IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ROBERT BRUCE STRUTHERS and VITEZSLAVA OTRUBOVA, husband and wife, and the marital community thereof, Appellants, v. CITY OF SEATTLE, a Washington municipal corporation, Respondent.	)	NO. 63943-9-I
ROBERT BRUCE STRUTHERS and VITEZSLAVA OTRUBOVA, husband and wife, and the marital community thereof, Appellants, v. CITY OF SEATTLE, a Washington municipal corporation, Respondent.	)	NO. 65201-0-I DIVISION ONE UNPUBLISHED OPINION FILED: April 18, 2011

Leach, A.C.J. — In each of these two linked cases, Robert Bruce Struthers and Vitezslava Otrubova, husband and wife, appeal the summary dismissal of their inverse condemnation claim against the city of Seattle.

Otrubova[1] also appeals the trial court's order allowing her counsel to withdraw without granting a continuance. Because Otrubova failed to establish the existence of any genuine issue of fact concerning an essential element of her inverse condemnation claims and her attorney demonstrated a sufficient basis to withdraw, we affirm.

FACTS

This case arises out of damage Otrubova claims the city of Seattle (City) caused to her waterfront residential property located adjacent to the lakeside terminus of a storm water outfall facility owned and operated by the City. The Lake City Sewer District installed the Meadowbrook outfall facility in the early 1950s to drain wastewater treatment runoff into Lake Washington. The City now uses the facility to carry storm water from the Meadowbrook Detention Pond to the lake.

The outfall facility begins as a 72-inch pipeline at the Meadowbrook Detention Pond, which is located west and uphill from Riviera Place NE. Water from the pond enters this pipeline, which enlarges to a 90-inch pipeline, and flows downhill to a concrete diversion structure built on a city-owned lot bordered on the west by Riviera Place NE, on the east by Lake Washington, and to the south by the Otrubova property. At the diversion structure, the pipe divides into three concrete "outfall" pipes 48 inches, 42 inches, and 30 inches in

[1] For simplicity, we refer to both appellants as "Otrubova." No disrespect is intended.

diameter, respectively. These smaller pipes run parallel to each other and are buried beneath the city-owned lot. At the lakeshore, the pipes run underneath a concrete seawall into the lake. In the water, the concrete pipes connect with corrugated metal pipes that extend farther out into the lake.

The Otrubova property lies adjacent to and south of this city-owned lot. It extends farther east into Lake Washington than the City's property to the north. At the lake, a concrete bulkhead divides the City's property from Otrubova's property. This bulkhead runs at a 90-degree angle from the south end of the seawall east into the lake and then doglegs to the south along the easterly (waterfront) side of the Otrubova property.

In March 1997 and in November 2004, Otrubova filed administrative claims for damages with the City. Both claims alleged that holes in the outfall pipes allowed water to leak during heavy rains, causing damage to her bulkhead, creating sinkholes in her yard, and threatening the foundation of her home. In the 2004 claim, she stated that she had informed the City of the problem several times a year since 1993. The City denied both claims.

In June 2007, Otrubova filed her first lawsuit (the 2007 lawsuit) against the City of Seattle. In it, she alleged negligence, trespass, continuing negligence and trespass, strict liability, and inverse condemnation. She based each theory of liability upon the same factual allegations: that as a result of the City's failure to properly maintain the outfall facility, the pipes developed holes

and that pressurized storm water escaping through these holes caused sinkholes to appear on and near her property. Otrubova sought compensation for diminution in the fair market value of her property, repair costs, and litigation expenses.

Sometime before Otrubova filed her 2007 lawsuit, a city-wide assessment of areas with drainage problems identified the Meadowbrook outfall as one needing repair. Beginning in summer 2007 and ending in 2008, the City repaired the facility through the $2.4 million Meadowbrook Outfall Rehabilitation Project. Among other improvements, the City replaced sections of the deteriorated 42-inch and 48-inch pipes, sealed many of the joints in these two pipes, abandoned the 30-inch pipe, and repaired the seawall.

In March 2008, the trial court dismissed the inverse condemnation claim on the City's motion for summary judgment and denied Otrubova's cross motion. In April, Otrubova moved to file a second amended complaint to add another inverse condemnation claim based on the City's rehabilitation effort. For support, Otrubova cited a November 2005 risk assessment for the City that stated,

> [T]here is a risk [in] a storm of increased runoff with flows sufficient to overwhelm the system, which is at least plausible in light of climate change forecasts. There are two homes on the Riviera Place NE road and a portion of the road itself that are at risk in this scenario.

The City opposed the motion on the grounds that it was untimely, that the harm

complained of was merely conjectural, and that Otrubova failed to establish damages as a "necessary incident" to the public use. The court denied Otrubova's motion and her motion for reconsideration.

Soon afterward, Otrubova filed a second lawsuit (the 2008 lawsuit) against the City, asserting inverse condemnation caused by the rehabilitation project. She claimed that by abandoning the middle pipe, the City failed to provide adequate outflow for diverted storm water and failed to remediate the area of erosion below the concrete pipes and bulkhead. The City moved for summary judgment, arguing that the alleged damages were merely conjectural and that Otrubova failed to establish damages incidental to the rehabilitation project. The City also argued that Otrubova engaged in improper claim splitting.

The court scheduled trial for the 2007 lawsuit beginning on December 15, 2008. On December 2, Otrubova's counsel, Karen A. Willie, informed the City that her health would not allow her to proceed with trial. The court reset the trial date to June 1, 2009, but ordered that all previous deadlines, including discovery cutoff, remained effective.

In January 2009, the trial court denied the City's motion for summary judgment in the 2008 lawsuit.

In March 2009, Ms. Willie filed and served a notice of withdrawal in both lawsuits. The City opposed the withdrawal in the 2007 lawsuit, but only to the extent that it would result in a new trial date. The City did not oppose Ms.

Willie's withdrawal from the 2008 lawsuit. Ms. Willie's declaration attached to her motion states,

> In general terms, the attorney-client relationship deteriorated over time. We had repeated significant disagreements over case strategy and there was an extended period where the clients, due to differences of opinion, refused to communicate in any way. My law firm formally advised Ms. Otrubova and Mr. Struthers of the intent to withdraw on January 22, 2009 and gave the names of six alternative law firms for their consideration.

On May 8, the trial court entered an order granting the request while maintaining the June 1 trial date. On May 11, Mr. Struthers filed a pro se notice of appearance.

Otrubova tried her remaining tort claims in the 2007 lawsuit to a jury. By special verdict form, the jury found that she had failed to prove the City's negligence, and the trial court entered judgment in the City's favor.

In September, the City again moved for summary judgment dismissal of Otrubova's 2008 inverse condemnation claim. The City argued that collateral estoppel barred relitigation of issues resolved in the first trial, Otrubova could not establish damages resulting from the rehabilitation project, and Otrubova failed to state a cognizable claim as any future damages were merely speculative. The trial court granted the City's motion and dismissed the claim.

Otrubova appeals the summary judgment dismissal of both inverse condemnation claims and the trial court's order allowing Ms. Willie to withdraw.

ANALYSIS

Inverse Condemnation

We must decide whether the trial court erred by granting summary judgment to the City in each lawsuit. We review a summary judgment order de novo, engaging in the same inquiry as the trial court.[2] Summary judgment is proper if, after viewing all facts and reasonable inferences in the light most favorable to the nonmoving party, no genuine issues exist as to any material fact and the moving party is entitled to judgment as a matter of law.[3] Where, as here, a defendant moves for summary judgment and shows an absence of evidence to support an essential element of the plaintiff's claim, the burden shifts to the plaintiff to provide evidence sufficient to establish the existence of the challenged element of that party's case.[4] Where the plaintiff fails to do so, summary judgment is warranted "'since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.'"[5]

Article I, section 16 of 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." An "inverse condemnation" claim is a

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[2] Qwest Corp. v. City of Bellevue, 161 Wn.2d 353, 358, 166 P.3d 667 (2007).

[3] CR 56(c); Torgerson v. N. Pac. Ins. Co., 109 Wn. App. 131, 136, 34 P.3d 830 (2001).

[4] Young v. Key Pharm., Inc., 112 Wn.2d 216, 225 & n.1, 770 P.2d 182 (1989) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)).

[5] Young, 112 Wn.2d at 225 (quoting Celotex Corp., 477 U.S. at 322-23).

legal action alleging a government "taking" or "damaging" brought to recover the value of the property that has been appropriated in fact, but with no formal eminent domain proceedings.[6] "'The elements required to establish inverse condemnation are: (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 proceedings.'"[7]

"(N)ot every government action that takes, damages, or destroys property is a taking."[8] Recently, our Supreme Court approved the following test for determining whether public interference with private lands implicates article I, section 16: is the interference a "necessary incident" to the maintenance and operation of property put to a public use.[9] Because this inquiry addresses the "public use" element of the inverse condemnation analysis,[10] it requires that Otrubova produce evidence sufficient to establish that her alleged damages were a "necessary incident" to the maintenance and operation of the outfall facility.

To determine whether claimed damages are a "necessary incident" of the government action, Washington courts look to whether the alleged taking was

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[6] Fitzpatrick v. Okanogan County, 169 Wn.2d 598, 605, 238 P.3d 1129 (2010) (quoting Dickgieser v. State, 153 Wn.2d 530, 534-35, 105 P.3d 26 (2005)).

[7] Fitzpatrick, 169 Wn.2d at 605-06 (quoting Dickgieser, 153 Wn.2d at 535).

[8] Eggleston v. Pierce County, 148 Wn.2d 760, 768, 64 P.3d 618 (2003).

[9] Fitzpatrick, 169 Wn.2d at 613.

[10] Fitzpatrick, 169 Wn.2d at 613.

"reasonably necessary" to the maintenance or operation of property devoted to a public use.[11] For instance, Washington courts found evidence sufficient to support a takings claim when a government project collected surface water and channeled it directly onto private property,[12] when airplanes invaded the private airspace of adjacent landowners to use an airstrip,[13] and when cars careened off a road and onto private property as a result of design and construction defects in a road widening project.[14] In each case, the damage to the private property was reasonably necessary to the maintenance or operation of the property put to a public use.

But where a municipality devotes property to public use and damage to the private property results from the negligent maintenance of the public property, an inverse condemnation claim may not exist. Peterson v. King County[15] illustrates this point. In Peterson, a drainage system in an uphill bulkhead became clogged during a heavy rain. This caused a hole in the

[11] See Dickgeiser, 153 Wn.2d at 541-42; Boitano v. Snohomish County, 11 Wn.2d 664, 668, 120 P.2d 490 (1941).

[12] Phillips v. King County, 136 Wn.2d 946, 969, 968 P.2d 871 (1998) (material issue of fact as to whether flow spreaders built into public right-of-way acted to channel surface water onto plaintiff's land); DiBlasi v. City of Seattle, 136 Wn.2d 865, 882, 969 P.2d 10 (1998) (issue of fact whether city street acted as an artificial channel collecting storm water and pouring it into plaintiffs' property); Boitano, 11 Wn.2d at 671 (artificially channeling water from spring uncovered in gravel pit operation onto plaintiffs' property constituted a taking).

[13] Ackerman v. Port of Seattle, 55 Wn.2d 400, 413, 348 P.2d 664 (1960), overruled on other grounds by Highline Sch. Dist. No. 401 v. Port of Seattle, 87 Wn.2d 6, 548 P.2d 1085 (1976).

[14] Lambier v. City of Kennewick, 56 Wn. App. 275, 283-84, 783 P.2d 596 (1989).

[15] 41 Wn.2d 907, 252 P.2d 797 (1953).

bulkhead to open, allowing mud and debris to wash down onto the plaintiffs' property.[16] The plaintiffs asserted a claim for inverse condemnation.[17] The court dismissed the claim, stating,

> It is the duty of the county to build roads for the use of the public. In doing so, the county is not an insurer that damage will not result to adjoining landowners as a result of such construction. Nevertheless, it is incumbent upon the county to use every reasonable means to protect adjoining landowners. The county attempted to do that in this instance. It installed a drainage system and constructed a bulkhead. . . . For a period of nine years, the construction of the road on top of the hill resulted in no invasion of, or encroachment upon, respondents' property. It was only when the drainage system allegedly became clogged, and when the bulkhead allegedly became in a state of disrepair, that the slide occurred. In other words, the damage was caused, not by the construction of the road, but by the alleged negligence of the county in failing to properly maintain the safeguards it had provided.[18]

(Emphasis added.) Courts reached similar results in Songstad v. Municipality of Metropolitan Seattle[19] and Seal v. Naches-Selah Irrigation District.[20]

This case is like Peterson. The Meadowbrook outfall facility bypassed

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[16] Peterson, 41 Wn.2d at 908.

[17] Peterson, 41 Wn.2d at 909, 911.

[18] Peterson, 41, Wn.2d 912-13.

[19] 2 Wn. App. 680, 684, 472 P.2d 574 (1970) (no inverse condemnation where municipality acquired easement to fill slope, made engineering efforts to allow drainage along preexisting path, alleged damages were not contemplated in the plan of construction nor necessarily incident to the construction, and most of plaintiffs' testimony addressed municipality's negligence in manner of construction).

[20] 51 Wn. App. 1, 10, 751 P.2d 873 (1988) (no constitutional taking for seepage from irrigation canal where damage was not contemplated by plan as orchard was planted several decades after the canal was built, measures were taken by irrigation district to alleviate seepage problems, and jury verdict found district negligent in these activities).

Otrubova's property by design and for decades channeled water through the pipes and into Lake Washington with apparently little incident. The evidence before the trial court shows that only when the pipes fell into disrepair did damage to Otrubova's property begin to occur. And even though the City's engineering inspection determined "[t]he concrete bulkhead was poorly constructed more than 60 years ago, and has gradually deteriorated," Otrubova presented no evidence that the seawall failed to satisfy the applicable standard of care existing at the time of construction. Similarly, she presented no evidence that any design or construction defect proximately caused damage to her property.

As Peterson makes clear, the City is not an insurer against all flood damage.[21] Instead, the City's duty extends to designing and constructing the outfall facility in accordance with applicable standards of care. Accordingly, in this case, damage allegedly caused by the government negligently failing to properly maintain an outfall facility constructed years ago gives rise to a tort claim, not an inverse condemnation claim. Because Otrubova failed to produce evidence sufficient to establish a prima facie case that the alleged taking was reasonably necessary to the operation of the outfall facility, the trial court properly dismissed the 2007 inverse condemnation claim on summary judgment.

Otrubova's 2008 inverse condemnation claim fails because she did not

[21] See Peterson, 41 Wn.2d at 912.

present evidence of damages caused by the rehabilitation project.[22] Inverse condemnation requires proof that a governmental action proximately caused some measurable harm to a private property interest.[23] Generally, the measure of damages in a takings case is the reduction in fair market value to the property caused by the government interference.[24] Here, Mr. Richard Hagar, Otrubova's appraiser, testified by deposition that the rehabilitation project improved rather than impaired Otrubova's property value. He testified as follows:

> Q: You're saying the plaintiffs would have been better off if these repairs would never have occurred?
>
> A: No.
>
> . . . .
>
> Q: You're not saying that the repairs diminished the value of the plaintiffs' property as opposed to what it was the day before the repairs were undertaken?
>
> A: That is correct.
>
> Q: In fact, surely, they're better off having had the repairs, correct?
>
> A: It does appear to some degree that is a correct statement.
>
> . . . .
>
> Q: But you would say, given that the percentages of diminution are less post-completion of repair, that it's logical to assume that there was some improvement in the value as a result of the

[22] The City also argues that it acquired a prescriptive easement or that collateral estoppel provides an alternate basis for affirming the trial court. Because the damage issue is dispositive, we express no opinion on these arguments.

[23] See Phillips, 136 Wn.2d at 957.

[24] Petersen v. Port of Seattle, 94 Wn.2d 479, 482, 618 P.2d 67 (1980).

Meadowbrook Outfall rehabilitation?

A: Yes, I would agree.

This testimony is consistent with his declaration, which states,

> To be very clear, and very concise, my professional opinion on this matter is:
>
> a. Based upon our analysis, the problems experienced from the long-standing and recurring issues with the Meadowbrook Outfall and its proximity to the subject property, ***has*** caused a diminution in value of the plaintiffs' property.
>
> b. Even after completion of the repairs, to the Meadowbrook Outfall and the subject property, the subject property will ***still*** experience a diminution in market value.

Otrubova did not produce any other evidence to prove any diminution in property value caused by the 2007 repairs. The evidence she produced indicates that the 2007 improvements made to the outfall facility increased rather than diminished the value of her property. Because inverse condemnation requires a loss of fair market value, the trial court properly dismissed the 2008 inverse condemnation claim as well.

Motion to Withdraw

Next, we must decide whether the trial court abused its discretion by allowing Otrubova's counsel to withdraw from the 2007 lawsuit without granting a continuance. We review both a trial court's decision to grant leave to withdraw and denial of a motion for continuance for an abuse of discretion.[25] Discretion is

[25] Kingdom v. Jackson, 78 Wn. App. 154, 158, 896 P.2d 101 (1995) (motion to withdraw); Pub. Util. Dist. No. 1 of Klickitat Cnty. v. Int'l Ins. Co., 124 Wn.2d 789, 813, 881 P.2d 1020 (1994) (motion to continue).

abused when it is exercised on untenable grounds or for manifestly unreasonable reasons.[26]

A number of factors bear on the trial court's decision to either grant or deny a request to withdraw. These factors include (1) delay or other interference in the administrations of the court, (2) whether the client has had or will have an opportunity to secure substitute counsel, (3) whether the client had sufficient notice of counsel's intent to withdraw, (4) whether the client has failed to cooperate with counsel, (5) whether the lawyer is unable to communicate with the client, and (6) whether any other prejudice will result to the client or counsel.[27]

Here, Ms. Willie filed her request to withdraw on March 30, 2009. She delayed filing this request at Otrubova's express request to provide her with an opportunity to substitute new counsel. Otrubova apparently believed this would be less prejudicial. In support of her request, Ms. Willie attached a declaration, indicating that their attorney-client relationship deteriorated over time, that Ms. Willie's law firm formally advised Otrubova of her intent to withdraw in January 2009 (nearly five months before trial), and that Ms. Willie's law firm delivered the names of six alternate firms. Specifically, Ms. Willie stated,

> Although it is true that Mr. Struthers and Ms. Otrubova owe me a very substantial amount of money, the primary problem here is that

[26] Vance v. Offices of Thurston Cnty. Comm'rs, 117 Wn. App. 660, 671, 71 P.3d 680 (2003).

[27] Kingdom, 78 Wn. App. at 158-60.

> there is basically no trust on either side. No attorney-client relationship exists and that has been the case for more than four months. During that time, my attorney and the attorneys at Ryan Swanson worked very hard to help Mr. Struthers and Ms. Otrubova see a clear path to take this case to trial. They did not avail themselves of several opportunities to make that happen. . . . The communications by Mr. Struthers have grown more critical and abusive over time and I am certain that I cannot communicate with him on any level.

Applying the factors described above, the trial court did not abuse its discretion by granting Ms. Willie's request to withdraw.

Otrubova also complains that the trial court did not continue the trial date when it allowed Ms. Willie to withdraw. However, Ms. Willie did not request a trial continuance when she filed her motion to withdraw, and Otrubova did not request one in connection with her objection to Willie's withdrawal. Although Otrubova's briefing references an e-mail addressing this subject sent directly to the judge, that e-mail is not part of the record in this appeal. Therefore, we cannot consider it. The trial court did not abuse its discretion by failing to grant a trial continuance not made on the record.

Attorney Fees

Otrubova requests attorney fees. Because she does not prevail in this appeal, we deny this request.

Motion to Strike

In view of our disposition, we do not rule on the City's motion to strike portions of Otrubova's briefing.

CONCLUSION

Because Otrubova failed to meet her burden of producing evidence that her alleged damages were "reasonably necessary" to the installation or repair of the outfall facility, the trial court did not err in dismissing Otrubova's 2007 inverse condemnation claim on summary judgment. Similarly, because she failed to meet her burden of producing evidence that the 2007 repairs diminished the value of her property, the trial court properly dismissed her 2008 claim. And because Otrubova had ample notice of her lawyer's intent to withdraw and subsequently failed to move to continue the trial, the court did not abuse its discretion in granting Ms. Willie's request without also granting a trial continuance. We affirm.

Leach, A.C.J.

WE CONCUR:

Spearman, J.

Dwyer, J.