108 Wn.2d 386, 395-96, 739 P.2d 648 (1987).

Settlement agreements between private parties are viewed with finality. *Paopao v. State, Dep't of Soc. & Health Servs.*, 145 Wn. App. 40, 48, 185 P.3d 640, 645 (2008); *see also Oregon Mut. Ins. Co. v. Barton*, 109 Wn. App. 405, 414, 36 P.3d 1065, 1069 (2001) ("The law favors the private settlement of disputes and is inclined to view them with finality... the state's interest in fully compensating accident victims was secondary to the prevailing interest in the finality of settlements"); *Stottlemyre v. Reed*, 35 Wn. App. 169, 173, 665 P.2d 1383 (1983) (noting interest in "finality of settlements"); *Snyder v. Tompkins*, 20 Wn. App. 167, 173, 579 P.2d 994 (1978) ("The law favors the amicable settlement of disputes, and

is inclined to view them with finality.") (citing *Wool Growers Serv. Corp. v. Simcoe Sheep Co.*, 18 Wn.2d 655, 690, 140 P.2d 512 (1943)).

As here, the presence of a release is "generally given great weight in establishing the finality of a settlement." *Jain v. State Farm Mutual Auto. Ins. Co.,* 130 Wn.2d 688, 693, 926 P.2d 923 (1996). So long as the entity being released is "clearly identified," there is a "strong presumption of finality as to the settlement." *Niven v. E.J. Bartells Co.*, 97 Wn. App. 507, 512-13, 983 P.2d 1193, 1196 (1999). This principle makes sense as a practical matter. No rational party would settle to "buy their peace," if courts took a narrow view of what "peace" actually was.

The question is, therefore, one of competing interpretations:

The City's Interpretation. The release protects the City from liability for pre-release flooding, as well as flooding which arises out of the litigated subject matter and any damages caused by the City's delay in issuing their permit.

The Partnership's Interpretation. The City paid $750,000 with the understanding that, should the property flood the following day, the exact same lawsuit could be brought alleging the exact same wrongdoing.

Contract interpretation is a question of law. *Mega v. Whitworth Coll.*, 138 Wn. App. 661, 672, 158 P.3d 1211, 1216 (2007); *State v. Chambers*, 81 Wn. 2d 929, 931, 506 P.2d 311 (1973).

1. The Partnership's Interpretation Disregards Plain Language

The Partnership conspicuously fails to address the fact that the settlement agreement makes virtually no sense if given its proposed meaning. In purportedly settling a "building permit lawsuit," it somehow released claims related to "permanent and progressive injury" and those based upon "unknown future property damage." CP III: 1366. This language speaks only to flooding allegations, not permit delay. *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d at 503, 115 P.3d 262 (2005) (plain language controls unless ambiguous). Indeed, Mr. Holden emphatically stated as much in his declaration statement about damages related to the permit claims. *See* CP I: 390 ("it is clear from our interrogatory answers that these damages were *not* related to permanent property damage") (emphasis in original).

The same is true of the language about "the nature, extent, effect, and duration of said injuries," *id.*, in a permit dispute. A permit dispute does not cause injuries of lasting "duration." *See id.* The duration language is directed toward flooding (which the Partnership itself alleged *was* permanent), and addressed the near-certainty that the problem would not stop by virtue of the parties executing a settlement document.

The Partnership now claims that the "reservation of future flooding claims" was based upon an unspoken promise by the City to accept

permanent responsibility for the Partnership's flooding problem. Br. at 13. This is flatly contradicted by its settlement's plain language. The City settled "... for the ***sole consideration*** of SEVEN HUNDRED FIFTY THOUSAND AND NO/100 DOLLARS..." CP III: 1366 (emphasis added). The Court may not go outside of this unambiguous language—such as "sole consideration"—to "vary, contradict or modify" it. *See Freestone Capital Partners L.P. v. MKA Real Estate Opportunity Fund I, LLC*, 155 Wn. App. 643, 672, 230 P.3d 625 (2010).

2. The Partnership's Interpretation Renders Other Language In The Release Nonsensical

The settlement broadly contemplates a release of future *flooding* claims that "arise out of the conduct described in the Complaint" in Cause No. 95-2-03498-3. CP III: 1366. If, as the Partnership claims, the complaint was "only about a building permit dispute," one certainly wonders what manner of future flood could "arise out of it," and why the parties were concerned about it. The fact is a flood would not— and could not — arise out of the revocation of a building permit; the Partnership's interpretation renders the "exception" language wholly meaningless. *See Seattle-First Nat. Bank v. Westlake Park Associates*, 42 Wn. App. 269, 274, 711 P.2d 361 (1985) (contracts should be construed to avoid interpretations that would fail to give effect to contractual terms).

The Partnership belatedly came up with an explanation on reconsideration (which it now half-heartedly presents in a footnote). It claimed that the exception in the release was actually intended to single out future flooding *caused by its undersized pipe*, which was one of the City's concerns in the building permit lawsuit. The problem with this theory—besides being raised for the first time on reconsideration, *see* CR 59; *Wilcox v. Lexington Eye Institute*, 130 Wn. App. 234, 241, 122 P.3d 729 (2005) (disallowing alternative theories on reconsideration)—was that the City already had this benefit at the time of the 1998 settlement. Early in the first litigation, the City permitted the Partnership to retain its undersized pipe *on the condition that it sign a hold-harmless agreement related to it*. CP III: 1364 ("HCI hereby agrees to hold Arlington harmless from any damages occurring to HCI as a result of Arlington authorizing HCI to… reinstall a 24" x 36" drain pipe across HCI's property… to the extent that a 24" x 36" drain pipe is inadequate") (emphasis added). Thus, when the parties settled in 1998, the City's future interests were already protected vis-à-vis the pipe. There would have been no reason to redundantly single this category of claims and re-release them, when the City was already held-harmless. Symbolic and meaningless acts are not assumed in the context of interpretation. *See Dep't of Labor & Indus. v. Tacoma Yellow Cab Co.*, 31 Wn. App. 117, 124, 639 P.2d 843, 847

(1982); *see also Seattle-First Nat. Bank v. Westlake Park Associates*, 42 Wn. App. 269, 274, 711 P.2d 361 (1985).

3. The Partnership's Interpretation Is Antithetical To The Parties' Express Intention and Requirement That Releases Be Construed In Favor of Resolution

The parties' settlement was specific about its purpose. The City paid "to avoid litigation and buy their peace." CP III: 1366. And the purpose of contract interpretation is to effectuate the parties' intent. *See Jones v. Strom Const. Co., Inc.*, 84 Wn.2d 518, 520, 527 P.2d 1115 (1974); *Deep Water Brewing v. Fairway Resources Ltd.*, 152 Wn. App. 229, 248, 215 P.3d 990 (2009) (contracts should be construed in light of the intentions of the parties, based upon the language in the document).

Again, the parties' competing interpretations speak for themselves. On the one hand, the City's interpretation effectuates that explicit intent by ending the litigation, including future claims related to "permanent or progressive damage" arising out of the litigated subject matter. On the other hand, the Partnership filed a declaration asserting that it could have accepted the $750,000 and sued the City immediately after. *See* CP I: 391. This interpretation is antithetical to the intent of the document—in addition to the Washington's rule favoring finality in releases. *See Niven v. E.J. Bartells Co.*, 97 Wn. App. 507, 512-13, 983 P.2d 1193, 1196 (1999) (noting "strong presumption").

4. The Partnership's Interpretation Is Imprudent, Unjust, And Dictates An Absurd Result

Setting aside interpretation maxims and case law—all of which heavily tilt in favor of enforcing the settlement—the Partnership's interpretation is just plain unfair. Indeed, the Partnership does not even disagree. *See* Resp. to Summ. J. (noting the "raw deal" the City would get). When faced with two interpretations, courts will favor a reasonable interpretation over one which renders the contract unreasonable. *Berg v. Hudesman*, 115 Wn.2d 657, 672, 801 P.2d 222 (1990).

The Partnership, to be clear, is arguing that the City paid full-freight for the $750,000 in future stormwater damages—according to the Partnership's own estimate—yet left itself liable for those same future problems (which everyone agreed were likely "permanent and progressive"). On its face, this is not a reasonable interpretation.

5. Even If the Settlement Agreement Were Analyzed For "Issues of Fact," It Would Not Support A Different Result Because There Is No "Extrinsic Evidence" Under Civil Rule 10(c)

According to the Partnership, the superior court looked to "extrinsic evidence: *i.e.*, a document other than the complaint in the building permit lawsuit." Br. at 21. This is the Partnership's "issue of fact." *See* Br. at 19.

As a threshold matter, this is an argument advanced for the first time on appeal and should be disregarded. *See* supra Section III, B.

But even setting that aside, the Partnership's reasoning does not bear scrutiny; it offers all manner of justification and explanation to divorce the complaint—which the Partnership admits is *not* extrinsic because it is incorporated by reference—from the exhibit that was physically attached to it and served as one document.

The first problem is that Civil Rule 10—and binding Supreme Court precedent—make it clear that documents affixed to the pleadings become part of the pleading. CR 10 specifically provides that "[a] copy of *any* written instrument which is an exhibit to a pleading *is a part thereof for all purposes.*" CR 10(c) (emphasis added). There is no dispute that the claim was an exhibit to the complaint – which should end the debate.

Unfortunately, it does not. The Partnership spends pages arguing about "the context" and how it was attempting to comply with claim filing. True or not, this is irrelevant for two reasons.

First, Civil Rule 10 does not carry a scienter requirement. The Rule turns, quite simply, on whether there is "an exhibit to a pleading," not whether the filing party "intended to incorporate it." Even assuming the Partnership was attempting to comply with claim filing—in an

objectively inconsistent way[14]—that does not change the only relevant inquiry: whether the exhibit was attached. The answer, undisputedly, is yes. *See* CP V:2008-12-13 (faxed copy with continuous pagination); CP I:63-65 (physical attachment and service of process as one document).

The Supreme Court emphatically confirmed this in *P.E. Sys., LLC v. CPI Corp.*, 176 Wn.2d 198, 204, 289 P.3d 638 (2012), where the dispute was whether a contract was "part of the pleadings" for purposes of a motion for judgment on the pleadings. The trial court believed it was, and granted the motion. On appeal, the losing party—like the Partnership— argued that the "contract [was] not part of the pleadings, and 'you do not make it so by simply attaching it to an answer or complaint.'" *Id.* at 204. The Supreme Court flatly disagreed, holding that "the contract *does* become part of the pleadings *by simply attaching it*." *Id.* (emphasis added). Contrary to the Partnership's arguments, a party need not "reference" an exhibit, desire it, or manifest intent to incorporate it. A unanimous Supreme Court ruling, citing "multiple lines of authority," made it clear that "simply attaching the document" makes it part of the complaint. *Id.* Neither surrounding events, nor the

[14] As discussed above, the claim filing statute did not call for a party to attach a notice of claim to the complaint in a different litigation, it did not require service on the city attorney, and it did not require filing the notice with the county superior court.

Partnership's subjective motivations, have any bearing on whether its admittedly-attached exhibit became a part of the complaint. It did.

And **second,** contract formation, like CR 10, is not a subjective exercise. Subjective intentions are irrelevant to objective manifestation. *See, e.g., Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 504, 115 P.3d 262 (2005); *Go2Net, Inc. v. C I Host, Inc.*, 115 Wn. App. 73, 85, 60 P.3d 1245 (2003) (party's "unilateral or subjective purposes and intentions" are not considered). In fairness, the City has no idea why the Partnership chose to attach an exhibit discussing flooding allegations to its first complaint. Perhaps it was to provide context for the building permit dispute—which clearly involved water issues, flooding, and storm systems. *See* CP V: 2008-10. Perhaps the Partnership was attempting to secure early leverage by threatening additional claims. Or perhaps the Partnership was genuinely confused by the claim filing statute. Ultimately, it does not matter.

What does matter is the objective evidence. It is undisputed that the Partnership *objectively* attached an exhibit to its complaint and *objectively* sent it to the City, which *objectively* was bound by CR 10, and *objectively* agreed to an outcome that would make no sense if it did not include flooding (*i.e.*, "permanent and progressive property damages" due to a building permit revocation). The Partnership's strained

explanations about what it *intended* to do are immaterial by definition. Objectively, its complaint identifies flooding as "conduct" for purposes of the settlement.

The Partnership then makes an even less compelling argument: the exhibit is not a "legal instrument." Br. at 29. While true that "instrument" connotes a "written legal document that defines rights, duties, entitlements, or liabilities, such as a contract, will, [or] promissory note..." (*CPI Corp.*, 176 Wn.2d at 198), it is quite untrue that CR 10 is *limited* to contracts and promissory notes. In *Tierney v. Vahle*, 304 F.3d 734, 738 (7th Cir. 2002)—relied upon by the Washington Supreme Court in *P.E. Systems*—the instrument was a personal letter to a school athletic director. Judge Posner held that "[b]ecause the letter was attached to the complaint; it became a part of it for all purposes." *Id.* at 738.

Obviously, a claim for damages would qualify under this broad standard. It is certainly more formal than the letter in *Tierney*. It is a "written legal document" (signed by a lawyer), purporting to define rights (HCI's freedom from flooding), duties (to control stormwater), and liabilities ($750,000).

To find a contrary holding, the Partnership had to reach to an unpublished Arizona district court decision on a reconsideration motion. *See* Br. at 30-31 (citing *Foust v. City of Page*, 2014 WL 1791250 (D.

Ariz. May 6, 2014)). This is hardly a vehicle to rewrite Washington law, especially when it: (a) has never been cited in any other decision or order, anywhere; and (b) it is against the weight of authority in even the federal system. *See, e.g., Hartmann v. California Dep't of Corr. & Rehab.*, 707 F.3d 1114, 1124 (9th Cir. 2013) (details of prison appeals process with respect to complaints); *Amini v. Oberlin College*, 259 F.3d 493 (6th Cir. 2001) (held that the trial court erred by refusing to consider the allegations contained in the plaintiff's EEOC charge, which was attached as an exhibit to the complaint); *Gant v. Wallingford Bd. of Educ.*, 69 F.3d 669, 674 (2d Cir. 1995) (opinions of principal about racial discrimination); *Song v. City of Elyria*, 985 F.2d 840 (6th Cir. 1993) (plaintiff's own allegations set forth in attached affidavit were properly considered as part of the pleadings).

Though the Partnership works very hard to complicate the issue, it is not complex. In 1995, the Partnership attached an exhibit to its complaint and served it as one document. By law, the exhibit was "part of the pleading." The parties then referenced that same pleading in a settlement that would otherwise make no sense, and yield an absurd outcome, in the absence of the exhibit. The Partnership's invitation to rewrite Civil Rule 10, find "extrinsic evidence" where none exists, and

render the plain language of the parties' settlement nonsensical—and in the process interpret a settlement *against* finality—should be declined.

D. The Trial Court's Application Of *Res Judicata* To A Settlement Agreement That Ended An Active Litigation Is Supported By Unbroken Case Law

The Partnership also spends substantial time arguing that it was error to apply *res judicata*. But it is the Partnership that errs. Courts have never taken the formulaic approach to *res judicata* suggested in the Partnership's brief. Indeed, they have repeatedly held the opposite.

The trial court cited *Pederson v. Potter*, 103 Wn, App. 62, 68-69, 11 P.3d 833 (2000), in concluding that the parties' 1998 settlement triggered *res judicata*. Its plain language supported this Court's ruling:

> In order that a judgment or decree should be on the merits, it is not necessary that the litigation should be determined on the merits, in the moral or abstract sense of these words. It is sufficient that the status of the action was such that the parties might have had their suit thus disposed of, if they had properly presented and managed their respective cases.

Id. at 70. In this case, the parties could have resolved the 1995 lawsuit if they "properly presented and managed the case" to verdict. They did not, however, electing instead to resolve the case by settlement, which was followed by a discontinuation of the litigation, the trial date being stricken, and a judge entering an Order of Dismissal. This is classic finality.

The Partnership first objects because the dismissal was "without prejudice." Br. at 33. This is literally true, but irrelevant here. "Determination of what constitutes a final judgment in the context of *res judicata* has always been "a matter of substance and not form." *Gazin v. Hieber*, 8 Wn. App. 104, 113, 504 P.2d 1178 (1972). A final judgment may be found when the outcome is "not tentative, provisional, or contingent and represents the completion of all steps in the adjudication of the claim by the court." *Ensley v. Pitcher*, 152 Wn. App. 891, 900-901, 222 P.3d 99 (2009). This includes circumstances where "there is no apparent reason to anticipate reconsideration and that the alternative of denying preclusion would entail substantial costs." *Id.*

In this case, the 1998 settlement ended the litigation for all intents and purposes. The Partnership does not argue otherwise, let alone offer evidence. The parties struck the trial date and went their separate ways, and a year later the case was dismissed for want of prosecution. The effect of this order was to permanently discontinue the case—the statute of limitations, after all, would have barred re-filing—so it would be treated as a "final judgment." *See Munden v. Hazelrigg*, 105 Wn.2d 39, 44, 711 P.2d 295, 298 (1985) ("final judgment" determined by "its effect rather than its language").

It is, therefore, not surprising that Washington courts have *always* recognized the applicability of these *res judicata* to private settlements

ending litigation. In *Rasmussen v. Allstate Ins. Co.,* 45 Wn. App. 635, 637, 726 P.2d 1251 (1986), for example, there was a car accident involving a rent-a-car. The driver secured partial payment from the tortfeasor, and then brought suit against Allstate and Farmers, seeking UIM coverage. *Id.* at 636. She later settled with Allstate; in exchange for $113,000, she released all of her claims. *Id.* at 637-38. Allstate then sought to appeal the question of coverage, while seeking contribution from Farmers. The Court of Appeals rejected the appeal:

> This compromise agreement constitutes a merger and bar of all existing claims and causes of action and is as binding and effective as a final judgment itself. It is res judicata of all matters relating to the subject matter of the dispute.

Id. at 637 (internal citations omitted).

In re Phillips' Estate, 46 Wn.2d 1, 2, 278 P.2d 627 (1955), involved an estate dispute. Ms. Phillips brought suit against her deceased husband's brother and business partner, alleging fraudulent accounting relating to their wheat business. Yet, partway through the case, she settled, acknowledging, not unlike our case - that "to bring the matters on for hearing would require some very extensive litigation." *Id.* at 13. The case was dismissed – though, sometime later, Ms. Phillips learned that there actually *was* fraud, and her settlement was inadequate. She sued again, and the trial court agreed she had been "misled and deceived" by

the business partner. *Id.* at 11. On appeal, the Supreme Court rejected this second lawsuit citing *res judicata*. It noted that the scope of the loss was the very matter at issue in the first lawsuit, and nothing precluded Ms. Phillips and her attorney from "going to trial and proving" these very issues. *See id.* at 12-13. She did not, electing instead to (like the Partnership) monetize the cause of action through settlement:

> Verona Phillips cannot now claim that she was fraudulently induced to enter into the settlement agreements merely because she subsequently seemingly confirmed, to the extent of about ten per cent, the truth of her allegations about grain produced and not accounted for. A compromise or settlement is *res judicata* of all matters relating to the subject matter of the dispute.

Id. at 13-14 (citing C.J.S. 745, Compromise and Settlement, § 27); *see also McClure v. Calispell Duck Club*, 157 Wash. 136, 139, 288 P. 217 (1930) ("We are, however, satisfied that the defense of compromise and settlement *and res judicata* was also established. Briefly stated, that issue was raised by pleading and proof to the effect that a prior suit of similar nature between the same parties (though charging loss of crops in previous years) was settled and compromised in the year 1921 by the payment of a substantial sum of money.") (emphasis added).

Res judicata has been applied to private settlement agreements that end litigation for almost a century - and appropriately so. First, it is

entirely consistent with Washington's policy favoring settlement of disputes. *See, e.g., Stottlemyre v. Reed*, 35 Wn. App. 169, 173, 665 P.2d 1383 (1983) (noting interest in "finality of settlements"); *Snyder v. Tompkins*, 20 Wn. App. 167, 173, 579 P.2d 994 (1978) ("The law favors the amicable settlement of disputes, and is inclined to view them with finality.") If parties who pay substantial money to end litigation are not protected, it creates a strong *disincentive* to settle. Second, application of *res judicata* protects the courts. Part of the purpose of *res judicata* is to "conserve judicial resources, and prevent the moral force of court judgments from being undermined." *Hisle v. Todd Pac. Shipyards Corp.*, 113 Wn. App. 401, 410, 54 P.3d 687, 692 (2002) *aff'd*, 151 Wn.2d 853, 93 P.3d 108 (2004). That is, if parties like the Partnership are allowed to avail themselves to the legal system, pursue costly litigation, accept money, and then start all over again, the judiciary is ill-served and ill-used. Last, the party accepting the money is in the best position to forego future litigation. The Partnership sought $750,000 to address the effects of an allegedly defective storm water retention system." CP V: 2012-13. It then accepted $750,000 in settlement of its claims, and, according to its CR 30(b)(6) representative, spent none of it mitigating floodwater. CP VII: 2179. The only money spent has been on repetitive litigation. This is perhaps the best explanation of why *res judicata* should and does apply.

Consistent with the rule, decades of authority, and the doctrine's purpose, this Court should affirm the application of *res judicata*.

E. The Partnership's Claim That The Parties "Made Flooding Worse Over Time"—Advanced For The First Time On Reconsideration—Is Not Borne Out By The Evidence—And Even If It Were, It Would Not Support Provable Damages

Next, the Partnership argues that, according to Dr. Leytham, flooding worsened "at every stage of the Gleneagle development" and therefore the trial court "must be reversed." Br. at 39. This, too, is wrong.

The first problem is that the factual record simply does not support what the Partnership attempted to assert for the first time on reconsideration. According to Dr. Leytham's report, the property was flooding at a 25-year frequency before development (Scenario 1); then a three-year frequency following the Section 1 buildout (Scenario 2); then a 15-year frequency upon completion (Scenario 3); and then a 10-year frequency following the City's development of the regional stormwater infrastructure (Scenario 4). CP III: 1183-1186. Even accepting Dr. Leytham's claims at face-value,[15] flooding on a 10 year frequency is an improvement over a three-year frequency—and, incidentally, better than the Partnership bargained for in 1998.

[15] As discussed above, much of this analysis fell apart during his deposition. Supra Section II, D.

The Partnership's response is that any improvement whatsoever is exclusively a function of it relocating a pipe on the property. Br. at 39. Three responses are in order.

First, at no point, anywhere, did Dr. Leytham say this. In his deposition, Dr. Leytham admitted that he was *unable* to say that the City's 2002 improvements made things worse (CP II: 516 (Tr. 109:1-23)); and in fact, the current system had *improved* things to a 25-year frequency. CP I: 174. He also acknowledged that the capacity created by the City's Triangle Pond was a net benefit, because the water in it would otherwise continue toward the Partnership's property. *See id.* (Tr. 111:25-112:14). As for "lowering 67th Avenue," Dr. Leytham could not connect it to an impact on flooding. CP II: 518. Regardless of what he said in a litigation report, his sworn testimony controls. *McCormick v. Lake Washington Sch. Dist.*, 99 Wn. App. 107, 111, 992 P.2d 511 (1999) (affidavits contradicting depositions cannot be used to create issues of fact.).

But even if the Court were to credit the report—despite testimony to the contrary—it would not help the Partnership's cause. In the report, Dr. Leytham said that Scenario 3 took into account "all additional stormwater detention ponds" (CP III: 1185), in addition to the pipe, all of which were required by the City as a condition of development, and concluded that under this Scenario as a whole, flooding was improved to a

15-year frequency. *Id.* Dr. Leytham *did not* say, or even imply, that the pipe deserves 100% of the credit for this. That is a lawyer's claim. It was never seriously argued or developed, because it was never a serious argument.

Second, even assuming for the sake of argument that the pipe was what made the difference, it was the City that compelled the pipe to be moved through its authority as the regulatory agency. This was a condition of the Partnership's building permit, which is evident in Mr. Holden's 2012 declaration (CP 1: 391), the Hold Harmless Agreement (CP III: 1364), and Mr. McDaniel's denial that they had done *anything* other than bring lawsuits addressing water (CP VII: 2179). The Partnership cannot have it both ways; attempting to hold the City liable for *not* exercising regulatory control over a private developer (Gleneagle), while refusing to give credit for an effective exercise of that authority.

Third, even ignoring *all* of the above-factual and legal problems, the Partnership is not—and cannot—establish provable damages. "More water directed toward the Partnership's property, which does not actually impact the Partnership's property due to a pipe" is not real damage. It is a hypothetical, would-be damage.

What the Partnership was unable to do below was prove a causal connection between flooding exceeding the 1995 level of protection (but

mitigated by a pipe) and actual harm, *e.g.*, an injury that would *not* have occurred under 1995 conditions, on a three-year frequency. Claims "that the defendant's actions 'might have,' 'could have,' or 'possibly did' cause the subsequent condition [are] insufficient." *Shellenbarger v. Brigman*, 101 Wn. App. 339, 348, 3 P.3d 211 (2000). It is well-settled that:

> [I]f there is nothing more tangible to proceed upon than two or more conjectural theories under one or more of which a defendant would be liable and under one or more of which a plaintiff would not be entitled to recover, a jury will not be permitted to conjecture how the accident occurred.

Gardner v. Seymour, 27 Wn.2d 802, 809, 180 P.2d 564 (1947); *Kristjanson v. City of Seattle,* 25 Wn. App. 324, 326-27, 606 P.2d 283 (1980) ("recovery cannot be based upon a claim of what might have happened").

Accepting the Partnership's new theory about increased "rates of return," the categories of *provable damage* remain wholly unproven.

Diminished property value. This theory was rejected when Mr. Moody's declaration was disallowed (CP I: 16-18). The Partnership does not appeal that ruling.

BlueScope. The Partnership offers no evidence or argument that it would not have sustained lost rent, or that BlueScope would have stayed, under 1995 conditions (*e.g.*, flooding on a three-year frequency).

Flooding at 1995 levels would still have given them a basis to leave. This is not a provable damage.[16]

Infiltration system. There is no evidence or argument that the flood which allegedly damaged the infiltration would not have occurred in 1995. No expert has opined that the theoretical increase between 1995 and the present (with or without the pipe) would have avoided this flood, such that the infiltration system would not have been damaged. Indeed, Dr. Leytham *could not* say that any particular flooding event would not have happened, or would have been lessened, under pre-2002 conditions.

Clean up costs. Finally, the same is true of the "clean-up costs," which the Partnership failed to offer any documentation or evidence of.

In all, the Partnership was unable to establish that any flood or increased severity was causally connected to the City's 2002 improvements. It certainly cannot prove a connection between the present and the much more severe 1995 flooding. The trial court rightly rejected this new theory on reconsideration. It had many reasonable grounds to do so, and did not abuse its discretion. *See Davies v. Holy Family Hosp.*, 144 Wn. App. 483, 497, 183 P.3d 283, 290 (2008) ("abuse of discretion exists

[16] As detailed above, the evidence overwhelmingly established that BlueScope was plagued by the fact that the Partnership's site would flood regularly and *in the absence of any offsite problems. See, e.g.*, CP IV: 1837 (citing CP IV: 1840-42)).

only if no reasonable person would have taken the view adopted by the trial court").

F. The Partnership's "Intentional Tort" Claims Verged On The Absurd, And Were Rightly Dismissed

The Partnership frivolously sought to pursue "intentional" nuisance and trespass claims. The trial court was right to disallow them.

The first problem is legal. The Partnership misconstrues the term "intentional act." *Hurley v. Port Blakely Tree Farms, L.P.*, 182 Wn. App. 753, 770, 332 P.3d 469 (2014), provides a helpful illustration. There, the plaintiffs brought suit following a landslide, alleging that it was caused by the defendants' clear-cutting. In doing so, as here, they attempted to pursue intentional trespass and nuisance claims. They were dismissed by the trial court, and on appeal, the plaintiffs argued that the claims were viable "because of the intentional act of cutting down trees." Division 1 disagreed, emphasizing that "tortious intent is found where 'the actor desires to cause the consequences of his act, or ... believes that the consequences are substantially certain to result from it.'" *Id.*

Here, the claim that the City "intended" to cause flooding, or knew it would occur to a "substantial certainty," is baseless. For one thing, the Partnership's entire theory of the case is that the City tried over and over to *stop* the flooding because it was "on the hook" for it. Moreover, it was

undisputed that the City worked very hard to ensure that Gleneagle's stormwater was controlled. It was communicated to the City that the development was designed to a 100-year storm standard, which was a level of protection almost unheard of in the 1990s. *See* CP IV: 1938-39. When a problem with water was discovered in the mid-1990s, an engineer, Noel Higa, was retained to address it. CP IV: 1944.[17]

Intentional Trespass and nuisance were appropriately dismissed.

G. The Trial Court Did Not Abuse Its Discretion When It Declined To Consider A "Lawyer Letter," Written By An Undisclosed Declarant, Affixed To Counsel Of Record's Declaration

Lastly, the trial court was correct when it declined to consider a hearsay, unauthenticated BlueScope lawyer-letter, attached to the declaration of the Partnership's counsel.

ER 801(c) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." *See also Moss v. Vadman*, 77 Wn.2d 396, 404, 463 P.2d 159 (1969) (disallowing admission of letter signed by non-parties); *Boyer v. State*, 19 Wn. 2d 134, 146, 142 P.2d 250 (1943) (same). Below, the Partnership sought to admit the out-of-court

[17] Mr. Higa worked with the Partnership's principle, Lee McDaniel, to find a solution – and did so, in the form of a ditch going around the property. But when Higa suggested that the City would maintain it pursuant to an easement, Mr. McDaniel "became irate and basically threw [Higa] out of his offices," yelling "Do you think I'm idiot? I'm not going to give my land to the City." *See* CP IV: 1944 (Tr. 82:23-84:7).

statements of a lawyer, made in the context of posturing. This is perhaps the most unreliable hearsay there is.

The Partnership argues that it is a "business record" under RCW 5.45.020. It is difficult to know where to begin. First, there is no foundation for that finding. Nobody with personal knowledge ever discussed the nature of the letter's creation, nor its accuracy, nor its timing. But more importantly, by the Partnership's logic, almost nothing is hearsay. *Every* letter, from *every* law firm, is "made in the ordinary course of business." Br. at 49. One can imagine the impact wholesale admission of lawyer-letters would have on trial practice (*e.g.*, demand letters, discovery disputes). But it does not stop there. The Partnership's reasoning would apply to works by fiction writers. E.L. James wrote *50 Shades of Grey* in the ordinary course of her job and Michael Crichton wrote *Jurassic Park* in the ordinary course of his. According to the Partnership, the statements in those books are competent to be offered for the truth of the matter asserted, so long as the reference is present tense (*e.g.*, "at or near the time of the transaction.").

Hearsay rules exist for a reason. In the absence of sworn testimony, there must be meaningful indicia of reliability; an independent reason to believe the statement is true, because it cannot be cross-

examined.[18] Litigation lawyers negotiating with each other, in contrast, have every reason to embellish, posture, and otherwise be "zealous" for their clients. Their statements are subject to no hearsay exception.

Independent of that problem, the BlueScope letter is also unauthenticated. The Partnership's attorney cannot testify to the authenticity or contents of a letter from BlueScope's counsel based upon personal knowledge. ER 602; *see also Burmeister v. State Farm Ins. Co.*, 92 Wn. App. 359, 366-67, 966 P.2d 921 (1998) (striking police report which was attached to attorney declaration).

The inadmissible lawyer-letter was properly disregarded at summary judgment. *See Int'l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.*, 122 Wn. App. 736, 744, 87 P.3d 774 (2004).

IV. CONCLUSION

For the foregoing reasons, the trial court's decisions should stand. The City respectfully requests that this Court affirm.

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[18] Statements made to medical providers for purposes of diagnoses (ER 803(a)(4), for example, are admissible because people have a vested interest in their health, and would not typically fabricate. Nor do they fabricate when in heightened states of emotion. *See* ER 803(a)(2) (excited utterance).

RESPECTFULLY SUBMITTED this 7th day of December, 2015.

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