

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

DONALD B. BURKHOLDER, a single person,	)	NO. 66368-2-I
	)	
Appellant,	)	DIVISION ONE
	)	
v.	)	
	)	UNPUBLISHED OPINION
CITY OF SAMMAMISH, a Washington municipal corporation,	)	
	)	
Respondent.	)	FILED: February 19, 2013
	)	

Leach, C.J. — Donald Burkholder sued the city of Sammamish for trespass and inverse condemnation, alleging that the city directed storm water runoff from a nearby road improvement project through Burkholder’s private drainage system. The trial court granted the city’s motion for summary judgment and subsequently denied Burkholder’s motion for reconsideration. Because Burkholder presented no evidence to the trial court that the city’s project diverted water through his pipes, we affirm.

**FACTS**

Donald Burkholder owns property at 1601 East Lake Sammamish Parkway NE (ELSP) in the city of Sammamish. The property sits on the eastern bank of Lake Sammamish. When he developed the property in 2004,

Burkholder spent about \$50,000 to install a storm drainage system to control the flow of storm water runoff across his property into the lake. Before this construction, surface water flowed from uphill properties westward through a culvert under ELSP and onto undeveloped land owned by King County. It then flowed through approximately 20 feet of open ditch and into a culvert crossing under Kokomo Place, a privately owned driveway. Water passing through the Kokomo culvert continued to flow westward, downhill across Burkholder's property and into the lake.

At the time Burkholder constructed his drainage system, substantial dirt and debris blocked the Kokomo culvert. This blockage caused the water to back up onto the undeveloped parcel, and very little drainage flowed through the culvert onto Burkholder's property. Nevertheless, Burkholder connected the north side of the culvert to his catch basin<sup>1</sup> to collect any runoff water from the culvert and route it underground to an outfall that discharged into Lake Sammamish.

In 2009, the city began an improvement project to the ELSP. The original design followed this preexisting flow path, replacing the open ditch with a new culvert before directing water under Kokomo Place. Water from the uphill basins

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<sup>1</sup> A catch basin is a part of a storm drain or sewer system that can trap debris while still allowing water to enter the drainage system, or it may be fitted with a solid lid to prevent water from entering the system.

would continue to flow unimpeded on its original course, using the new culvert. Water coming from the ELSP would be diverted into a sand filter installed on the unimproved parcel, where it would be cleaned and discharged through the Kokomo culvert. The cleaned storm water would combine with the uphill basin flows to pass through the culvert into Burkholder's drainage system to the lake.

The city offered Burkholder \$30,000 for a permanent easement to utilize his drainage system, but negotiations broke down when Burkholder demanded \$230,500 for the easement. The city elected to save money by redesigning the project to avoid any connection into Burkholder's drainage system. The redesign did not alter the water flow from offsite uphill basins to the Kokomo culvert. It routed all of the flow from the expanded ELSP, including water flow from the roadway that used to flow through Kokomo culvert, through the sand filter to a new outfall constructed 450 feet south of Burkholder's property. The city then plugged and abandoned the catch basin and pipe connected to the Kokomo culvert.

During construction, the city arranged with the owner of Kokomo culvert to have the blockage removed, restoring the culvert to full drainage capacity. The other catch basins on the sand filter site that once connected to the Kokomo culvert were capped with solid lids to prevent any surface water from entering this culvert. On October 17, 2009, during construction, the city's temporary

drainage system failed and caused several private parcels, including Burkholder's, to flood. The record contains no evidence of any later failure in the city's drainage system.

Burkholder sued the city for trespass and inverse condemnation. The city moved for summary judgment. In response, Burkholder submitted various photos of his property, most dated between April and October 2009, that showed flooding and sediment plumes in the lake near the outfalls. He estimated damages based on his expert's earlier appraisal of the easement the city previously requested. He also submitted a technical memorandum authored by engineer Kelley Wrigg, dated December 2, 2009.<sup>2</sup> However, when deposed, Wrigg acknowledged that he based this report on the city's original design. He had not seen the redesigned plans, and he did not conduct any personal survey of the area.

Several days before the summary judgment hearing, Burkholder attempted to bolster his position and filed a surreply containing a supplemental report by Wrigg. The applicable rules do not authorize this pleading. In the supplemental report, Wrigg stated that despite not having seen the city's redesigned plans, he still believed that most of the storm water runoff passed through Burkholder's pipes and that Burkholder may have an increased risk of

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<sup>2</sup> The project redesign went into effect on December 23, 2009.

flooding to his property.

The court noted that all of Burkholder's admissible evidence was based upon the original rather than the revised design and that Burkholder's reliance on the easement appraisal to show damages was misplaced. Because Burkholder presented no evidence showing that the system actually built by the city improperly used private pipes or caused damage to Burkholder's property, the court granted summary judgment for the city. Burkholder moved for reconsideration, and the court declined. Burkholder appeals.

#### STANDARD OF REVIEW

This court reviews summary judgment orders de novo.<sup>3</sup> Summary judgment is proper only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.<sup>4</sup> When reviewing a summary judgment order, this court engages in the same inquiry as the trial court, considering the facts and all reasonable inferences from the facts in the light most favorable to the nonmoving party.<sup>5</sup>

A defendant moving for summary judgment may meet his initial burden by showing that an absence of any evidence to support a required element of the nonmoving party's case.<sup>6</sup> This showing shifts the burden to the plaintiff, who

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<sup>3</sup> Hadley v. Maxwell, 144 Wn.2d 306, 310, 27 P.3d 600 (2001).

<sup>4</sup> CR 56(c).

<sup>5</sup> Right-Price Recreation, LLC v. Connells Prairie Cmty. Council, 146 Wn.2d 370, 381, 46 P.3d 789 (2002).

must set forth specific facts that would be admissible at trial in order to avoid summary dismissal.<sup>7</sup> If the plaintiff fails to make a showing sufficient to establish the existence of an element essential to that party's case, the trial court should grant the motion for summary judgment.<sup>8</sup>

### ANALYSIS

Burkholder maintains that he presented evidence sufficient to raise genuine issues of material fact on both his trespass and inverse condemnation claims. We disagree.

Trespass is an interference with the right to exclusive possession of property.<sup>9</sup> The concept of trespass includes trespass by water.<sup>10</sup> "To establish intentional trespass, a plaintiff must show (1) invasion of property affecting an interest in exclusive possession, (2) an intentional act, (3) reasonable foreseeability the act would disturb the plaintiff's possessory interest, and (4) actual and substantial damages."<sup>11</sup> In this context, "intent" means desire or

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<sup>6</sup> Howell v. Spokane & Inland Empire Blood Bank, 117 Wn.2d 619, 624, 818 P.2d 1056 (1991).

<sup>7</sup> See Las v. Yellow Front Stores, Inc., 66 Wn. App. 196, 198, 831 P.2d 744 (1992).

<sup>8</sup> Hiatt v. Walker Chevrolet Co., 120 Wn.2d 57, 66, 837 P.2d 618 (1992) (quoting Young v. Key Pharm., Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989)).

<sup>9</sup> Gaines v. Pierce County, 66 Wn. App. 715, 719, 834 P.2d 631 (1992).

<sup>10</sup> Phillips v. King County, 136 Wn.2d 946, 957 n.4, 968 P.2d 871 (1998).

<sup>11</sup> Crystal Lotus Enters. Ltd. v. City of Shoreline, 167 Wn. App. 501, 506, 274 P.3d 1054 (2012) (citing Bradley v. Am. Smelting & Ref. Co., 104 Wn.2d 677, 692-93, 709 P.2d 782 (1985)).

knowledge to a substantial certainty that a particular consequence will result from one's act.<sup>12</sup>

Burkholder's amended complaint alleged that the city's discharge of storm water runoff from ELSP constitutes a continuing trespass. He requested that the court enjoin the city from discharging water through his pipes in the future. However, Burkholder presented no evidence to the trial court showing a trespass. Primarily, Burkholder contends that he made this showing with Wrigg's technical report, alleging that the city's ELSP project "redirected and increased flow into the privately owned drainage pipe system." Specifically, he notes that Wrigg concluded that the ELSP project resulted in the following conditions:

1. Additional flow is being redirected through the private pipe system by the removal of blockages at the upstream inlet of the pipe system and within the first pipe in the system . . . .
2. Additional flow is being routed through the private pipe system by the project changes, including the addition of impervious surfaces and the removal of ditches upstream of the pipe system.
3. Additional flow is being redirected through the private pipe system from properties which previously did not contribute flow to the pipe system; these include the lots which contain the sand filter and proposed parking lot, Basin 2A, and the property upstream of Basin 2A.

However, Burkholder ignores Wrigg's deposition testimony that he based his report on the city's original design and that he did not consider the redesigned

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<sup>12</sup> Bradley, 104 Wn.2d at 682-83.

plan actually constructed. Wrigg also conceded that he did not conduct any field testing or other modeling work to contradict the city engineer's water flow projections for the constructed system. Wrigg based his conclusions on the examination of the city's original designs, the city engineer's modeling of preexisting water flow, and one visit to the Burkholder property on October 17, 2009, the day of the city's isolated pump failure.

Despite acknowledging that water flowed up out of the city's catch basin during the storm, Wrigg's report assumed that the flooding he witnessed that day indicated normal surface water patterns in the area and that the floodwater that day followed the natural flow path.

Wrigg testified as to his understanding of the project:

Q: [A]re you aware that the plans that you looked at for purposes of creating and drafting your report issued on December 2, 2009, that the city changed those plans? The project was redesigned to have the sand filter outfall to a new location south of Mr. Burkholder's property to avoid Mr. Burkholder's property. Are you aware of that?

A: I am aware. I haven't seen any of the revised plans. I was aware at the time I wrote this report that they were in the process of doing that. And I have seen the new culvert, and it's my understanding and—that the way it is, that the water from the sand filter goes to the new outfall, and the water that bypasses the sand filter goes to Mr. Burkholder's outfall.

Q: Is it your understanding that all of the runoff from the East Lake Sammamish Parkway now drains to the sand filter outfall?



A: The answer is both yes and no. The answer is yes in that, what the engineer has done is taken a representative sample of the water which, is equivalent to the flow from East Lake Sammamish Parkway, and sent it through the sand filter. The actual water from the roadway, some of it gets into the sand filter and some of it bypasses. But it's equivalent to the amount of water that comes off the roadway.

Q: Again, what do you base that on when you told me earlier you've not done any field testing?

A: The engineering report I've seen to date.

Q: Weren't those engineering reports prepared based on the city's original plans, not on the redesign?

A: It's—again, I have not seen the redesign plans, and I can't say exactly what they do. I've heard through other parties, and what I've observed is consistent with that, that the city took the water from the sand filter and redirected it out. That's the only water that is now passing out the old outfall.

The rest of the stormwater, which is the bulk of the stormwater, 76 percent of it, still goes to Mr. Burkholder's property.

The trial court noted that because Wrigg based his opinions upon conditions that did not exist and a design that was not built, his opinions were not evidence that the redesigned project caused excessive (or any) surface water runoff through Burkholder's property. In making its decision, the trial court correctly disregarded Wrigg's supplemental report contained in Burkholder's surreply, as that document was not properly before the court. Even that report provides no evidence of surface runoff through Burkholder's property caused by

the city's project.

Burkholder also alleges inverse condemnation. The Washington Constitution provides that “[n]o private property shall be taken or damaged for public or private use without just compensation having been first made.”<sup>13</sup> A party alleging inverse condemnation must establish “(1) a taking or damaging (2) of private property (3) for public use (4) without just compensation being paid (5) by a governmental entity that has not instituted formal [condemnation] proceedings.”<sup>14</sup>

Unlike a trespass, for a taking to occur, the intrusion must be chronic and not merely a temporary interference that is unlikely to recur.<sup>15</sup> Burkholder presented no evidence of such an intrusion. The photographic evidence he submitted to the trial court showed a single incident of flooding in October 2009. Burkholder makes no claim this was a repeating occurrence. The flooding pictured occurred once during the city's construction project and occurred because of an equipment failure during the city's construction of the ELSP drainage system. Burkholder presented no evidence that the city's project caused flooding on any other occasion.

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<sup>13</sup> Wash. Const. art. I, § 16.

<sup>14</sup> Fitzpatrick v. Okanogan County, 169 Wn.2d 598, 605-06, 238 P.3d 1129 (2010) (quoting Dickgieser v. State, 153 Wn.2d 530, 535, 105 P.3d 26 (2005)).

<sup>15</sup> Lambier v. City of Kennewick, 56 Wn. App. 275, 283, 783 P.2d 596 (1989).

The trial court correctly denied Burkholder's motion for reconsideration because its original decision was correct. Additionally, because we conclude that Burkholder's appeal is not frivolous, we deny the city's request for fees on appeal.

CONCLUSION

Because Burkholder presented no evidence to show that the city's constructed system discharges water through his private drainage system, he could not prove trespass or inverse condemnation. We affirm the trial court's summary dismissal of his claims.

Leach, C. J.

WE CONCUR:

Spencer, J.

Dreyer, J.