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

<p>DONALD B. BURKHOLDER, a single person,</p> <p style="text-align: center;">Appellant,</p> <p style="text-align: center;">v.</p> <p>CITY OF SAMMAMISH, a Washington municipal corporation,</p> <p style="text-align: center;">Respondent.</p>
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NO. 66368-2-1

REPLY BRIEF OF APPELLANT
DONALD B. BURKHOLDER

COURT OF APPEALS DIVISION I
 STATE OF WASHINGTON
 2012 JUN -5 PM 12:15

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TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

1. Cases

Champagne v. Thurston County, 178 P.2d 936, 163 WN.2D 69 (Wash. 2008)....4
Maynard Inv. Co. v. McCann, 465 P.2d 657 (Wash. 1970).....8

2. Statutes

RCW 4.96.0204
RCW 4.24.6308

3. Other Authorities

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ARGUMENT

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1. The Complaint Adequately States A Claim For Trespass.

The principal argument raised by The City of Sammamish is that Mr. Burkholder did not specifically request damages for his trespass claim.¹ The record is clear, however, this was not an oversight. The omission of a request for damages was intended to permit Mr. Burkholder to seek injunctive relief without violating RCW 4.96.020.² In any event, the omission of the request for damages does not sound the death knell for Mr. Burkholder’s claim for trespass.

A similar issue was considered by the Supreme Court of Washington in *Champagne v. Thurston County*³ The *Champagne* Court confirmed that the State of Washington follows the notice pleading rule.⁴ The Court referred to the “liberal bounds of the notice pleading standard.”⁵ In *Champagne*, the plaintiff was seeking damages under three statutory schemes, but only plead damages under one. The Court states, “Champagne’s allegedly intentional omission of a particular prayer for relief is immaterial.”⁶ The Court states, “the pleader’s intention when drafting a particular prayer

¹ Brief of Respondent City of Sammamish at p.6.

² CP 2.

³ *178 P.2d 936, 163 WN.2D 69 (Wash. 2008).*

⁴ *Id. at 944.*

⁵ *Id.*

⁶ *Id.*

1 for relief is immaterial...because the pleader's intention when drafting a complaint does
2 not control the court's scope of review".⁷

3 More to the point, the City of Sammamish obviously had actual notice that Mr.
4 Burkholder was seeking damages. The City conducted discovery on this issue and moved
5 for summary judgment on the claim.

6
7
8 **2. Mr. Burkholder Has Demonstrated Damages.**

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

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

12 1. The removal of the pipe blockages and the direct connection of the storm drainage
13 system from East Lake Sammamish Parkway have redirected stormwater flows which
14 previously drained into Lake Sammamish by other pathways.

15 2. Project improvements associated with replacement of the ditches on the east side
16 of Lake Sammamish Parkway with a closed piping system, and the replacement of
17 landscaped or native areas with impermeable pavements, have redirected stormwater
18 which previously infiltrated into the ground, evaporated, or were absorbed by plants.

19 3. Project improvements have redirected stormwater into the privately owned
20 drainage system and out the Kokomo Outfall from areas which previously drained to
21 Lake Sammamish by other pathways. These areas include:

- 22 a. Parcel Nos. 3575300365, 3575300370, and 3575300260
23 b. Portions of the stormwater flows from Basin 2A which previously drained
24 to another outfall to the north.⁸

25 As described by Mr. Wrigg,

[p]rior to the ELSP project improvements, the only flow into the Burkholder pipe
system was flow from the Burkholder Parcels (Nos. 2925069040 and 2925069030),

⁷ *Id.*

⁸ CP 59-60, CP 234-235.

1 and from Kokomo Lane which is collected at the bottom of the hill by a trench drain
2 that connects into the pipe system on the north side of Kokomo Lane.⁹

3 Most of the water that now flows through Mr. Burkholder's drainage system previously
4 flowed into a drainage ditch on the east side of the East Lake Sammamish Trail (the Trail
5 was built on an abandoned railroad right of way) before being discharged into the lake to the
6 south of Mr. Burkholder's Property.¹⁰

7 As part of the improvements to ELSP, the City installed a "storm water filtration facility"
8 on the property owned by King County that includes Kokomo Place (Parcel No.
9 3575300340).¹¹ The filtration facility only "intercepts the water that used to flow off of
10 E.S.L.P., cleans it, and then discharges it back into its previous drainage course."¹² It does
11 not intercept and treat water from other sources that the City has redirected through Mr.
12 Burkholder's private system.¹³ As a result of this lawsuit asserting claims for trespass,
13 injunctive relief, and taking of private property,¹⁴ the City has "reroute[ed] the discharge
14 from the new filtration facility so that it does not flow through the Kokomo Place culvert and
15 the pipe/culvert across Mr. Burkholder's property."¹⁵ However, the rerouting only removes
16 about 26% of the flow which the City had redirected to the Kokomo Outfall.¹⁶ The change
17

18
19 ⁹ CP 54, CP 229.

20 ¹⁰ CP 54, CP 391.

21 ¹¹ CP 427.

22 ¹² CP 427.

23 ¹³ CP 57, CP 232.

24 ¹⁴ CP 8.

25 ¹⁵ CP 57, CP 232, CP 429.

¹⁶ CP 57, CP 232.

1 leaves the majority (74%) of the redirected storm water flow connected to the Kokomo
2 Outfall.¹⁷ The smaller portion was the treated (clean) storm water, while the larger portion is
3 untreated (dirty) storm water.¹⁸

4 Now that significantly more water is flowing through the private storm drainage system
5 and because the system was not designed to handle the City's flow of offsite water, Mr.
6 Burkholder anticipates that water will back up on the Property when the culvert is submerged
7 under water during a large rain event, or when it plugs up from debris caused by wave
8 action.¹⁹ Also, the City has no plans to clean all of the dirty water that it has redirected
9 through Mr. Burkholder's drainage system and into the lake in front of the Property. This
10 will make the Property less desirable to a potential purchaser when Mr. Burkholder decides
11 to sell it.²⁰ In fact, Mr. Burkholder hired an MAI appraiser to determine the negative
12 financial impact of the City's trespass on his Property.²¹ The appraiser concluded that the
13 fair market value of the Property has been decreased by the amount of \$230,500 as a result of
14 the City's unauthorized use of Mr. Burkholder's storm drainage system.²² The City's
15 conduct has also substantially diminished Mr. Burkholder's use and enjoyment of his beach
16 and the Property as a whole.²³

17 CP 57.

18 CP 57.

19 CP 392.

20 CP 392.

21 CP 392.

22 CP 392, CP 187.

23 CP 392.

1 The City of Sammamish attempts to refute this evidence largely by attacking the
2 credibility of Mr. Burkholder's expert Kelley Wrigg based on his deposition testimony. In so
3 doing the City of Sammamish overlooks the fact that the credibility of a witness is to be
4 determined by the jury.

5
6 **3. Mr. Burkholder Did Not Raise a New Argument On Appeal.**

7 The City of Sammamish argues that by Relying on RCW 4.24.630 Mr. Burkholder is
8 attempting to raise a new argument on appeal.²⁴ The City of Sammamish overlooks the
9 portion of the complaint which states,
10

11 "3. That the Court award plaintiff his costs, including
12 reasonable attorneys' fees, under any applicable statutory or
13 common law basis; and
14 4 That the Court award plaintiff such other relief that it
15 deems just and reasonable."²⁵

16 The applicable statute is RCW 4.24.630. Moreover, by focusing solely on the treble
17 damages portion of the statute the City of Sammamish is simply rehashing its argument
18 regarding the lack of a request for damages. Finally, as this Court is no doubt aware, under the
19 right circumstances it is permitted to consider additional legal arguments on appeal.²⁶
20
21
22

23
24 ²⁴ Brief of Respondent City of Sammamish at p. 9.

25 ²⁵ CP 4.

²⁶ See *Maynard Inv. Co. v. McCann*, 465 P.2d 657 (Wash. 1970)

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CONCLUSION

For the reasons of stated above, Mr. Burkholder respectfully requests that this Court reverse the decision of the trial court and order further proceedings consistent with its opinion.

Respectfully submitted this June 6, 2012.

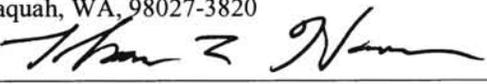
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I certify that on June 6, 2012 a copy of the foregoing was mailed/hand-delivered to:

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1
2 **APPENDIX**

3 **§ 4.96.020. Tortious conduct of local governmental entities and their agents - Claims -**
4 **Presentment and filing - Contents**

5 (1) The provisions of this section apply to claims for damages against all local governmental
6 entities and their officers, employees, or volunteers, acting in such capacity, except that claims
7 involving injuries from health care are governed solely by the procedures set forth in chapter
8 7.70

9 RCW and are exempt from this chapter.

10 (2) The governing body of each local governmental entity shall appoint an agent to receive any
11 claim for damages made under this chapter. The identity of the agent and the address where he or
12 she may be reached during the normal business hours of the local governmental entity are public
13 records and shall be recorded with the auditor of the county in which the entity is located. All
14 claims for damages against a local governmental entity, or against any local governmental
15 entity's

16 officers, employees, or volunteers, acting in such capacity, shall be presented to the agent within
17 the applicable period of limitations within which an action must be commenced. A claim is
18 deemed

19 presented when the claim form is delivered in person or is received by the agent by regular mail,
20 registered mail, or certified mail, with return receipt requested, to the agent or other person
21 designated to accept delivery at the agent's office. The failure of a local governmental entity to
22 comply with the requirements of this section precludes that local governmental entity from
23 raising
24 a defense under this chapter.

25 (3) For claims for damages presented after July 26, 2009, all claims for damages must be
presented on the standard tort claim form that is maintained by the risk management division of
the office of financial management, except as allowed under (c) of this subsection. The standard
tort claim form must be posted on the office of financial management's web site.

(a) The standard tort claim form must, at a minimum, require the following information:

(i) The claimant's name, date of birth, and contact information;

(ii) A description of the conduct and the circumstances that brought about the injury or damage;

(iii) A description of the injury or damage;

(iv) A statement of the time and place that the injury or damage occurred;

(v) A listing of the names of all persons involved and contact information, if known;

(vi) A statement of the amount of damages claimed; and

(vii) A statement of the actual residence of the claimant at the time of presenting the claim and at
the time the claim arose.

(b) The standard tort claim form must be signed either:

(i) By the claimant, verifying the claim;

(ii) Pursuant to a written power of attorney, by the attorney in fact for the claimant;

(iii) By an attorney admitted to practice in Washington state on the claimant's behalf; or

(iv) By a court-approved guardian or guardian ad litem on behalf of the claimant.

(c) Local governmental entities shall make available the standard tort claim form described in
this

section with instructions on how the form is to be presented and the name, address, and business

1 hours of the agent of the local governmental entity. If a local governmental entity chooses to also
2 make available its own tort claim form in lieu of the standard tort claim form, the form:

3 (i) May require additional information beyond what is specified under this section, but the local
4 governmental entity may not deny a claim because of the claimant's failure to provide that
5 additional information;

6 (ii) Must not require the claimant's social security number; and

7 (iii) Must include instructions on how the form is to be presented and the name, address, and
8 business hours of the agent of the local governmental entity appointed to receive the claim.

9 (d) If any claim form provided by the local governmental entity fails to require the information
10 specified in this section, or incorrectly lists the agent with whom the claim is to be filed, the local
11 governmental entity is deemed to have waived any defense related to the failure to provide that
12 specific information or to present the claim to the proper designated agent.

13 (e) Presenting either the standard tort claim form or the local government tort claim form
14 satisfies
15 the requirements of this chapter.

16 (f) The amount of damages stated on the claim form is not admissible at trial.

17 (4) No action subject to the claim filing requirements of this section shall be commenced against
18 any local governmental entity, or against any local governmental entity's officers, employees, or
19 volunteers, acting in such capacity, for damages arising out of tortious conduct until sixty
20 calendar

21 days have elapsed after the claim has first been presented to the agent of the governing body
22 thereof. The applicable period of limitations within which an action must be commenced shall be
23 tolled during the sixty calendar day period. For the purposes of the applicable period of
24 limitations,

25 an action commenced within five court days after the sixty calendar day period has elapsed is
deemed to have been presented on the first day after the sixty calendar day period elapsed.

(5) With respect to the content of claims under this section and all procedural requirements in
this
section, this section must be liberally construed so that substantial compliance will be deemed
satisfactory.