NO. 45742-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

GREG HOOVER,

Respondent,

v.

SCOTT WARNER and "JANE DOE" WARNER, individually and the marital community composed thereof; ERNEST WARNER and "JANE DOE" WARNER, individually and the marital community composed thereof,

Appellants,

and

WARNER FARMS,

Defendant.

OPENING BRIEF OF APPELLANTS

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I. INTRODUCTION

Appellants Scott and Ernest Warner ("the Warners") own agricultural land in rural Thurston County adjacent to the parcel of real property on which Respondent Gregory Hoover ("Hoover") has resided since 1999. The land in the area is quite flat, but traditionally the Hoover parcel had no drainage problems and indeed, no surface water "running off of it ever anywhere." RP (10/28/13) at 31:20-21.

Between the summer and fall of 2006, the Warners performed work on an old existing road that borders the Hoover parcel to the north and west. More than six years later, on November 7, 2012, Hoover sued the Warners, alleging that their road work in 2006 had blocked off surface and subsurface drainage from his parcel, causing it to flood. The matter proceeded to a bench trial in Thurston County Superior Court, and on December 24, 2013 the trial judge issued findings of fact, conclusions of law, and a judgment in Hoover's favor.

As explained in detail below, the judgment in favor of Hoover rests on multiple errors of fact and law. The trial court's findings that prior to 2006, surface and subsurface water flowed off of the Hoover parcel onto the Warner parcel are not supported by substantial evidence in the record. Moreover, even if the evidence did show that the Warners had caused damage to Hoover, they are protected from liability by Washington's common enemy doctrine. The trial court erroneously applied that doctrine (or erroneously replaced it with the "reasonable use rule" which has been rejected by Washington's Supreme Court) by focusing on a comparison of

the utility of the road work to the Warners with the alleged harm caused to Hoover. The trial court also erred as a matter of law by finding the Warners liable for trespass by water, and by imposing an unduly broad injunction. Finally, it abused its discretion by awarding Hoover $50,648.45 in fees and costs under CR 37(c). For all of these reasons, this Court should reverse the Superior Court's judgment in favor of Hoover.

II. ASSIGNMENTS OF ERROR

1. The trial court erred by entering Finding of Fact ("FOF") 1.4.
2. The trial court erred by entering FOF 1.8.
3. The trial court erred by entering FOF 1.11.
4. The trial court erred by entering FOF 1.12.
5. The trial court erred by entering FOF 1.13.
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15. The trial court erred by entering COL 2.7.
16. The trial court erred by entering COL 2.8.
17. The trial court erred by entering COL 2.9.

18. The trial court erred by entering COL 2.10.

19. The trial court erred by entering COL 2.11.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Is there substantial evidence in the record supporting the conclusion that, prior to 2006, rain water ever drained off on the surface of Hoover's property to the north and northwest? (Assignments of Error Numbers 1, 2, and 4.)

2. Is there substantial evidence in the record supporting the conclusion that, prior to 2006, rain water ever drained off under the surface of Hoover's property to the north and northwest? (Assignments of Error Numbers 1, 2, and 4.)

3. Is there substantial evidence in the record supporting the conclusion that the Warners' activities impeded the free flow of surface and/or subsurface water off of the Hoover property? (Assignments of Error Numbers 4 and 5).

4. Is there substantial evidence in the record that the Warners' actions caused damage to the Hoovers' foundation, well, and septic system, or caused loss of use and enjoyment of the property? (Assignments of Error Number 5, 7-10, 16-19).

5. Did the trial court err as a matter of law by relying on a comparison of the utility of the road project to the Warners with the damage allegedly caused to Hoover to determine that the Warners had not acted with due care? (Assignments of Error Numbers 6, 11, 12, 14, 16-19).

6. Did the trial court err as a matter of law by implementing a "reasonable use rule," contravening *Currens v. Sleek*, 138 Wn.2d 858, 983 P.2d 626 (1999)? (Assignments of Error Numbers 6, 7, 11, 12, 14).

7. Did the trial court err as a matter of law by concluding that the Warners' actions constituted trespass? (Assignment of Error Number 13).

8. Did the trial court err as a matter of law by issuing an unduly broad injunction? (Assignment of Error No.18).

9. Did the trial court abuse its discretion by awarding Hoover fees and costs under CR 37(c)? (Assignment of Error Number 3).

IV. STATEMENT OF THE CASE

This case primarily concerns Hoover's allegations that the Warners improperly blocked the natural *subsurface* drainage of water off of his property. CP 275-76.[1] Hoover owns an approximately 7.5 acre parcel located at 16547 Smith Prairie Road S.E. in Yelm, Washington. RP(10/28/13) at 26:15-21. To the north and west, his parcel abuts the larger Warner parcel. The physical relationship of the two parcels, and their general topography, are well illustrated by Trial Exhibit 13.

As the trial judge found, "[t]he slope of the land [in the relevant area] is very gentle." CP 277. The Hoover residence and its adjoining

[1] The Warners also filed counterclaims against Hoover for trespass, nuisance, and injunctive relief. CP 57-62. The trial court dismissed the counterclaims, CP 436 at ¶ 4, and the Warners are not appealing that decision.

well lie in the northern quarter of the parcel at between 550 and 552 feet above sea level. Ex. 39 at pp. 8-10. The low point of the Hoover parcel is its very northwest corner at 548 feet, from whence the parcel rises gradually and without substantial interruption toward both south and east. Ex. 39, p. 9 (showing elevation in northwest corner); Ex. 13 (giving broader view of property contours).[2] It is undisputed that if water ever did drain off on the surface of Hoover's property, a substantial part of it would flow to the north and northwest, and in particular toward the northwest corner. Ex. 13; Ex. 39 at p. 4, 7; CP 277; CP 429 at ¶ 1.4; and RP (10/29/13) 145:6-10.[3]

However, according to Hoover, prior to 2006 his property "*didn't have running water, groundwater, running off of it ever anywhere.*" RP (10/28/13) at 31:20-21 (emphasis added) When it rained hard, "the water all drained under the soil." RP (10/28/13) at 32:4-5. From there, the water would somehow continue to drain underground. Hoover repeatedly stressed that the actual pathways of this pre-2006 drainage were "under the soil, and you could not see [them]." RP (10/28/13) at 32:3-4. Asked specifically about whether "there [was] previously some kind of a drainage swale or some kind of a drainage feature that went through your

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[2] The lack of substantial interruption in the gradual rise of the Hoover property to the south and east from its northwest corner is evident from both the 2 foot and 1 foot contour maps of Ex. 13 and Ex. 39 at p. 8, and Ex. 45, photograph 5.

[3] But see Ex. 29 (2011 LIDAR) (showing contours in south east of Hoover parcel indicating some surface drainage would flow toward Smith Prairie Road).

northwest corner," Hoover responded that "[a]ny drainage that took place off of my property went under the soil *so I can't tell you which—which direction it went once it was under the soil.*" RP (10/28/13) at 44:7-13 (emphasis added).[4]

Starting around 2006, however, the drainage characteristics of the Hoover parcel began to change. According to Hoover, the Warners built a new road running more or less adjacent to the entire common boundary of the Hoover and Warner parcels between the late spring and early fall of 2006. RP (10/28/13) at 35:25 to 36:2; 93:6-16; Ex. 10. Hoover further alleges that this work—and in particular the driving of loaded dump trucks and a bulldozer over the affected areas during construction—had the effect of blocking off the underground drainage from his parcel. RP (10/28/13) at 101:4 to 101:13.[5] This impediment to the supposed underground drainage allegedly caused water to pool on the surface of his property, to such an extent that standing water reached the doorstep of his house in 2008 and again in 2010. RP (10/28/13) at 45:9 to 46:24.

The Warners contend that there was a pre-existing gravel road that ran along both the northern and western boundaries of the Hoover parcel. Ex. 38. They acknowledge that in 2006 they used a bulldozer to clear vegetation off of this road. RP (10/28/13) at 17:20 to 18:19; Ex. 36

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[4] *See also* RP (10/28/13) at 91:22 to 92:14; RP (10/29/13) at 156:4-5; RP (10/30/13) at 379:23 to 380:4; and RP (11/20/13) at 510:8-23.

[5] Hoover testified that "[t]he compaction of driving dump trucks and bulldozers over the top of it are what stopped the underwater [sic] flow").

(picture of bulldozer). They claim that they drove dump trucks on a different road running parallel to the East/West portion of the driveway in question, hauling out dirt to fill in an old lagoon, and hauling in boulders in September to fill in above and around a culvert approximately ¼ mile further to the west of Hoover's western boundary line. RP (10/28/13) at 19:19 to 25:12; CP 393.

According to the Warners and their experts, Hoover's drainage problems trace to his over-grazing the property. RP (10/30/13) at 365:1 to 368:6; Ex. 45.[6] Up to some point in 2005, Hoover pastured some or all of his horses on the Warner parcel. RP (10/28/13) at 33:6 to 34:16. Whether this prior use was permitted or not, the Warners requested that it stop in 2005, and it did. *Id.* Subsequently, when Hoover's horses were pastured on his own parcel, they denuded the pasture, and during the rainy seasons that followed compacted it with their hooves. RP (11/20/13) at 506:18 to 510:7. *See also* Ex. 25, picture no. 3 (showing horses grazing along the Hoover parcel's western boundary). Once the soil is compacted it is largely impervious to water, causing localized ponding and wet conditions which worsen over time as the over-grazing continues. RP (10/29/13) 166:10 to 168:13; RP (10/30/13) at 426:19 to 427:3.

After filing his Complaint, Hoover served Requests for Admissions on the Warners, asking them to admit "that in 2006 you or other under your control caused rock and fill material to be brought in

[6] The Warners' theory is briefly summarized in the Letter Decision at CP 276.

from offsite and deposited" in the areas immediately north and west of the Hoover property. CP 297-99. The Warners denied these requests. CP 297-99; 430-31.

The parties proceeded to a bench trial starting on October 28, 2013. The trial court found that there was a pre-existing road along both Hoover's northern and western boundaries.[7] In its Letter Opinion, the trial court also noted that "Defendants presented unrebutted testimony that Plaintiff had pastured a number of horses on his property and that the grasses had been negatively affected." CP 276. *See also* RP (12/23/13) at 615:1-19 (stating that "yes, there was damage from livestock").

However, the trial court also found that "some rock and/or other material was brought in and deposited in the area to the North and to the West of the Hoover property," and that "[t]he Warners' 2006 grading project altered and changed the preexisting drainage in a manner that impeded the free flow of surface and subsurface water off of Hoover's property." CP 431, ¶¶ 1.11-1.12. It further determined that the Warners' "activities directly and proximately caused excessive moisture conditions

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[7] The trial court noted in its Letter Decision that the Warners "improved a road that runs along *the North and West* boundaries of Plaintiff's property" CP 276 (emphasis added). Also, the trial court was "satisfied by a preponderance of the evidence that some rock and/or other material was brought in to improve the road. . . .[and] that Defendants cleared the roadway of brush with heavy equipment." CP 276-77 (emphasis added).Compare Findings and Conclusions, CP 430 at ¶ 1.7 (referring to the "historical driveway" along the northern boundary of the Hoover parcel) and ¶ 1.8 (noting an area of fill to the west of the Warner property deposited "many years prior to 2006").

and ongoing damage to the Hoover property, including: damage to the home foundation; failure of the septic system; failure of the well; and loss of use and enjoyment of the property," and concluded that the Warners were liable to Hoover for negligence, nuisance, and trespass. CP 431-32.

The trial court awarded Hoover $97,000 in damages for annoyance and inconvenience, loss of use and enjoyment, and repairs. CP 433 at ¶ 2.9. It also awarded Hoover $50,648.45 in attorneys' fees and costs under CR 37 for the Warners' failure to admit that they had brought rock and fill material into the relevant areas of their property. CP 433 at ¶ 2.7, ¶ 2.9.7. Further, the trial court imposed a permanent injunction, prohibiting the Warners from "undertaking any further actions on [their] property that adversely affect the drainage on the Hoover property, and directed the Warners to prepare and implement a remediation plan, on pain of being subject to an additional $156,000 in damages. CP 433 at ¶ 2.11; 436 at ¶ 3. The Warners filed a Notice for Discretionary Review, which this Court converted to a notice of appeal after the trial court entered the findings required by CR 54(b).[8]

[8] On July 18, 2014, five days before this Brief was due, the parties stipulated, and the trial court ordered, that the Warners had successfully completed a plan to remediate drainage problems on the Hoover property. A copy of the Stipulation and Order dated July 18, 2014 is attached to this Brief as Appendix A. The Warners intend to appeal from this new order, and will request by motion that the new appeal be consolidated with this proceeding.

V. SUMMARY OF THE ARGUMENT

The trial court made significant errors of both fact and law. There is not substantial evidence in the record to support the trial court's findings that either surface or subsurface water drained off the Hoover parcel to the north and west onto the Warner parcel prior to 2006. These findings rest on nothing more than speculation and conjecture. With these findings removed, all of Hoover's claims fail, for unless water drained off of the Hoover parcel to the north and west, the Warners' activities on their road could not have affected Hoover's drainage and caused Hoover damage. Moreover, even if the Warners' activities did block Hoover's drainage and cause him damage, the Warners are protected from liability by proper application of Washington's common enemy doctrine. In addition, Hoover's trespass claim lacks all foundation, the permanent injunction is unduly broad, and the trial court abused its discretion by awarding $50,648.45 in fees and costs under CR 37(c). For all of these reasons, this Court should reverse the trial court.

VI. ARGUMENT

A. There is no substantial evidence in the record for critical factual findings by the trial court.

1. The standard of review for findings of fact.

This Court reviews a trial court's findings of fact "under the substantial evidence test, which is evidence of sufficient quantum to

persuade a fair-minded person of the truth of the declared premise."[9] The trier of fact is in a better position than is an appellate court "to assess the credibility of witnesses, take evidence, and observe the demeanor of those testifying."[10] However, the trial court may not make findings of fact based only on "speculation and conjecture."[11]

2. There is no substantial evidence in the record that prior to 2006, water ever drained off on the surface of the Hoover parcel to the north or northwest.

The trial court made several findings which either hold or imply that water naturally drains on the surface of the Hoover parcel to the north and northwest. CP 429-31 at ¶¶ 1.4, 1.8, and 1.12. To the extent these findings concern the drainage of the Hoover parcel prior to 2006, they are not supported by substantial evidence in the record. Hoover, who acquired his parcel in 1999, was adamant that prior to 2006 his property "didn't have running water, groundwater, running off of it ever anywhere." RP (10/28/13) at 26:17; 31:20-21. Scott Warner agreed with this assessment, testifying that he had "never" seen any water flowing on the surface from the Hoover parcel to the Warner parcel. RP (11/20/13) at 510:8-11 and 510:20-23. At least prior to 2006, when water drained off of the Hoover parcel, it did so underground. RP (10/28/13) at 32:3-4; 44:7-13; and 91:22 to 92:14. None of the other lay or expert witnesses

[9] *In re Yakima River Drainage Basin*, 177 Wn. 2d 299, 346, 296 P.3d 835 (2013).
[10] *State v. Hill*, 123 Wn.2d 641, 646, 870 P.2d 313 (1994).
[11] *State v. Dugger*, 75 Wn.2d 689, 692, 453 P.2d 655 (1969).

attempted to contradict this evidence regarding Hoover's drainage prior to 2006. *See, e.g.*, RP (10/29/13) at 267:16-19.

At the close of the evidence, the trial judge noted that "if I were to accept the evidence that's been presented by the plaintiff, prior to 2006, water would be absorbed into the ground and then flow below the surface." RP (11/20/13) at 565:1-11. However, at the hearing on proposed findings and conclusions, the trial judge responded to the Warners' objection to the reference to water flowing off the surface of the Hoover parcel prior to 2006 by stating as follows:

> [T]here was ample testimony about the contour lines over the adjacent properties . . . .[a]nd based on that and based on the testimony of the plaintiffs' expert as well as the plaintiff himself, the court is finding surface and subsurface flows. It only makes sense to me that if you have one, you're going to have the other.

RP (12/23/13) at 608:19 to 609:1. Simply put, the fact that the contours of the Hoover parcel *would allow* a flow of water on the surface from the Hoover parcel toward the Warner parcel is not enough to support a reasonable inference that such flows *actually occurred.* Given the uncontroverted testimony that prior to 2006 Hoover's ground immediately absorbed all rain water, even during the heaviest rain, there is no evidentiary support for a contrary conclusion.[12] In this context, it is

[12] Expert witness Vince McClure, not himself an eyewitness of any surface flows on the Hoover parcel, nonetheless did assert that "the vast majority of flow on this site would be on the surface." RP (10/29/13) at 159:7-8. But he immediately qualified this assertion by noting that "if there is silt in there or sand beds and that kind of stuff, and often there are

baseless "speculation and conjecture" to infer that there must have been surface flows.[13] The trial court erred by making findings holding or implying that there was ever water flowing off on the surface of the Hoover parcel prior to 2006.

3. There is no substantial evidence in the record that water ever flowed underground off of the Hoover parcel onto the Warner parcel, because although there is evidence that the Hoover parcel drained underground, there is *no* evidence regarding which way the water went once underground.

According to the trial court, "sub-surface drainage runs naturally across the Hoover parcel to the north and west." CP 429 at ¶ 1.4. Given the centrality of this "fact" to Hoover's case, one might assume there must be substantial evidence in the record to support it. However, there is no such evidence, and as a result, Hoover's negligence, nuisance, and trespass claims all fail as a matter of law.

As noted in the previous section, Hoover was adamant that his pre-2006 drainage occurred underground. RP (10/28/13) at 32:3-4; 44:7-13; and 91:22 to 92:14. He was equally insistent that once the water was underground, he could not see which direction it went. RP (10/28/13) at 44:7-13. Only once did Hoover opine as to where the water went once it was underground, when he asserted that it "sheet flowed" out from the ground toward the far western part of the adjoining Hoover parcel. RP (10/28/13) at 31:10-18. This is self-evidently speculation: Hoover had

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in these glacial soils, that's a different story." RP (10/29/13) at 149:9-11. This is not substantial evidence of surface flows prior to 2006.

[13] *Dugger*, 75 Wn.2d at 692.

no basis for contending that the water he saw flowing out of the ground hundreds of yards from his property was water from his parcel. Tracing the path of water below the surface of the soil requires an expertise which Hoover does not even claim to possess.

Hoover did present the trial court with the testimony of two expert witnesses. The first was Vince McClure ("McClure"), a licensed structural engineer and licensed professional engineer. RP (10/29/13) at 138:11-12. McClure testified about how water would flow on the surface, if it did so flow (RP (10/29/13) at 145:6-20), and opined that the raised road on the Warner parcel would block surface flows to the north and northwest. RP 145 (10/29/13) at 145:21 to 146:2. Hoover's counsel eventually reminded McClure that "there's no evidence—no fact witness here has seen surface water flowing in that direction," at which point McClure stated that removing and re-vegetating the road would restore any pre-existing subsurface flows to the northwest. RP (10/29/13) at 156:3 to 157:2. But McClure never testified that there in fact had been (or currently were) any such subsurface flows.

This point is reinforced by a key passage in McClure's cross examination. Elaborating on his general knowledge of sub-surface flows through soils, McClure had the following exchange with the Warners' trial counsel:

> A. . . . Almost every soil will flow water through it. The question becomes where does that water go, and it doesn't flow very fast. Silty soils don't allow the flow of water through them very rapidly.

> Q. Right.
> A. So the vast majority of flow on this site would be on the surface -- would be surface flows of one sort or another. Now if there is silt in there or sand beds and that kind of stuff, and often there are in these glacial soils, especially the outwash materials, that's a different story, and there may be lenses in there or beds in there where the water would flow pretty well.
> Q. But you did no investigation to determine anything below the surface of these soils?
> A. I did not.

RP (10/29/13) at 159:7-16. Not only did McClure *do no investigation of anything below the surface of Hoover's property*, he indicated that in general there can be subsurface "lenses" of highly permeable materials that allow subsurface flows to go in unpredictable ways. McClure emphatically did not supply substantial evidence that the Hoover parcel drained under the surface toward the Warner parcel.

Neither did Ms. Lisa Palazzi ("Palazzi"), Hoover's other expert and a "certified professional soil scientist." RP (10/29/13) at pp. 202-277; Ex. 39; CP 116. Palazzi certainly asserted that "the Hoover site drains to the north and northwest." RP (10/29/13) at 208:12-13. But she based this conclusion on her visual inspection of the surface of the Hoover parcel, as well as on aerial topography and LIDAR maps of the surface contours. RP (10/29/13) at 209:18-21 (aerial topography); 210:23 to 212:13 (LIDAR). Like McClure, Palazzi did no investigation of actual subsurface flows on the Hoover parcel. She dug no holes or test pits on the Hoover parcel (the only hole she dug was on Warner property). RP (10/29/13) at

238; Ex. 39 at p. 31.[14] She simply made no effort to determine the actual direction of water flows under the surface of the Hoover parcel.

The Warners anticipate that Hoover will argue that the slope of the surface of the Hoover parcel supports a reasonable inference that subsurface waters had to flow toward the Warners' parcel, either to the west or the north. However, not only did none of Hoover's witnesses testify to the effect that surface slope controls underground water flow directions, this proposition is neither obviously true as a general matter nor more probable than not as applied to the Hoover parcel. The surface slope of the Hoover parcel is "very gentle." CP 277. Along Hoover's northern border, the height of the surface ranges from 548 feet in the northwest corner to 550 feet in the northeast corner some 368 feet away. Ex. 39 at p. 9; Ex. 14 at p. 1 (giving length of Hoover's northern boundary). Although Palazzi offered testimony that the soils in this area generally consist of a layer of silt over an impermeable layer of clay, she did not testify that the silt or other materials on top of the clay are uniform in thickness across the Hoover parcel, nor did she nor any other witness testify that impermeable clay layers in this area generally have the same grade as the surface. RP (10/29/13) at 272:17-18. As Palazzi stated about silty loam soils in general:

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[14] *See also* RP (10/29/13) at 221:6-10 (asserting that she had no time to dig her own test pits). Plaintiffs should not be allowed to excuse their failure to carry their burden of proof by claiming a lack of time to develop their case, when they are the ones who chose to bring it forward on an accelerated basis. CP 169, CP 178.

> [W]ater can drain down into these soils as long as they are not compacted, and then they [sic] hit this impermeable layer at about two to three feet, and then from then on the water travels sideways, *whichever direction is downslope.*

RP (10/29/13) at 227:3-7 (emphasis added). The Warners submit that it is self-evident that the "downslope" that matters here is the downslope of the impermeable layer two to three feet (or perhaps some other distance) below the surface of the Hoover parcel, which no one investigated , and not the slope at the surface of the ground.

Moreover, even if there had at some point been a natural impermeable layer under the surface of the Hoover property that closely followed the contours of the surface (a truly heroic assumption, unsupported by any testimony), it would not follow that the flow of water under the Hoover parcel at any relevant recent time follows the contours on the surface. As Palazzi herself said, "in farms everybody moves dirt." RP (10/29/31) at 231:6-7. This truism clearly applies to the Hoover parcel, with its driveway, house, garage, well, and septic system. *See, e.g.,* Ex. 37 and Ex. 39 at p. 10. The county soil map showing almost total coverage of the Hoover parcel with Skipopa silt loam clearly does not contradict the possibility—indeed, probability—of substantial areas of fill on the Hoover parcel, because that very same soil map fails to identify the extensive area of old non-native fill around the northern and western borders of the Hoover property. Ex. 39, p. 17 (soil map); Ex 39, p. 7 ("old fill" along western boundary; RP (10/29/13) at 231:1-4 ("old fill"). The soil map just does not contain the level of detail that can pick up

potentially significant areas of non-native fill, and none of Hoover's witnesses made any effort to identify such areas on the Hoover parcel, or explain how they might affect (or not affect) subsurface flows.

The point is not that fill added to the Hoover parcel since 2006 has changed pre-existing underground flows. The Warners readily admit the record contains no evidence of any such event. Rather, the point is that the almost certain existence of old areas of fill on the Hoover parcel is another reason why any conclusion about the direction of underground flows leaving the Hoover parcel is simply speculation in the absence of an analysis of the actual underground composition of the Hoover parcel. No such analysis was offered.

For all of these reasons, the record does not contain substantial evidence in support of the trial court's finding that "sub-surface drainage runs naturally across the Hoover property to the north and northwest." CP 429 at ¶ 1.4. "In matters of proof the existence of fact may not be inferred from mere possibilities."[15] Hoover and his experts cannot turn the mere possibility that water flowed underground toward the Warners' property into evidence simply by assuming it to be true. Given that no one has ever investigated the direction of actual flows, the very gentle slope of the surface of the Hoover parcel,[16] McClure's testimony that "lenses" of

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[15] *Nejin v. City of Seattle,* 40 Wn.App. 414, 421, 698 P.2d 615(1985).

[16] If the slope of a parcel were very steep, it might make sense to conclude that subsurface flows follow surface contours. However, the Hoover parcel "is just about as flat as a fritter," RP (10/29/13) at 144:19-20

particularly permeable soils "often" occur in "these glacial soils," and Palazzi's testimony that "in farms everybody moves dirt," the only finding supported by substantial evidence is that no one knows on a more-probable-than-not basis the direction of subsurface flows off the Hoover parcel.

This conclusion is fatal to all of Hoover's claims. FOF 1.4 is not itself the trial court's finding of proximate causation, but it is a necessary precondition to it. The trial court's proximate cause finding is expressed in FOF 1.12 and 1.13 as follows:

> 1.12 The Warners' 2006 grading project altered and changed the preexisting drainage in a manner that impeded the free flow of surface and subsurface water off of Hoover's property, causing water to collect on the Hoover property, where it did not collect before.
> 1.13 These activities directly and proximately caused excessive moisture conditions and ongoing damage to the Hoover property, including: damage to the home foundation; failure of the septic system; failure of the well; and loss of use and enjoyment of the property.

Since there was no *surface* drainage off of the Hoover parcel prior to 2006 (as established in Section A-2 above), and no substantial evidence that *subsurface* drainage flows off of the Hoover parcel to the north and northwest, then there is no factual support for either FOF 1.12 or FOF 1.13, because there were no proven flows that could have been blocked by the Warners activities on Hoover's northern and western borders. Since

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(McClure), and no expert testified that subsurface flows necessarily follow surface contours.

all of Hoover's claims require proof of proximate causation of damages, all of his claims fail. [17]

This case is thus very similar to *Nejin v. City of Seattle*, 40 Wn. App. 414, 698 P.2d 615. In *Nejin*, the Superior Court entered judgment for the plaintiff following a bench trial, finding that the city's negligence in maintaining a sewer line that ran behind and upslope from the plaintiff's property had proximately caused a landslide. Although "no direct evidence existed that the broken sewer line had caused the landslide on Nejin's property," there was testimony that "water could have exfiltrated from the sewer pipe" and "could conceivably in some manner have reached the landslide site." [18] Although the trial court also found that Nejin had herself contributed to the landslide by "tree cutting and placing of materials above the slide area," it concluded that the city was liable for 85% of the damage.[19]

The Court of Appeals reversed. Although acknowledging that "[p]roximate cause may be adduced as an inference from other facts proven," the Court emphasized that

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[17] *See, e.g., Lowman v. Wilbur*, 178 Wn.2d 165, 169, 309 P.3d 387 (2013) (noting that causation and damages are necessary elements of negligence claims); *Tiegs v. Watts*, 135 Wn 2d 1, 13, 954 P.2d 877 (1998) (holding that "[a]n actionable nuisance must either injure . . . property" or cause other damages); and *Grundy v. Brack Family Trust*, 151 Wn. App. 557, 566-67, 213 P.3d 619 (2009) (causation of damages is a necessary element of both negligent and intentional trespass by water).

[18] *Nejin*, 40 Wn. App. at 420-21.

[19] *Id.* at 416-17.

> [w]here causation is based on circumstantial evidence, the factual determination may not rest upon conjecture; and if there is nothing more substantial to proceed upon than two theories, under one of which a defendant would be liable and under the other of which there would be no liability, a jury is not permitted to speculate on how the accident occurred.[20]

The existence of a plausible alternative causal explanation weighed heavily in the analysis, as this Court also noted that "[w]hen the circumstances lend equal support to inconsistent conclusions or are equally consistent with contradictory hypotheses, the evidence will not be held sufficient to establish the asserted fact."[21] Because of the plaintiff's failure of proof on causality, the trial court's judgment could not stand.[22]

Just as the record in *Nejin* made it "conceivable" that water flowed from a broken sewer pipe and "in some manner" reached the landslide site, so too here the record makes it "conceivable" that underground drainage from the Hoover parcel flows in the direction of the Warner parcel. But it is equally conceivable that it does not, for the reasons surveyed above. In the end, Hoover's real argument that underground water flows off the Hoover parcel toward the Warner parcel is completely circular: since supposedly the only explanation for the "excessive moisture conditions" experienced by the Hoover parcel after 2006 is the Warners' road work, the facts necessary for this explanation to work—in particular, that underground drainage from the Hoover parcel flows toward

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[20] *Id.* at 420 (citing *Sanchez v. Haddix*, 95 Wn.2d 593, 599, 627 P.2d 1312 (1981))
[21] *Id.* at 421-22 (citing *Lamphiear v. Skagit Corp.*, 6 Wn. App. 350, 357, 493 P.2d 1018 (1972).
[22] *Id.* at 620.

the Warner parcel—must be assumed to be true. But assumptions are not evidence, even if those assumptions are articulated by experts.

Moreover, just as the record in *Nejin* supported an alternative causal explanation for the landslide—one for which the defendant would not be liable—so too does the record here support an alternative causal explanation for Hoover's damages. It is undisputed that in late 2005, Hoover moved stock that had previously been grazing on the Warner parcel back onto his own property. RP (10/28/13) at 34; RP(11/20/13) at 501. As the trial court itself acknowledged in its letter opinion, "over-pasturing can compact the ground and limit its ability to absorb water." CP 276. Compacting the ground and diminishing its ability to absorb water can directly lead to ponding of the sort observed in the relevant photographs of Hoover's parcel. RP (10/29/13) 146:2-8; RP (10/29/13) 166:10 to 168:13; Ex. 39 at pp. 10-12; Ex. 25 at photograph 3; Ex. 45 at photograph 5.

In addition, the compaction caused by continued over-grazing self-evidently will worsen over time. This makes over-grazing a better candidate to explain the timing of Hoover's problems than the work the Warners performed on their road. Although the Warners performed their work in the summer of 2006, it wasn't until 2008 that Hoover's property allegedly flooded "up to his doorstep." RP (10/28/13) at 45:13 to 46:8. It wasn't until May, 2012 that Hoover complained to Thurston County about the Warners' grading activity. RP (10/29/13) at 190:22 to 192:16; Ex. 18. Of course the timing of Hoover's complaints *could* have been driven by

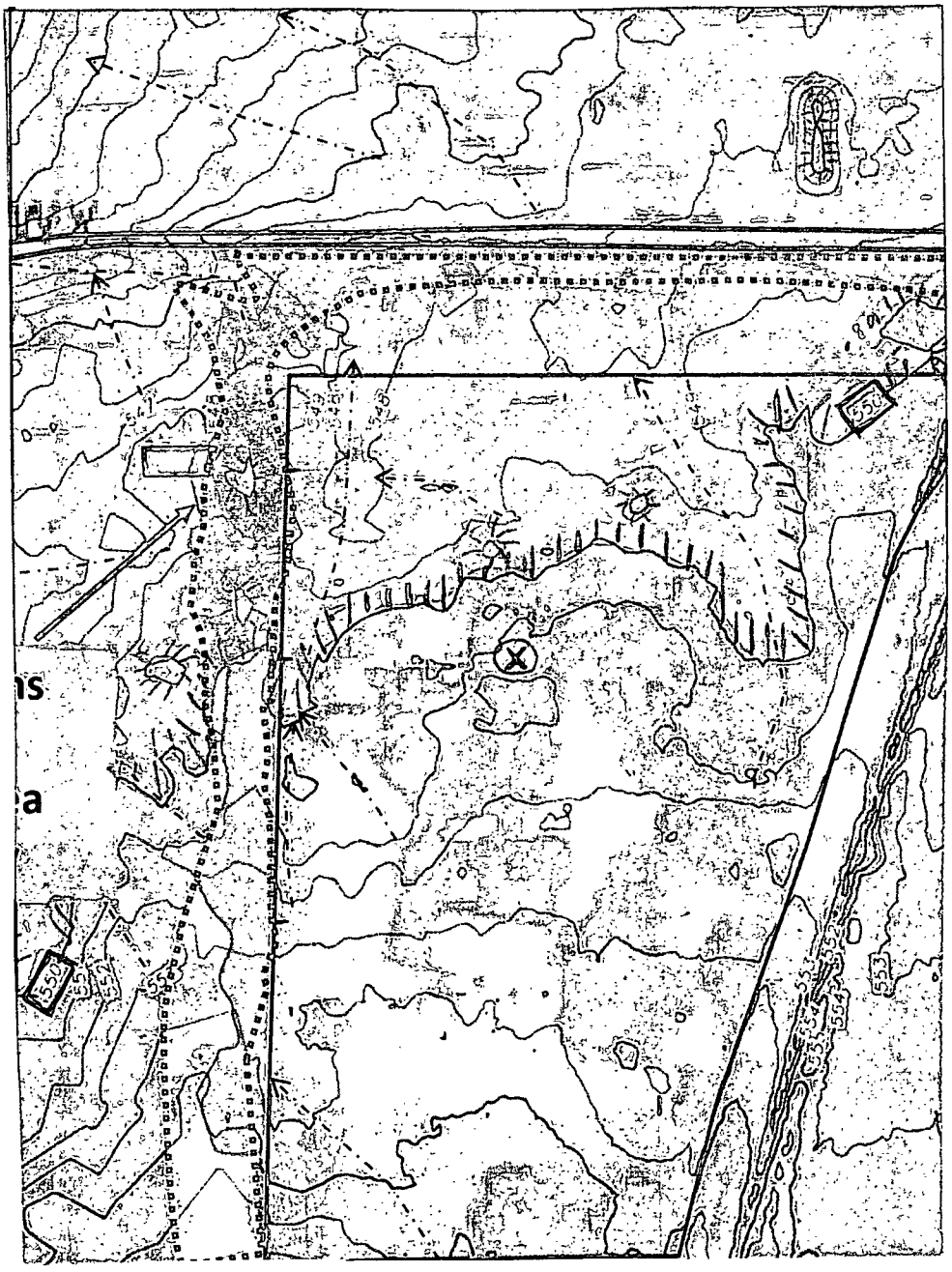
fluctuations in the amount of rainfall, rather than by any change in the severity of the problem caused by continued overgrazing, but since there is no evidence in the record regarding rainfall amounts, that would be pure speculation. One of the lessons of *Nejin* is that the party with the burden of proof on causation and damages should not be allowed to benefit from "speculation or conjecture or . . . inference piled upon inference."[23]

The Warners acknowledge that overgrazing could not cause water to actually back up on the surface "to the doorstep" of Hoover's home in a continuous pool. But then again, neither can Hoover's theory that water that previously drained out under the surface of his property was being impounded by the Warners' road. This is because the record establishes that Hoover's house is *at least* 550 feet above sea level. Ex. 39 at pp. 10, 19-20. It also establishes that the crest of the Warner's road in the north for much of its length is *no more* than 549 feet, and probably substantially less, without even considering the ditch in the northwest corner. Ex. 39 at p 9 (2011 LIDAR showing crest of road to the north as between 547 and 548 feet from the northwest corner to more than halfway to Smith Prairie Road); Ex. 30 at p. 1 (showing centerline elevations of road to north ranging from 549.320 at point 20 toward Smith Prairie Road to 548.25 at point 22 closer to the northwest corner). Since there is no substantial intervening ridge between the Hoover home and the northern road, for water to back up on the surface against the home at the 550 level, it would

[23] *Nejin*, 40 Wn. App. at 421.

have to form part of a purely mythical "Hoover Lake" covering hundreds if not thousands of acres of farmland to the north and west as well as a

Mythical "Hoover Lake" at 550 feet above sea level (Marked up from 2011 LIDAR, Ex. 29)



substantial part of Smith Prairie road. [24]

Given the facts in the record, it is thus not surprising that the trial court made no finding that water actually ever backed up on the surface to the level of Hoover's doorstep. Critically, the causation and damages findings the trial court did make—that "[t]he Warners' grading project . . . impeded the free flow of surface and subsurface water off of Hoover's property . . . . and proximately caused excessive moisture conditions and ongoing damage"—have no more support in the record than does the alternative that overgrazing caused Hoover's "excessive moisture conditions." CP 431 at ¶¶1.12 to 1.13. Under *Nejin,* the trial court erred when it accepted Hoover's causation theory, because "the circumstances lend equal support to inconsistent conclusions or are equally consistent with contradictory hypotheses."[25]

In sum, Hoover insisted that all of his pre-2006 drainage occurred below the surface, and that he could not tell which way water went once it was underground. None of the other witness contradicted either of these

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[24] The diagram on the proceeding page shows in blue the southern extent of the mythical Lake Hoover, at 550 feet above sea level. The diagram is based on the 2011 LIDAR diagram from Exhibit 29, cropped to fit within the margins of this Brief but retaining the same scale as the original. The "x" within the circle in roughly the middle of the diagram represents the approximate location of the south-west corner of the Hoover residence, as interpolated from Ex. 39, pp. 19-20. A comparison of this diagram with Ex. 39, p. 4 shows that a Lake Hoover at 550 feet in elevation would cover parts of Smith Prairie road to the north east of the Hoover parcel to a depth of more than 10 feet.

[25] *Nejin*, 40 Wn. App. at 421 (citing *Lamphier v. Sakgit Corp.,* 6 Wn. App. 350, 357, 493 P.2d 1018 (1972)).

assertions, or offered testimony from which one could reasonably infer on a more probable than not basis that Hoover's underground drainage flowed toward the Warners' parcel. Any argument that the underground water must have flowed in that direction, because otherwise it could not have been blocked by the Warners' road work, would be hopelessly circular, particularly since there is an alternative explanation of Hoover's damages (overgrazing) which is consistent with the evidence and which does not rest on any assumption about the direction of underground flows. Under the principles articulated in *Nejin*, in these circumstances there is not substantial evidence for the conclusion that Hoover's underground drainage must naturally flow toward the Warners' parcel. Because the failure of this finding undermines the basis of the finding of causation of damages, all of Hoover's claims fail.

B. Even if there were substantial evidence in the record that the Warners caused Hoover damage, the Warners are shielded from liability by proper application of Washington's "common enemy doctrine."

Washington "still adheres to the general common enemy rule that a landowner may develop his or her land without regard to the drainage consequences to other landowners."[26] Proper application of this doctrine to the facts here absolves the Warners of any liability to Hoover, even if their actions *did* cause damage to Hoovers' property.

In its original "strict[] form, the common enemy doctrine allow[ed] landowners to dispose of unwanted surface water in any way

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[26] *Currens v. Sleek*, 138 Wn.2d 858, 861, 983 P.2d 626 (1999).

they see fit, without liability for resulting damage to one's neighbor."[27] Over time Washington courts have carved out a number of exceptions to the doctrine. The first exception provides that a landowner may not inhibit the flow of a watercourse or natural drainway.[28] The second prohibits a landowner from collecting water and channeling it onto her neighbor's land.[29] Neither of these first two exceptions is relevant here.[30]

In *Currens v. Sleek*, 138 Wn.2d 858, 861, 983 P.2d 626 (1999), the State Supreme Court created a third exception to the common enemy rule: "landowners who alter the flow of surface water on their property must exercise their rights with due care by acting in good faith and by avoiding unnecessary damage to the property of others."[31] When it created the "due

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[27] *Id.*
[28] *Id.* at 862
[29] *Id.* Starting with *Ripley v. Grays Harbor Cnty.*, 107 Wn. App. 575, 580, 27 P.3d 1197 (2001), Washington courts have typically referred to this as "the channel and discharge exception."
[30] Hoover's Trial Brief alleges that the Warners blocked natural drainways. CP 228-230. However, the trial court made no such finding. *See* Letter Decision (CP 275-79) and Findings and Conclusions (CP 427-34). Moreover, the Warners submit that there is no evidence in the record that could support a finding that they blocked any natural drainway, particularly not any *underground* natural drainway, in view of the fact that "clear and convincing proof . . . is necessary to overcome the presumption that all underground waters are percolating" or diffuse. *Evans v. City of Seattle*, 182 Wash. 450, 455, 47 P.2d 984 (1935). *See also Wilkening v. State*, 54 Wn.2d 692, 696, 344 P.2d 204 (noting that "[i]t is well settled that unless it appears that the underground water in a given case flows in a defined and known channel, it will be presumed to be percolating water, and that the burden of establishing the existence of an underground stream rests upon the party who alleges such fact").
[31] *Currens*, 138 Wn.2d at 865.

care" exception, the *Currens* court expressly "decline[d] to abandon our common enemy jurisprudence in favor of the reasonable use rule."[32] As the Supreme Court explained, "[t]he reasonable use rule is akin to a nuisance cause of action and requires the court to weigh the utility of the improvements against the resulting damage to the adjacent property."[33] The "critical difference" between the common enemy doctrine, as supplemented by the due care exception, and the rejected reasonable use rule "is that the common enemy doctrine does not require any inquiry into the utility of a particular project."[34] In fact, inquiry into comparative utilities is prohibited:

> When determining liability under the common enemy doctrine, *the due care exception requires the court to look only* to whether the landowner has exercised due care in improving his or her land, i.e. whether the method employed by the landowner minimized any unnecessary impacts upon adjacent land. Unlike the reasonable use rule, *a landowner's duty under the common enemy doctrine is not determined by weighing the nature and importance of the improvements against the damage caused to one's neighbor.* Rather, a landowner has an unqualified right to embark on any improvements of his or her land allowed by law, but must limit the harm caused by changes in the flow of surface water to that which is reasonably necessary.[35]

The reason for this emphatic prohibition on "weighing the nature and importance of the improvements against the damage caused to one's neighbor" is straightforward and powerful: "A rule that requires parties to

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[32] *Currens*, 138 Wn.2d at 866.
[33] *Id.*
[34] *Id.*
[35] *Currens,* 138 Wn.2d at 866 (emphasis added).

litigate the importance of a particular project in order to apportion liability is inconsistent with this state's historic deference to property rights."[36]

Trial counsel for the Warners raised this point, citing this exact authority to the trial judge, prior to the Judgment. CP 406-7 at ¶ 1.15. Despite this, the trial judge did *precisely* what *Currens* prohibits: he based his determination that the Warners had not used due care on a weighting of the nature and importance of the improvements to the Warners against the damage caused to Hoover. As the Findings of Fact state:

> *The Warners filling and grading improvements do not serve any particular utility on the Warner property.* Defendants took no action to mitigate any rainwater flow until after it was brought to their attention by Plaintiff. At that point, Defendants either dug themselves or allowed the Plaintiff to dig some rudimentary ditches through the roadway. These ditches have proven largely ineffective to ameliorate negative impacts to Hoover's property. *Considering the low level of utility of the project, the significant impact on Plaintiff, and the minimal mitigation efforts that were undertaken, the Court finds that the Defendants' actions were not reasonable.* They were not taken in good faith and in a manner to avoid unnecessary damage to Plaintiff.

CP 431 at ¶ 1.15. *See also* CP 278, and RP (12/23/13) at 616:17 to 617:20.

Relying on a comparison of utilities to make his determination that the Warners' actions was clear error.[37] In effect, the trial judge adopted

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[36] *Id.* at 866-67.

[37] The Warners acknowledge that the determination of whether a party used "due care" is typically a fact question. *See, e.g., Borden,* 113 Wn.

and applied the "reasonable use rule" that *Currens* expressly rejected. Nor was this a harmless error, properly cured at the end by citing the magic words that the Warners' actions were "not taken in good faith and in a manner to avoid unnecessary damage."[38] If the trial judge had instead actually applied the "due care" rule, he would have started by acknowledging that the Warners "ha[d] an unqualified right to embark on any improvements on [their] land allowed by law."[39] Driving on their pre-existing road with loaded dump trucks and a small bulldozer—according to Greg Hoover the cause of blockage of underground drainage flows—is clearly something the Warners had a legal right to do.[40] The only question then should have been whether the Warners had done their rightful activities (including grading and adding of fill to the existing road) in such

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App. at 372. However, if the finder of fact relies on a legally prohibited factor to make their decision, this is an error of law.

[38] Findings and Conclusions at ¶ 1.15 (CP 431), tracking *Currens,* 138 Wn.2d at 865 (holding that "landowners who alter the flow of surface water on their property must exercise their rights with due care by acting in good faith and by avoiding unnecessary damage to the property of others"). It is important to note that the trial judge made no finding that the Warners acted in bad faith. "[T]o prove bad faith, one must show 'actual or constructive fraud ' or 'a neglect or refusal to fulfill some duty ... not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive." *Pruitt v. Douglas Cnty.*, 116 Wn. App. 547, 557-58, 66 P.3d 1111 (2003). Hoover made no such showing here.

[39] *Currens*, 138 Wn.2d at 867.

[40] *See* RP (10/28/13) at 101:10-13 (asserting that "[t]he compaction of driving dump trucks and bulldozers over the top of it are what stopped the underwater [sic] flow." See also Exhibits 21, 23, and 24, establishing that the Warners had no need for a permit to do the work at issue. *See also* Ex. 36 (picture of bulldozer).

a way as to inflict "unnecessary damage" to the Hoover property.[41]

Framed in this proper manner, the Warners submit that the question of their due care has an obvious answer. How were the Warners supposed to drive dump trucks and a bulldozer over their road (rightful activities) without actually driving them over the road? Even if doing so caused damage to Hoover's drainage, it was not "unnecessary damage."[42] In light of Hoover's testimony that prior to 2006 rain falling on his property had all soaked into the ground, and not run off across the surface onto the Warners' property, how were the Warners supposed to suspect that adding fill to their existing road (or even building a new road) would block surface drainage? RP (10/28/13) at 32:4-5. How should they have known that their actions would block subsurface flows, subsurface flows that Hoover himself insists could not be seen, and which went in

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[41] *Currens*, 138 Wn.2d at 865.

[42] Put another way, if the Warners had a right to drive laden dump trucks and a bulldozer over their own property (and they did), then any damage this caused could not be "unnecessary" unless there had been something unreasonable about *the manner* in which the dump trucks were driven. Since the issue here is not any noise of the dump trucks, or their smell and exhaust, or the congestion they may have caused at the junction of the driveway and Smith Prairie Road, *but simply the fact that they were driven*, it is very difficult to see how driving them could have been done in a manner that would have avoided "unnecessary" compaction. Any other conclusion seems "inconsistent with this state's historic deference to property rights," because it would amount to effectively denying that the Warners really did have a right to drive the equipment on their private property. *Currens*, 138 Wn2d at 867.

directions that he could not determine? RP (10/28/13) at 44:7-13.[43] The trial court made no finding that Warners knew or should have known these things, and the record would not support such a finding.[44] As a consequence the trial court erred in concluding that the Warners failed to act with due care.

Finally, the fact that the trial court referred to the Warner's "minimal mitigation efforts" in support of its conclusion that they acted without due care does not rescue its holding from error. The question is, or should be, whether the actions the Warners *actually took* on their land were done with due care.[45] For the reasons noted above, the answer to this question with regard to the initial maintenance of the road is almost surely "yes." Subsequently, the Warners dug (or allowed Hoover to dig) some ditches across the road. CP 278, 431 at ¶ 1.15. These ditches may have been "rudimentary" and "largely ineffective" but there is no reason to believe that they *worsened* Hoover's drainage situation. CP 431 at ¶ 1.15 Hence, digging the ditches was neither negligent in itself, nor could the fact that the ditches were dug somehow make the initial non-negligent

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[43] The Warners submit that the direction of underground flows was not even determined on a more-probable-than-not basis after a four day trial. See Section A-3 above.

[44] *Compare Borden*, 113 Wn. App. at 371-72 (evaluating breach of duty of due care in light of fact that "the record supports inferences that the City knew or should have known that the water table would rise" when it helped design and finance a project which diverted storm water from three new subdivisions into a wetland abutting plaintiffs' property).

[45] After all, the "due care" requirement applies to actions which "alter the flow of surface water." *Currens,* 138 Wn.2d at 865. Actions which are <u>not</u> taken are incapable of altering the flow of surface water.

maintenance work negligent.[46] Holding that digging only "rudimentary" and "largely ineffective" ditches supports a lack of due care only makes sense if the Warners had a duty to remedy Hoover's drainage problems, even though those drainage problems were not caused by the Warners' own lack of due care. Washington law imposes no such duty, nor should it do so. Indeed, it would be completely "inconsistent with this state's historic deference to property rights" to require landowners who have not been negligent to rescue neighbors from their drainage problems.[47]

For all of these reasons, the trial court erred when it concluded the Warners did not act with due care. The trial court improperly applied the "reasonable use rule," and weighed the utility of the road to the Warners against the damage to Hoover, instead of correctly applying the "due care" exception to the common enemy doctrine. This was not harmless error, because it led the court to the wrong conclusion on the due care issue, which in turn provides the only support for the court's holding that the

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[46] *Compare Borden*, 113 Wn. App. at 371-372 and footnote 32 (evaluating whether the defendant city's initial action in pumping water into a wetland constituted a breach of the duty of due care, and considering subsequent remedial measures only as evidence that the city could have acted differently from the start, since it knew or should have known both that its actions would cause problems and that there were alternative ways of proceeding that would have avoided unnecessary damages). In this case, by contrast, there is no reason the Warners should have known that their initial actions would cause problems, and hence no way that their subsequent remedial measures—which did not themselves reduce drainage off of the Hoover property—could somehow transform non-negligent actions into negligent ones.

[47] *Currens,* 138 Wn.2d at 867.

Warners were liable in negligence. CP 432 at ¶ 2.3 and ¶ 2.5. Hoover's nuisance claim fails as well, because to prove nuisance, a claimant must show an unreasonable interference with the use and enjoyment of property. "When the interference is blocking the claimant's drainage, it is deemed unreasonable only if it falls within an exception to the common enemy doctrine." [48] Since no exception to the common enemy doctrine applies here, Hoover's claim for nuisance fails with his claim for negligence.

C. The trial court erred by finding that the Warners committed trespass.

The trial court also found that "the actions of [the] Warners in backing up surface and subsurface water onto the Hoover property constituted trespass." CP 432 at ¶ 2.4. This is clear error. Although Washington law allows a claim for trespass by water, it does so only "when there is an intentional or negligent *intrusion* [of water] onto or into the property of another."[49] Hoover does not claim that any water from the Warner property actually invaded his property, on the surface or

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[48] *Borden v. City of Olympia*, 113 Wn. App. 359, 373, 53 P.3d 1020, (2002).

[49] *Borden*, 113 Wash. App. at 373 (dismissing claim for trespass where plaintiff did not plead that any water originating outside his property "actually invaded their property on the surface"); *see also Hedlund v. White*, 67 Wn. App. 409, 417-18, 836 P.2d 250 (1992) (upholding trespass claim where defendant had discharged water onto plaintiff's property in a way in which it would not naturally have drained); and *Pruitt*, 116 Wn. App. 547, 66 P.3d 1111 (2003) (overturning summary judgment for defendant on water trespass claim where there was evidence that the defendant had channeled water and cast it upon plaintiff's property).

otherwise.[50] Essentially, his claim is the same as was dismissed in *Borden*: "that water that would otherwise have drained from [his] property failed to do that" because of an alleged blockage of drainage flows.[51] Because the Hoover property suffered no actual invasion or intrusion of water from the Warner property, Hoover's allegations are legally insufficient to support a claim for trespass by water.[52]

D. The trial court erred by issuing an impermissibly broad permanent injunction.

This Court reviews a trial court's decision to grant an injunction, and its decision regarding the terms of the injunction, for abuse of discretion.[53] A trial court necessarily abuses its discretion if its decision is based upon untenable grounds, or is manifestly unreasonable or arbitrary.[54] A decision based on an erroneous view of the law is an abuse

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[50] *See, e.g.,* Trial Brief of Plaintiff, at pp. 8-9 (CP 229-30) (mentioning exception to common enemy doctrine that "prohibits artificially collecting and channeling surface water onto his neighbor's land," but making no effort to argue this exception applies to this case). *See also* Amended Complaint, at ¶ 2.8 (CP 193) (alleging that the Warners have not "allow[ed] proper and full drainage from Hoover's property").

[51] *Borden,* 113 Wn. App. at 373.

[52] The argument here shows that the trial court's decision on the trespass claim would be erroneous even if the Warners had negligently blocked Hoover's drainage. *See, e.g., Borden*, 113 Wn. App. at 373 (upholding dismissal of the trespass claim even though also overturning summary judgment for the defendant on a due care claim). But failure to show that any of the exceptions to the common enemy doctrine apply provides another reason why Hoover's trespass claim fails. *See Pruitt*, 116 Wn. App. at 554 (noting that a claim for negligent trespass by surface water requires a breach of duty under the common enemy doctrine).

[53] *Washington Fed'n of State Employees v. State,* 99 Wn.2d 878, 887, 665 P.2d 1337 (1983).

[54] *Id.*

of discretion.[55] Here, *even if* the Warners' were negligent, and *even if* they committed trespass by water, the trial court still erred as a matter of law, and abused its discretion, by issuing an impermissibly broad injunction.

The trial court "permanently enjoined [the Warners] from undertaking any further actions on [their] property that adversely affect the drainage on the Hoover property." CP 433 at ¶ 2.10. This is an impermissibly broad injunction, because it rests on a mistaken understanding of Washington law, and in particular on an incorrect view of the rights and duties established by the common enemy doctrine. After all, "Washington still adheres to the general common enemy rule that a landowner may develop his or her land without regard for the drainage consequences to other landowners."[56] As modified by the "due care" exception, this means that landowners may alter the flow of surface water on their property, so long as they act in good faith and avoid "*unnecessary* damage to the property of others."[57] The corollary of the developing landowner's duty to take "due care" is the affected landowner's right to have "*unnecessary* damage" remedied or prevented.

The trial court misapplied this law by prohibiting the Warners from taking "*any*" actions that "*adversely affect*" Hoover's drainage. Hoover

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[55] *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn. 2d 299, 339, 858 P.2d 1054, (1993).
[56] *Currens,* 138 Wn.2d at 861.
[57] *Id.* at 865 (emphasis added). This formulation leaves aside the first and second exceptions to the common enemy doctrine, which play no role in this case.

does not have a right to be protected from any and all "adverse effects" on his drainage, he only has a right to be protected from "unnecessary" damaging effects. The injunction as granted by the court imposes duties on the Warners inconsistent with Washington law, and creates rights for Hoover that exceed those conferred by the common enemy doctrine. Put differently, the point is that Hoover failed to establish the first required element for any injunction: that he has the relevant "clear legal or equitable right."[58]

As previously noted, the injunction severely restricts the Warners' ability to act. Indeed, given the trial court's acceptance of Hoover's theory that merely driving dump trucks and a small bulldozer over their pre-existing road impermissibly affected Hoover's subsurface drainage, it is not clear that the injunction allows the Warners to use any sort of heavy farm equipment anywhere on their property.

E. The trial court abused its discretion by awarding Hoover $50,648.45 in attorneys' fees and costs under CR 37(c).

On September 24, 2013, Hoover requested that the Warners admit that they had "caused rock and fill material to be brought in from off site

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[58] *See, e.g., Washington Fed'n of State Employees, Council 28, AFL-CIO v. State*, 99 Wn.2d 878, 888, 665 P.2d 1337 (1983) (noting that to obtain injunctive relief, a party must establish (1) he has a clear legal or equitable right; (2) he has a well-grounded fear of immediate invasion of that right by the entity against which he seeks the injunction; and (3) the acts about which he complains are either resulting or will result in actual and substantial injury to him). A plaintiff "must satisfy these three basic requirements regardless of whether the injunction he seeks is temporary or permanent." *Nw. Gas Ass'n v. Washington Utilities & Transp. Comm'n*, 141 Wn. App. 98, 115, 168 P.3d 443, 452 (2007).

and deposited" along the northern and western boundaries of the Hoover parcel in 2006. CP 297-99. On or about October 14, 2013, the Warners submitted their timely response denying the requests. CP 329.[59] After trial, the superior court found that "some rock and or other material" was in fact brought in. CP 431 at ¶ 1.11. Concluding that an award of fees and costs was proper under CR 37(c), it awarded Hoover $32,714.85 in attorneys' fees and $17,933.65 in costs. CP 433 at ¶ 2.7 and 2.9.7. The Warners respectfully submit that making this award was an abuse of discretion.

CR 37(c) provides in pertinent part as follows:

> **(c) Expenses on Failure to Admit.** If a party fails to admit the genuineness of any document or the truth of any matter as requested under rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe the fact was not true or the document was not genuine, or (4) there was other good reason for the failure to admit.

[59] The Requests for Admission did not ask the Warners to date their responses, and they did not do so. However, the billing records for Hoover's counsel at CP 329 contain an entry for October 14, 2013 stating "[r]eceive and review Defendants' answers to requests for admission."

This Court reviews a trial court's decision to impose discovery sanctions under CR 37(c) for an abuse of discretion.[60] A court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds.[61]

Here, the trial court abused its discretion in three distinct ways. First, the admission sought was of no substantial importance, so any grant of fees was improper.[62] As established above, there was an absence of proof at trial that any water drained—on or below the surface—off of the Hoover parcel onto the Warner parcel. In the absence of such proof, it simply doesn't matter whether the Warners added material to their road. Moreover, even if water did drain toward the road, the Warners were protected from liability by the common enemy doctrine. It is not the purpose of CR 37(c) to award fees and costs for proving a point which is immaterial to the outcome of the litigation.[63]

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[60] *Rivers v. Washington State Conference of Mason Contractors,* 145 Wn.2d 674, 684, 41 P.3d 1175 (2002); *see also Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.,* 122 Wn.2d 299, 338–39, 858 P.2d 1054 (1993).

[61] *Fisons,* 122 Wn.2d at 339, 858 P.2d 1054.

[62] *See, e.g.,* 14 Wash. Prac., Civil Procedure § 17:18 (2d ed.) (noting that "[a]n award of expenses should *not* be made if . . . the admission sought was of no substantial importance").

[63] Indeed, the purpose of CR 37 "is to make available to the court the means of preventing injustice when one party has by his conduct placed the other party at an unfair disadvantage." *Reid Sand & Gravel, Inc. v. Bellevue Properties*, 7 Wn. App. 701, 705, 502 P.2d 480 (1972) (citing to Annot., 2 A.L.R.Fed. 811, 816 (1969)). It is extremely difficult to see how the Warners placed Hoover "at an unfair disadvantage" by their denial that they had brought in material to the relevant areas.

Second, "if a party's failure to admit did not cause the propounding party to incur additional expenses . . . no award . . . [is] justified."[64] Here, there is no reason to think that the Warners' denial actually increased Hoover's costs of making his proof. Given that Hoover claimed that the Warners "brought in a massive amount of rock and fill," and that "the grade of the areas in question was raised between one and four feet," an admission that the Warners "caused [some] rock and fill material to be brought in" would not have made a difference to the proof Hoover presented at trial. CP 225 (emphasis added); CP 431 at ¶ 1.10. Even armed with such an admission, Hoover still would have had to present evidence about how the amount of material added was sufficient to "compact[], widen[] and raise[] the grade" to the north and west of his property. CP 430 at ¶1.9. It was an abuse of discretion to make the Warners pay the costs of Hoover's attempt to prove a massive importation of material when the request was silent as to the quantity of material allegedly brought in, particularly since the trial court only found that "some" material had been added.[65]

Finally, even if an award of fees and costs were proper, it should not exceed the "reasonable expenses incurred in making . . . proof" of the

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[64] Moore's Federal Practice 3d at §37.73. The text of Fed.R.Civ.P. 37(c) is substantially similar to that of CR 37.

[65] *See, e.g.,* Moore's Federal Practice 3d, § 37.71 (noting that courts "will not penalize a responding party who does not admit matters that are not set forth in the request").

matter that should have been admitted.[66] Moreover, an award should be bounded by "the costs associated with the time period after which a reasonable person . . . should have conceded the issues," and before the conclusion of trial.[67] Here, the Warners submitted their timely reply to the requests for admission on or about October 14, 2013. CP 329 Hoover's counsel's billing records clearly establish that by that date, he and his predecessor attorney had already billed $30,308.45 in attorneys' fees. CP 294, 300-329.[68] Billing records also establish that Hoover's counsel billed $3,990 for post-trial work through December 12, 2013, and sought an additional $900 in fees for attending the presentation hearing. CP 295 at ¶ 8, 337-38. Thus, of Hoover's total fee request of $65,430.50 (CP 295, ¶

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[66] CR 37(c). *See also Clausing v. Kassner*, 60 Wn.2d 12, 20, 371 P.2d 633 (1962) (noting that "reimbursement should be made "only for that portion of the trial made necessary by defendant's . . . abuse of the rule").

[67] The quote here is from *Thompson v. King Feed & Nutrition Serv., Inc.,* 153 Wn. 2d 447, 452, 105 P.3d 378, 380 (2005) (emphasis added). Although not the holding of the State Supreme Court on this point, but rather simply a description of how the trial court limited fees awarded in the underlying case, it is nonetheless a reasonable interpretation of CR 37(c). As to costs incurred after trial not being recoverable under Rule 37(c), see *House v. Giant of Maryland LLC,* 232 F.R.D. 257, 261 (E.D. Va. 2005) (interpreting Fed.R.Civ.P. 37(c), and noting that "[h]ad the drafters intended to allow a sanction of attorney's fees for the prosecution of a Rule 37(c)(2) motion, they would have included broad language of this nature. Instead, the language the drafters used specifically limited attorney's fees to those included in 'the reasonable expenses incurred in making that proof'").

[68] Fees incurred prior to 10/14/13 can be calculated as follows: $8,256.70 for the predecessor firm of Stone Navasky (CP 294) + $12,627 for Worth Law Group through 8/29/13 (CP 323) + $7,497.25 for Worth Law Group for 9/3/13 to 9/30/13 (CP 327) + $1,927.5 for Worth Law Group from 10/1/13 to 10/11/13 (thus excluding all charges for 10/14/13) (CP 328-29) = $30,308.45.

8; CP 433, ¶2.9.7), $35,198.45—calculated as $30,308.45 in pre-response fees + $4,890 in post-trial fees—was legally ineligible for reimbursement under CR 37. Even if all of the fees Hoover incurred between October 14, 2013 and November 20, 2013 (the last day of trial) were attributable to making the proof that some material had been added to the road, the maximum allowable fee award would have been $30,232 (calculated as the total amount of fees incurred and requested, $65,430.50, less the ineligible pre-response and post-trial fees of $35,198.45). Instead, the trial court awarded $32,714.85 in fees, a demonstrable abuse of discretion.

Taking into account the obvious fact that not all of Hoover's fees during trial were due to trying to prove that material was added to the road, and were instead also incurred attempting to prove causation and damages, making opening and closing arguments, or simply listening to the Warners' defense, a maximum upper bound for a reasonable fee award would be no more than 30% of $30,232, or $9,069.60. Awarding more was an abuse of discretion.

As for costs, the trial court awarded Hoover all of the costs incurred and requested, in the total amount of $17,933.60. CP 433 at ¶ 2.9.7 (award); CP 294-95 (request). This, too, was an abuse of discretion, because many of these costs were demonstrably not incurred in the process of proving what the Warners allegedly should have admitted. Such impermissible costs include, without limitation, the following:

- $522.73 in costs incurred by Novasky Stone prior to June 1, 2013 (CP 294);

- $450 for broker's opinion of value (CP 295);
- $97.50 for transcript of Halbert testimony (CP 295);
- $179 for other court reporter fees and transcription costs (CP 295);
- $6,492.13 for work by Jerome Morissette & Assoc., all of which was performed prior to the Warners' denial on or about October 14, 2013 (CP 295; 354-57); and
- $862.50 for work by McClure performed prior to July 1, 2013 (CP 341).

These amounts, ineligible for re-imbursement under CR 37(c), sum to $8,603.86. Thus, even assuming that all of the other costs were devoted exclusively to proving that some material was brought in to the relevant areas, the maximum amount of properly reimbursable costs was $9,329.74.

The trial court abused its discretion in making any award of fees and costs under CR 37(c), because the admission sought was of no substantial importance to Hoover's claims, and because proving the matter that should have been admitted did not cause Hoover to incur any additional expenses. Even if an award was proper, the trial court abused its discretion by awarding more than a total of $18,399.24 (representing the sum of an upper-bound fee award of $9,069.50 and an upper bound cost award of $9,329.74).

VII. CONCLUSION

Hoover's entire case against the Warners rests on the claim that the Warners' activities blocked water draining from his property. However,

Hoover insists that there was no surface drainage from his property prior to 2006, and concedes that subsurface drainage occurred in a direction or directions which he could not see or determine. Neither of the experts he presented at trial directly investigated the direction of current or historical subsurface flows on the Hoover parcel, and each offered testimony that helps explain why that drainage might go in unpredictable ways. Since there is a plausible alternative explanation for Hoover's problems—overgrazing by Hoover's horses—which does not depend on any assumed facts about the direction of Hoover's underground drainage, under the principles set forth in *Nejin v. City of Seattle,* there is simply not substantial evidence in the record to support the finding that drainage from the Hoover parcel naturally flows toward the Warner parcel. Without that finding, all of Hoover's claims fail as a matter of law.

Moreover, even if there were substantial evidence in the record that the Warners' road work blocked Hoover's drainage and caused him damage, the Warners are still shielded from liability by Washington's common enemy doctrine. In particular, the trial court erred by evaluating whether the Warners had used due care by comparing the utility of their road work with the alleged harm caused to Hoover. By doing so, the trial court effectively applied the "reasonable use rule" which was expressly rejected by the Supreme Court in *Currens.* If instead the trial court started by acknowledging that the Warners had a right to drive heavy equipment on their own land, and focused on whether they knew or should have known that their road work would block drainage which Hoover concedes

no one could see, the answer would have been clear: the Warners acted with due care. This defeats Hoover's negligence, nuisance, and trespass claims (the latter of which also fails because Hoover doesn't even allege that the Warners' actions thrust water onto his property). Finally, the trial court abused its discretion by awarding Hoover $50,648.45 in fees and costs under CR 37(c).

For all of these reasons, this Court should reverse the trial court and vacate the judgment entered against the Warners.

DATED this 22nd day of July, 2014.

DAVID CORBETT PLLC

By _____
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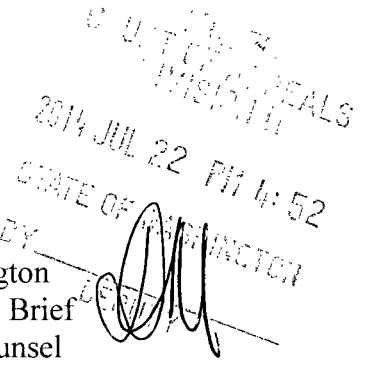
Attorney for Appellants



CERTIFICATE OF SERVICE

I certify under penalty of perjury of the laws of the State of Washington that on July 22, 2014 I emailed a PDF copy of the attached Opening Brief of Appellants, along with the Appendix thereto, to Respondent's counsel J. Michael Morgan at the following email addresses:

jmmorgan@worthlawgroup.com and JFulks@worthlawgroup.com.

Mr. Morgan has previously agreed to accept email service of documents to be filed in this appeal.

I also deposited a copy of the attached Opening Brief of Appellants, along with the Appendix thereto, in the U.S. Mail, first class postage pre-paid, for delivery to Mr. Morgan at the following address:

J. Michael Morgan
Worth Law Group
6963 Littlerock Rd. SW
Tumwater, WA 98512-7246

Dated this 22nd day of July, 2014.

By: _____
David J. Corbett

NO. 45742-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

GREG HOOVER,

Respondent,

v.

SCOTT WARNER and "JANE DOE" WARNER, individually and the marital community composed thereof; ERNEST WARNER and "JANE DOE" WARNER, individually and the marital community composed thereof,

Appellants,

and

WARNER FARMS,

Defendant.

APPENDIX TO OPENING BRIEF OF APPELLANTS

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☐ EXPEDITE
☐ No Hearing Set
☐ Hearing is set

Date:
Time:
Judge: Carol Murphy
Calendar:

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF THURSTON

Greg Hoover,

Plaintiff,

v.

Scott Warner and "Jane Doe" Warner, individually and the marital community comprised thereof; Ernest Warner and "Jane Doe" Warner, individually and the marital community comprised thereof, and Warner Farms;

Defendants

No. 12-2-02308-2

Stipulation and Order Approving the Completion of the Remediation Plan

I. STIPULATION

The Parties through their counsel stipulate and agree to the following:

1) The Remediation Plan dated February 21, 2014 and authored by Mike Szramek of MC Squared, a licensed Professional Civil Engineer, was completed by the Warners. The work involved digging drainage ditching on the Warners' property.

2) Vince McClure, a licensed professional engineer, was retained by Hoover and inspected the remediation work completed by the Warners, and he required additional drainage beyond the court approved plan.

3) The Warners did the additional drainage ditching work required by Vince McClure.

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4) Mike Szramek prepared a revised Remediation Plan with the additional drainage ditching required by Vince McClure on June 18, 2014. The revised Remediation Plan is depicted in the drawing prepared by Mr. Szramek, which drawing is attached to this Stipulation as Exhibit A.

5) Vince McClure inspected the additional drainage ditching as completed and approved the revised Remediation Plan in Exhibit A.

6) The Warners shall regularly inspect and maintain the drainage ditches as depicted in Exhibit A (at least annually) to ensure that they function to drain water that reaches them from the Warner / Hoover property boundary. Maintenance shall be only those actions necessary to remove obstructions in the ditches that prohibit the flow of water from the Hoover property.

7) The Court shall not enter additional monetary judgment against the Warners because the completed remediation work succeeds in restoring surface and subsurface drainage off of the Hoover parcel to its pre-2006 condition.

8) This stipulation does not waive any parties' right to appeal any or all aspects of the Court's decision in this matter.

Miller Law Office, P.S.

Thomas F. Miller WSBA #20264
Attorney for Warner's

Worth Law Group, P.S.

J. Michael Morgan, WSBA #18404
Attorney for Greg Hoover

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II. ORDER

Based on the foregoing Stipulation of the parties, the Court hereby makes the following findings of fact, conclusions of law, and order:

Finding of Fact:

1. The revised remediation plan attached hereto as Exhibit A was completed by the Warners, and succeeds in restoring drainage from the Hoover parcel to its pre-2006 condition.

Conclusions of Law:

1. The Warners shall regularly inspect and maintain the drainage ditches as depicted in Exhibit A (at least annually) to ensure that they function to drain water that reaches them from the Hoover/Warner property boundary. Maintenance shall be only those actions necessary to remove obstructions in the ditches that prohibit the flow of water from the Hoover property.
2. No further monetary judgment shall be entered against the defendants Warner for the damages identified in the Findings of Fact and Conclusions of law and Judgment filed herein on December 24, 2013.
3. This Order is without prejudice to the Warners' rights to appeal any or all aspects of the Court's decision in this matter.

IT IS SO ORDERED.

DATED this 18 day of July, 2014

~~Judge Carol Murphy~~
Chris Wickham

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MILLER LAW OFFICE, P.S.

Thomas F. Miller, WSBA # 20264
Attorney for Defendants Warner

Stipulated; Presentation waived:

WORTH LAW GROUP, P.S.

J. Michael Morgan, WSBA # 18404
Attorney for Plaintiff Hoover

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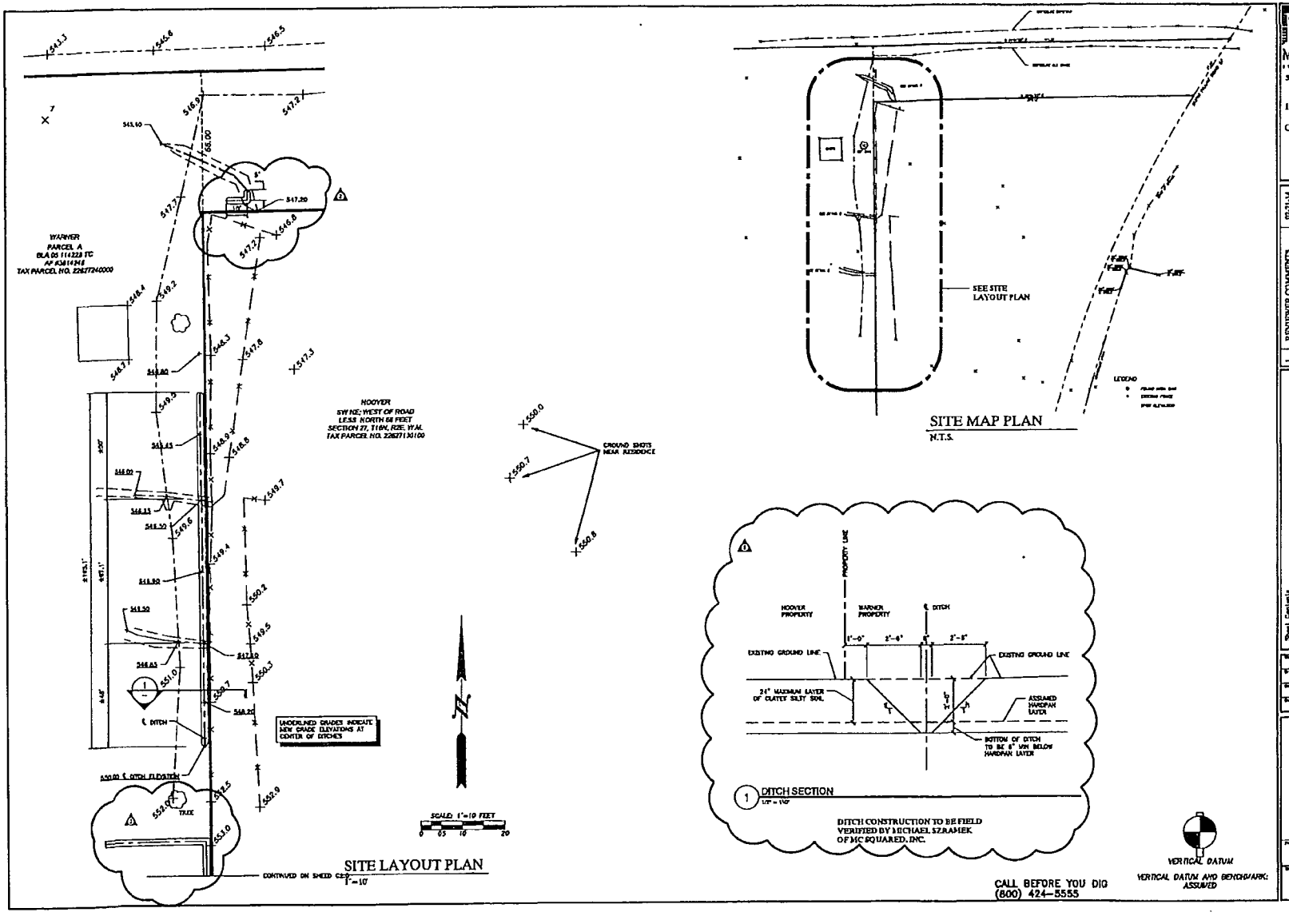
EXHIBIT A



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OLYMPIA, WA 98506
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P (360) 352-2044
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#	REVIEWER COMMENTS	02-21-14	06-18-14				MPC
1	ADDITIONAL DITCHING						
2							
							REVISION

Sheet Contents: Site Layout Plan & Section

Project: Drainage Ditch
16245 Smith Prairie Road SE
Yelm, WA 98597
For Scott Warner

Designed By	MS
Drawn By	MSDC
Reviewed By	MS
Date	03-06-14

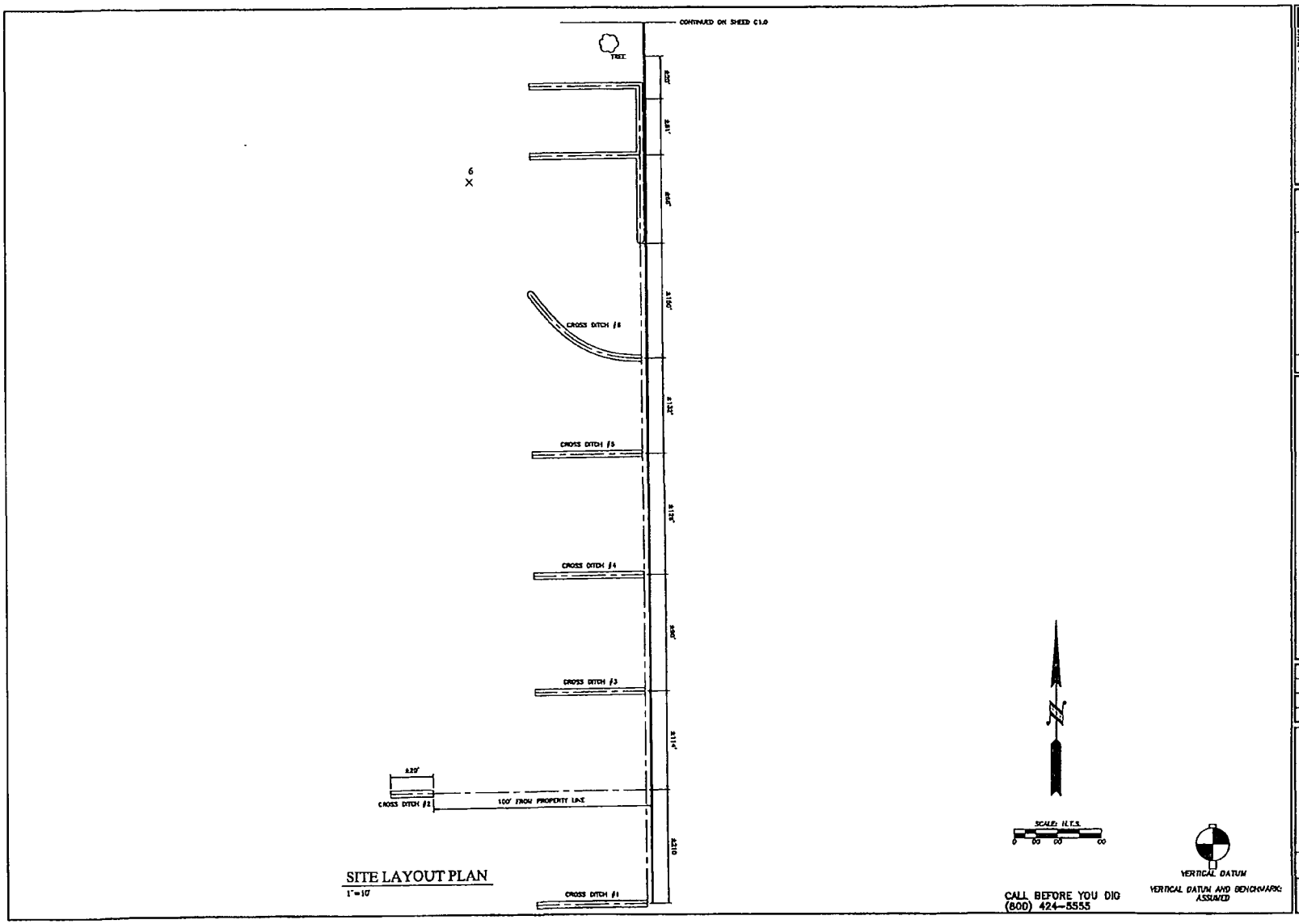
03-06-14

Project Number: 14032

Sheet Number: C1.0

Sheet 1 of 2

A-6



SITE LAYOUT PLAN
1"=10'

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VERTICAL DATUM
VERTICAL DATUM AND BENCHMARK ASSUMED

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REV	REVIEWER COMMENTS	02-21-14	DATE
1	DITCHES ADDED	06-18-14	
2			REVISION

Sheet Contents: Site Layout Plan (Continued)
Project: Drainage Ditch
16249 Stella Prairie Road SE
Yelm, WA 98597
For Scott Warner

Designed By: MS
Drawn By: MDC
Checked By: MS
Date: 03-06-14

03-06-14

14032

C2.0
2 of 2

4-7