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 comprised thereof, ERNEST WARNER and "JANE DOE" WARNER, individually and the marital community comprised thereof,

Petitioners,

and WARNER FARMS, defendant.

REPLY BRIEF OF RESPONDENT GREG HOOVER

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I. RESPONDENT'S STATEMENT OF THE CASE

Respondent Greg Hoover owns and lives on approximately 7.5 acres at 16547 Smith Prairie Rd. SE, in Yelm, Washington. (CP 13) He bought his property in 1999 from Martha Carroll, who had lived there since 1989. (RP 114) Appellant Ernest Warner owns 20 acres at 16541 Smith Prairie Rd. SE. that borders Hoover's property to the west and to the north. (CP 92; Exh. 15). This property has been in the Warner family for three generations, and has never been developed. (RP 313-14)

Hoover's property is higher in elevation than the Warner property. (RP 209-10; Exh. 13; Exh. 39 p. 4). Water naturally drains downhill across the Hoover property and onto the Warner property in a north to northwest direction.[1] (RP 145, 149, 209-10, 381-82) Although the property mostly drains toward the northeast corner, some flow naturally crosses Hoover's west line. (RP 161, 210) The Hoover house sits at the north end of the property. (RP 210)

The natural soils underlying both properties consist of a two to three foot deep organic layer on top of a silt loam layer. A typical profile of the soils underlying both subject properties revealed three zones or layers: (1) the top zone or "A" zone, which is dark in color due to a high content of organic material; (2) a "B" zone at intermediate depth, of lighter color due to higher salt and clay content and (3) the lightest colored and densest "C" zone, consisting of the impermeable Skipopa silt loam. (RP 224-25) Both parties' experts agreed that darker fill indicates a higher concentration of organic material and consequently a greater age of the fill. The silt loam soils in the "C" layer are non-

[1] The topography was verified by Exhibit 13 p.4, a LIDAR map, which measures the elevations by laser reflection and accurately depicts changes in elevation to within one foot. (RP 211)

gravelly silty soils that developed from sediments in an old glacial lakebed. (RP 222) They formed thousands of years ago in horizontal plates on slopes of zero to 3 degrees and do not drain. (RP 226, 369, 414) Warners' expert geologist William Halbert testified:

> And the silt loam formed somewhere between 10 and 15,000 years ago. This was the terminus of the continental ice sheet. The Puget lobe of the Cordilleran ice sheet stopped about Yelm/Rainier/Tenino areas. So what you have is a large amount of runoff water coming from the toe of the glacier, and you --- lakes, ice-dammed lakes can form. And of course, the water coming off the glacier has a lot of sediment carried in it. It flows into these lakes or quiet areas and the silt settles out. And so the silt loam formed in one of these what we call a proglacial lake.

(RP 350-51) These sediments form an impermeable silt layer at 2-3 feet in depth below Hoover's property. (RP 226-27) Water goes down 2-3 feet, hits the impermeable silt loam layer and then travels sideways, following the downslope. (RP 226-27) This impermeable silt loam forming the "C" layer was demonstrated at consistent depths in four different test pits on the Warner property. (Exh. 42)

The Hoover property drained prior to 2006. (RP 243) Prior to 2006 there were no areas on the Hoover property that puddled or naturally collected water, even in heavy rains. (RP 30, 115-16). There were never any septic failures or well problems on the Hoover property prior to 2006. (RP 46-47, 56, 118) There is no history of flooding on the property prior to 2006.[2] One could not see in which direction storm water drained prior to 2006 because it never collected on the surface. (RP 44, 116) As to the direction of the surface and subsurface flows, the only inference to be drawn from the test diggings and the scientific testimony was that prior to 2006, the precipitation hit the surface

[2] An aerial photograph taken 1/12/97 showed no flooding on the property at a time when most of the county was under water following a major storm. (RP 243; Exh. 28)

organic layer, soaked down to the impermeable silt loam layer, and then flowed downhill, following the west/northwest downslope onto the Warner property.

To Hoover's north there in an old 10' - 12' wide driveway on the Warner property, consisting of non-native sand and cobble stones,[3] running east-west from Smith Prairie road back to the remains of a long-abandoned cabin just off of Hoover's northwest corner. The historical driveway serves a residence north of the driveway between Smith Prairie Road and the old cabin. (RP 60, 319, 324).

On the Warner property, roughly paralleling Hoover's western boundary, south of the remains of the old cabin, are irregular deposits of non-native materials consisting of sand mixed with rounded gravel and cobbles.[4] The material in these fill ridges is by its nature very permeable, such that surface water could be expected to flow right through them. (RP 313-14) There has never been a road or driveway on the Warner property running along Hoover's west boundary, and the Warners never used this portion of their property for anything. (RP 313-4)[5]

Beginning in May 2006, Scott Warner and Ernest Warner, using dump trucks, a bulldozer and a backhoe, cleared, filled, graded and compacted road accesses on the Warner land directly adjacent and parallel to Hoover's north and west boundaries. This project went on for several months. On 9/24/13, Plaintiff served Requests for Admission

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[3] "Gravel" is defined as stones of up to 2" diameter; "cobbles" are defined as stones with 3" - 5" diameters; and a "boulder" is anything larger than a cobble. (RP 394)

[4] These fill ridges probably originated years ago by farmers plucking unwanted rocks from their fields and piling them along the property line. (RP 440, 512)

[5] On the 1972 aerial (Exh. 4) one can see the historical driveway to the north of Hoover's property; this driveway quits at the cabin without turning to the west. (RP 338-39) There has never been a building or other structure anywhere along Hoover's west boundary. (RP 314) There is no rutting or other physical evidence of a road to the west of the Hoover property. (RP 375)

on the Warners. (Exh. 32) The Warners' Requests and Responses read as follows:

> REQUESTS FOR ADMISSION NO. 1: Admit that in 2006 you or others under your direction and control caused rock and fill material to be brought in from off site and deposited at one or more locations within the area circled and labeled "A" on Exhibit 1.
>
> RESPONSE: DENY
>
> REQUESTS FOR ADMISSION NO. 2: Admit that in 2006 you or others under your direction and control caused rock and fill material to be brought in from off site and deposited at one or more locations within the area circled and labeled "B" on Exhibit 1.
>
> RESPONSE: DENY

The overwhelming weight of the evidence proved the Warners' responses (as well as their present appeal the Courts' finding on this issue) to be sham. Scott Warner told Greg Hoover that he and his brother had brought in over a hundred dump truck loads of fill (RP 41), described by Hoover as "[b]oulders and rocks and chunks." (RP 41-42). Eyewitness Linda Seamount testified: "It was all just large as in much larger rocks. . . . there was no dirt mixed with it." (RP 76) Eyewitnesses Scott Hyderkhan and Jerry Hoover (no relation to the Plaintiff), none of whom were interested parties, testified that they saw dump truck loads of fill being brought in and dumped. (RP 64); Deposition of Jerry Hoover (CP 238 at 248). A 2006 aerial photo (Exh. 8) verified extensive areas of fill south of the old driveway north of Hoover and also along Hoover's west boundary. (RP 210)

The Warners lied to Thurston County Compliance personnel about the nature of their project and submitted false affidavits to Thurston County in order to avoid the need for a grading permit, which they would not have otherwise gotten, given Critical Areas issues. Robert Manns, Compliance Coordinator for Thurston County Resources

Stewardship Department, confirmed in a site visit on 5/24/12 that the Warners were grading without a permit. Manns observed fill material 2 to 3 feet in depth and 10 to 12 feet in width. (RP 191-92) He sent Ernest Warner a letter dated 5/31/12 (Exh. 18), informing him that a grading permit had to be obtained within 30 days. At a 6/12/12 site visit, Ernest Warner denied that any fill had been brought in, falsely representing that they were just doing road maintenance. (RP 192-93) Upon further investigation, including site inspection and inspection of aerial photos, Manns concluded that 2 to 3 feet of fill material, including rocks, had been brought in. (RP 193-94) He informed Warner in a 6/26/12 letter (Exh. 19) that a grading permit needed to be obtained.

The Warners filed a Master Permit Application with the Thurston County Permit Assistance Center on 9/25/12 (Exh. 20), asserting that their project was exempt from construction permits on the basis that they had just bladed vegetation off of preexisting roads and that no fill had been brought in. The Master Application was supported by false affidavits from Patricia Bower, Tracy Duval, Harry Warner, Connie Warner and "Delray" Scott Warner. (See Exh. 20). All of these affidavits represent that historically there was always a driveway running north-south along Hoover's west boundary. The trial evidence proved the affidavits to be fraudulent. For example, when Tracy Duval was asked in his trial testimony about a driveway to the west of Hoover's property, he answered "I don't know. I never made it that far back in there." (RP 286) When Harry Warner was asked if he had ever used the property or anything along the west side of the Hoover's property, he answered "No." (RP 313)

Once Warners made the Master Permit Application, the matter passed out of the Thurston County Compliance Division to the Development Review Department, which

accepted the false affidavits and issued a letter dated 11/28/12 (Exh. 21) concluding that the Warners' work was exempt from construction permits. Robert Manns testified that he never would have "bought" the Declarations had he seen them. (RP 198)

The Warners filled and created a new east-west driveway south of the old north driveway. They also disturbed, bulldozed, mixed with fill and boulders and re-compacted the upper 12" - 18" of their property all around Hoover's northwest corner and all along his west boundary. The Court heard extensive expert testimony regarding four test pits that were dug in various locations in the fill areas. William Halbert, Warners' expert geologist and Lisa Palazzi, Hoover's expert hydrologist, were in agreement that the test pits revealed evidence of two different fill episodes, one much more recent than the other. (RP 228, 358; Exh. 39 pp. 18-32; Exh. 42). The presence of two different fill episodes was evidenced by the degree of "clast" formation around gravels and cobbles.[6]

The evidence established that the decades-old fill areas on the north and west had been disturbed to a depth of one to two feet in a second, more recent fill episode. Since the old preexisting material had probably been there for decades, it is not surprising that the uppermost, most recent layer had dark material mixed in with it due to organic content. This disturbed old material was mixed with rock and fill and driven over repeatedly with a bulldozer and dump trucks. As Ms. Palazzi explained:

> Grading and filling with heavy equipment along the roadway will fill low level elevation areas and will compact soils. That's just a fact. So if I fill low level elevation areas, I am going to reduce or eliminate surface flow pathways. If

[6] A clast is the impression or mold left by a piece of gravel or cobble when it is removed from its surroundings. The degree of clast formation is related to the age of the fill. More recent fill tends to be friable, with the gravel easily falling away from its surrounding clast. Generally the older the fill, the more tightly the stones are held in place by their clasts, due to the downward movement of silts and clays which "seals things up." (RP 352)

> I compact soils, I am reducing or eliminating subsurface through-soil pathways. I believe both of these surface and subsurface pathways have been impacted.

(RP 249) Lisa Palazzi described this subterranean compaction and collapsing of the clasts as "smearing," in which the tracks of a bulldozer or wheels of a backhoe or dump truck "kind of slips on the soil surface and it causes the soils to smear and you lose the structure and it compacts the soil, causes it to basically collapse the soil structure." (RP 239) As a result of the Warners' project, the subsurface drainage pathways were cut off, due to filling and compaction. (RP 240)

Vince McClure, PE, Ph.D opined that the compaction goes down 18 to 24 inches. (RP 156) Mr. Halbert agreed through his direct observation that the Warners' excavations disturbed at least the upper foot of the old, previously porous, fill ridge to the west. (RP 364, 379) Halbert admitted that such activity could have a significant effect on compacting the material, but tried to play the probable depth down to perhaps only 6 to 12 inches. (RP 364) Halbert did admit to the basic mechanics of surface water backup due to obstruction of the subterranean drainage channels:

> A. I would say if no activity occurred in that are between 2006 and the present day and the [drainage] conditions changed as [Hoover] says, then I would suspect something - - - something would be - - - may be intercepting underground flow.
>
> . . .
>
> Q. In any event, wouldn't you agree with me that in my hypothetical if you take this 12- to 18-inch pile of material and run a bunch of dump trucks and dozers over it, it is going to compress the material to some degree?
>
> A. To some degree, provided it wasn't compressed previously.
>
> Q. Well, if it was compressed previously, it probably, it probably wouldn't allow much water to flow through, would it, because by your definition this was loose?
>
> A. Sand and gravel is loose, not the subsoil. Well, I'm sorry. I see where

you're going.

Q. Right. But you agree that it is going to have an impeding effect to some degree on how much water it transmits through if you run dump trucks and a dozer over it. We can debate about how much of an impact, but it's going to have some impact on the ability of that water to flow through that material, isn't it? More likely than not.

A. Yes, it will have some impact.[7]

In summary, there was substantial evidence from which any reasonable trier of fact could conclude that: (1) prior to 2006, water flowed downhill west and northwest across the impermeable silt loam layer; (2) once this water reached decades-old formations of sand and cobbles it freely flowed through because such materials do not impound water; (3) disturbance in 2006 of the upper one to two feet of the surface together with compaction and mixing with rocks and fill caused a collapse of the more permeable "clasts," including the "A" and "B" layers, cutting off the previously highly pervious drainage channels; (4) unable to flow underground, the water was unable to escape overland due to the raising of the roadway, which acted like a dam; (5) turning Hoover's property into a swamp.

Warner attempted to blame all of Hoover's flooding problems on overgrazing by Hoover's horses. Mr. Halbert referred to a U.S. Department of Agriculture Survey recommending the proper stocking rates, pasture rotation, and restricted grazing during wet periods to help maintain pastures in good condition. (RP 368) However, nowhere does he opine on a more probable than not basis that overgrazing actually bore any causal relation to Hoover's moisture problems. Mr. Hoover testified that in any event, he does utilize rotational grazing practices. Prior to 2006, he was able to graze everything off in

[7] (RP 380, 386-87)

the north portion of his property half a dozen times a year. (RP 55-56) Dr. McClure testified there was no evidence of extensive grazing either around the septic area or to the north of the house. (RP 142-43) He opined that while compaction and overgrazing "may have exacerbated the problem slightly," such effects were limited to the area south of the house and that, in any event, *there was no evidence or indication that the situation was contributing in any material fashion to the overall water problems on the property.* (RP 148-49, 168) Clearly, it was within the province of the trial court to weigh the opposing expert testimony and accept that of Dr. McClure over Mr. Halbert. Substantial evidence supports the Court's determination that overgrazing was not a substantial causative factor.

Mr. Hoover proved through unrebutted expert testimony that as a direct result of the flooding and excessive moisture conditions that the foundation to his home sustained cracking and damage, and that it would sustain further damage if the wet conditions were not rectified. (RP 143–144). Mark Edwards, a septic contractor, testified that while Hoover's septic system was failing, if the water obstruction was removed, the system would have a chance of recovering and performing, and that further, it was unlikely that a replacement could be installed on the property due to the excessively wet conditions. (RP 174). Mr. Hoover testified as to his annoyance and inconvenience at having his property always wet; having has his well collapse; having his septic system failing; having had to take time off of work to deal with the problems; and having to dig ditches in the middle of the night to save his home. (RP 54) Linda Roberson, a licensed broker, gave unrebutted testimony that if Hoover's property could no longer be occupied, it would suffer a devaluation of $156,000.00. (RP 83-85; Exh. 33,34) Further, Hoover

submitted further evidence to support further claims for special and general damages, which were not challenged by the Defendants. (CP 363-371) Other than a general denial of liability for damages, none of these damage amounts are specifically being challenged on appeal.

On 12/24/13, the Court entered a judgment in favor of Hoover and against the Defendants, jointly and severally for:

- Permanent property damage in the amount of $156,000.00.
- General damages for annoyance and inconvenience: $25,000.00.
- Damages for actual repairs made by Hoover: $12,000.00.
- Damages to the foundation in the amount of $40,000.00.
- Damages for loss of use and enjoyment: $60,000.00.
- Previously awarded and unpaid sanctions: $1,000.00.
- Attorneys' fees of $32,714.85 and costs of $17,933.60 ($56,273.80 fees and $9,156.70 in costs reduced by 50%).

The Court gave the Defendants the opportunity to purge themselves of the $156,000.00 permanent damage award, provided they prepare and present to the Court for approval within 180 days a plan for remediation designed by a licensed engineer and approved by the Court. (CP 433-34)

In compliance with the trial court's Order, the Warners' submitted a remediation plan calling for the digging of ditch approximately 165 feet long on the Warners' side of the parties' shared boundary runs to the east of the Hoover parcel, along the with 3 cross ditches. (CP 496) On 3/7/14, the trial court approved the remediation plan, subject to the field approval of the as-built ditches by experts for each party. (CP 504) The trial court also ordered that "Defendants shall regularly inspect and maintain the drainage system (at least annually) to ensure that it functions." (CP 504) Without objecting to or seeking modification of this condition in the trial court, the Warners' counsel signed a Stipulation and Order Approving the Completion of the Remediation Plan (CP 506) that was entered

on 7/18/14. (CP 504) Before this final approval of the as-built, the experts had conducted discussions and site visits, which resulted in additional ditching being added to the original plan of remediation, including 9 new cross ditches. (CP 510-11) Neither counsel nor the expert for the Warners objected to any condition that all of the ditching required in the remediation plan would have to be regularly inspected and maintained by the Warners in the future.

II. ARGUMENT

A. Substantial evidence supports all critical Findings of Fact by the trial court.

The Warners' entire defense in this appeal rests on the faulty premise that because the subsurface drainage pathways cannot be physically seen, no inference can be drawn that surface and subsurface water flowed north and northwest prior to 2006. If this were correct, few if any surface water cases could be decided based upon circumstantial evidence. "Direct evidence" refers to evidence that is given by a witness that has directly perceived something. "Circumstantial evidence" refers to evidence from which, based upon common sense and experience, that a trier of fact may reasonable infer something that is at issue in the case. One type of evidence is not necessarily more or less valuable than the other.[8] Given the geological evidence, since the Hoover property slopes downward to the west and northwest, and that surface water would naturally drain onto the Warner property, the only inference to be drawn is that the surface water hitting the silt layer must the same law of gravity as surface water. [9]

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[8] 6 Wn. Pattern Jury Inst. Civ. WPI 1.03 (6th Ed.).

[9] Warner makes arguments for the first time on appeal that for all this Court knows, there *could be* "lenses" that soak up the groundwater, that subsurface water could run contrary to the terrain – even *uphill* – below the surface; or even that there could be fill material on

Warners' reliance on *Nejin v. City of Seattle*, 40 Wn. App. 414, 698 P.2d 615 (1985) is misplaced. In *Nejin*, the negligence of the City of Seattle was established where it was shown that faulty maintenance caused a break in a sewer line upstream from the site of a landslide on the plaintiff's property. The question was whether Plaintiffs had established a causal link between the broken line and a landslide on their property, where unrebutted engineering testimony from the city proved that (a) the sewer leak was 240 feet from the slide area, (b) the ground between the sewer break and the Plaintiff's property was already saturated with ground water and (c) the contributory effect of the leaking pipe would be substantially diminished beyond 50 feet. *Nejin*, 40 Wn. App. at 421.

Reversing a trial court finding of liability on the part of the city, the Court of Appeals held that this evidence at most established that the water from the leaking pipe *could have* contributed to the slide, but was insufficient to establish this premise on a more probable than not basis. *Nejin*, 40 Wn. App. at 422.

Nejin does not apply to the present case, for the simple reason that water flowing uphill can never be a competing, equally probable theory. "Water must and will obey the laws of gravity, and run down hill." *Kuhner v. Griesbaum*, 59 Ill. 48, 1871 WL 7972 (Ill. 1871). It is immaterial that no eyewitness could physically see it. The Warner property sits at a lower elevation than the Hoover property. The topographic LIDAR evidence, which all of the experts accept as valid, proves that the downhill slope across both properties is to the west and northwest, with pre-2006 flows crossing both Hoover's west and northwest boundaries to drain water onto the Warner property. Both properties sit on

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Hoover's property that might affect the run of the terrain. However, Warner did not present any evidence or argument to the trial court relative to these far-fetched theories.

an essentially impermeable silt loam layer formed on 0-3 degree slopes from very old glacial lake beds. The presence and drainage characteristics of this impermeable silt loam layer at the expected depths were not only unanimously acknowledged by both parties' experts, but was also demonstrated by government soil mapping in the area and by test pits. From the lay testimony as well as the scientific testimony from both parties' experts, the trial court that correctly drew the only logical inference to be drawn, which is that (1) the impermeable skipopa silt loam layer follows the general contours of the land, as mapped by the LIDAR laser-accurate topographic mapping and (2) prior to 2006, the precipitation falling on Hoover's property had someplace to go. Water could not have flowed to the south or to the east, and the Warners made no such bizarre claim at trial. Substantial evidence supports the trial court's finding that surface and subsurface water flowed to the north and northwest across the Hoover property and onto the Warner property prior to 2006.

Substantial evidence further supports Findings of Fact 1.12 and 1.13, that the Warners' project altered and changed preexisting drainage, causing water to collect and proximately causing moisture conditions and ongoing damage to the Hoover property. The scientific testimony provided substantial evidence that decades old, highly porous man-made deposits of rock and sand allowed for the free passage of surface and subsurface water to the west and northwest until they were disturbed, filled and compacted. The raising of the grade formed a dam, causing the impounded water to back up on the Hoover property. As Mr. Hoover put it in lay terms:

> The compaction of driving dump trucks and bulldozers over the top of it are what stopped the underwater flow. The dam that they built on top of it is what makes the water gather on top of my soil.

In summary, substantial evidence supports the trial court's finding of causation.

B. The trial court correctly applied the "due care" exception to the common enemy doctrine in concluding that Warners' actions were unreasonable and therefore actionable.

The Warners are not protected by the common enemy doctrine, which "provides that surface water is 'an outlaw and a common enemy against which anyone may defend himself, even though by so doing injury may result to others.'" *DiBlasi v. City of Seattle,* 136 Wn.2d 865, 875, 969 P.2d 10 (1998) (quoting *Cass v. Dicks*, 14 Wn. 75, 78, 44 P. 113 (1896)). If a landowner "in the lawful exercise of his right to control, manage or improve his own land, finds it necessary to protect it from surface water flowing from higher land, he may do so, and if damage thereby results to another, it is damnum absque injuria [injury without redress]." *Cass*, 14 Wn. at 78.

There are three exceptions to this rule. First, a landowner "may not inhibit the flow of a watercourse or natural drain way." *See Island County v. Mackie*, 36 Wn. App. 385, 388, 675 P.2d 607 (1984). Second, a landowner is prohibited from artificially collecting and channeling surface water onto his neighbor's land, whether the water be such as would naturally have flowed onto the land or not. *See Feeley v. E.R. Butterworth & Sons*, 42 Wn.2d 837, 842, 259 P.2d 393(1953).

The third exception requires that the property owners use "due care" by acting in good faith and by avoiding unnecessary damage to the property of others. *Currens v. Sleek,* 138 Wn.2d 858, 868, 983 P.2d 626, 993 P.2d 900 (1999). In *Currens*, water from the Sleek property naturally seeped into a low-lying forested area on the *Currens* property. Sleek decided to clear-cut her property and develop four building sites. As a condition for the clear-cutting, Sleek was required by the Department of Natural

Resources to mitigate the storm water impacts of the clear-cutting by planting trees and installing drywells. No drywells were ever installed, which caused flooding damage to Currens, who filed suit. *Currens*, 138 Wn.2d at 860. The trial court dismissed the lawsuit on summary judgment on the basis that the common enemy rule shielded Sleek from any liability. The Court of Appeals affirmed. *Currens*, 138 Wn.2d at 860-61. The Supreme Court reversed the Court of Appeals, holding that a third "reasonable use" or "due care" exception applied, requiring property owners to; (1) act in good faith and (2) avoid unnecessary damage to the property of others. *Currens*, 138 Wn.2d at 865.

Warners mischaracterize our Supreme Court's statement "we decline to abandon our common enemy jurisprudence in favor of the reasonable use rule"[10] as meaning that the reasonable use rule cannot apply unless the defendant blocks a natural waterway or focuses surface water in greater than natural concentrations. Thus, Warners' argument goes, because the Warners did not block a natural drain course or channel excess water onto Hoover, the reasonable use exception cannot apply to them. This is a direct misreading of the case. As the Court held:

> 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 the necessary impact upon adjacent land.
>
> . . .
>
> 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. [11]
>
> . . .
>
> The outcome of this appeal is thus determined by application of our common enemy doctrine. Sleek is not liable under the common enemy

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[10] *Currens*, 138 Wn.2d at 866.
[11] *Currens*, 138 Wn.2d at 866-67.

> doctrine for flood damage caused by her improvements, unless, in the course of making those improvements, she blocked a natural drain or waterway, collected and discharged water onto her neighbors' land, ***or*** **failed to exercise due care in preventing unnecessary damage.**

Currens, 138 Wn.2d at 867-68 (emphasis added). Accordingly, the Court held that even though the first two exceptions to the common enemy doctrine did not apply, the *Currenses* were allowed to sue under the due care exception, which specifies that a landowner "will be shielded from liability only where the changes in surface flow are made both in good faith and in such way as to not cause unnecessary damage." 138 Wn.2d at 868.

The "reasonable use" exception applies squarely to the Warners, even though the first two exceptions to the common enemy doctrine do not. The Warners acted unreasonably *and* in bad faith by failing to take reasonable steps to protect Hoover from adverse drainage consequences of their project and by lying to the County to avoid getting permits. The Warners implemented their road grading and filling project in a critical area without any permits or engineering studies. The fact that they claim to have installed three ineffective ditches across their berm in 2006 to attempt to alleviate adverse drainage impacts on the Hoover property indicates that they knew their project was creating a risk of adverse drainage impacts to Hoover. In *Currens*, defendant Sleek was held liable simply for failing to comply with the terms of her permit. Here, the Warners' conduct is far more egregious. First, they lied to the Compliance Department for Thurston County Resources Stewardship Department, falsely denying that they had imported fill into a Critical Area. Once forced to apply for a grading permit, they obtained an exemption therefrom by filing false affidavits.

Petitioners argue at length that the trial court erred by mentioning the lack of utility of the Warners' project in determining that they failed to act reasonably. However, a review of the evidence as a whole indicates that such an observation on the part of the trial judge was neither fundamental nor material to the Court's decision given the other overwhelming proof of the Warners' unreasonableness and bad faith.

The reason why the relative utilities of projects are not relevant to the due care exception is that "[a] rule that requires parties to litigate the importance of a particular project in order to apportion liability is inconsistent with this state's historic deference to property rights." *Currens*, 138 Wn.2d at 867. Nowhere in the entire record in this case was there evidence or argument that focused on the weighing of the relative benefits of the Warner project versus the detrimental impacts on Hoover. The focus of the litigation had nothing to do with "the importance of a particular project" or any apportionment of liability based on the weighing of competing interests. It is clear that Judge Wickham's comment was basically surplusage. However, even if the trial court erred in mentioning this factor, such error was harmless because there was so much other substantial evidence in the record to support such a finding. *See Brundridge v. Flour Federal Services, Inc.*, 164 Wn.2d 432, 191 P.3d 879 (2008). A party on appeal may present any ground for affirming a trial court decision as long the record is sufficient to permit appellate consideration of the issue. *Satomi Owners Ass'n. v. Satomi*, 167 Wn.2d 781, 808 n. 21, 225 P.3d 213 (2009).

Warners' attempt to limit the holding of *Currens* to water that can be seen on the surface is without merit and runs contrary to long-established case law regarding the handling of subsurface water flows. Washington courts have long recognized a duty of

reasonable care when it comes to the handling of subsurface water as well as surface water. *See, e.g., Bjorvatn v. Pacific Mechanical Construction, Inc.*, 77 Wn.2d 563, P.2d 432 (1970); *Evans v. City of Seattle*, 182 Wn. 450, 47 P.2d 984 (1935) and *Wilkening v. State*, 54 Wn.2d 692, 344 P.2d 204 (1959).

Borden v. City of Olympia, 113 Wn. App. 359, 53 P.3d 1020 (2002) *rev. den.* 149 Wn.2d 1021, 72 P.3d 761 (2003), which the Warners avoid discussing in any detail, is instructive as to the trial court's findings and conclusions regarding subterranean flow. The Bordens short platted their four acre property into east and west halves. Near the center of the northerly portion lay a natural drainage basin. Surrounding such low point was a wetland, known locally as the Royal Gardens' Wetland which was "closed' in the sense that it drained only by seepage into ground." *Borden*, 113 Wn. App. at 363. Private developers built a new storm water drainage project, which collected water from three new subdivisions to the south, bringing water the water north and discharging it into the Royal Gardens Wetland, significantly increasing the volume of water being drained therein. *Id.* The City of Olympia program staff not only actively participated in a consulting role but also participated financially in the project. *Borden*, 113 Wn. App. at 363-64. Bordens' property experienced repeated flooding over a three year period. The City responded by installing a pump system, which only partially ameliorated the flooding. Finally, the City completed a municipal drainage facility that drew waters out of the Royal Gardens' wetlands and conveyed them north. The Bordens' flooding then abated. *Borden,* 113 Wn. App. at 364-65.

The Bordens sued the City, alleging negligence, nuisance, inverse condemnation, trespass and statutory waste. The City denied liability, based in part on the common

enemy doctrine, and the parties filed cross-motions for summary judgment. The Bordens' theory of liability was not that the Defendant caused flooding by discharging surface water from higher ground to lower ground, but rather that the City's project created new discharges into the wetlands, having the effect of supercharging them, exceeding the capacity of the soil to accept the water and convey it away. This had the immediate result of raising the water table on and under the Plaintiffs' property. *Borden*, 113 Wn. App. at 365. The trial court denied *Bordens'* motion and granted the City's motion for dismissal. The *Bordens* appealed. As this Court characterized the *Bordens'* claim:

> Although the *Bordens'* claim that the 1995 drainage system brought additional water from remote locations and discharged it into the Royal Gardens' wetlands, they do not claim that the additional water physically invaded their property as surface water. Rather, they claim that the additional water physically invaded their property with surface water. Rather they claim that the additional water saturated ('super charged') the ground and raised the water table, thereby causing the ground not to except storm water that otherwise would have drained to the west. **In short they claimed that the City was a user of land downhill from theirs; that the City obstructed the flow of surface and ground water and that the City should be held liable for doing that.**

Borden, 113 Wn. App. at 365-66.[12] Noting that under *Wilkening v. State*, 54 Wn.2d 692, 698, 344 P.2d 204 (1959) that the common enemy doctrine extended from surface water to ground water, this Court analyzed and applied the "due care" exception to the common enemy rule as applied by *Currens v. Sleek.* The Bordens claimed, in effect, that the City owed them a duty of due care because the records demonstrated that the City participated in the 1995 drainage project which altered the flow of surface and ***ground water*** on their land. The City responded that it (1) did not owe a duty because it did not participate in

[12] (Emphasis added.)

the 1995 drainage project, (2) it is a municipality rather than a private land owner, and (3) it is protected by the public duty doctrine. *Borden*, 113 Wn. App. at 369.

This Court rejected the City's arguments, and held that (1) the City did owe a duty of care under *Currens* because it actively participated in the designing and funding of the project and (2) the Court declined to distinguish between a municipality and a private land owner for purposes of the common enemy doctrine.

In summary, the *Currens* "due care" exception squarely applies to this case. The Court correctly determined that the Warners acted in bad faith, and without proper regard for the potential impacts of their project on the adjoining property, proximately causing the Plaintiff's damages. Such finding is independently sustainable regardless of any consideration to the utility of the project to the Warners.

C. The trial court correctly held that Warner committed negligence, nuisance and trespass.

The term "nuisance" refers more to the type of harm that a property owner sustains, typically interference with use and enjoyment of property, than to the underlying wrongful conduct. See *Peterson v. King Cty.*, 45 Wn.2d 860, 862-63, 278 P.2d 774 (1954). Establishment of a nuisance claim requires proof of fault on the Defendants' part, whether intentional, negligent, or strict liability. *See* RCW 7.48.120; *Gaines v. Pierce Cty.*, 66 Wn. App. 715, 719, 834 P.2d 631 (1992).

Plaintiff's complaint sounds in nuisance, negligence and trespass. The elements of negligence are duty, breach, causation and damages. *Harbeson v. Parke-Davis, Inc.*, 98 Wn.2d 460, 468, 656 P.2d 483 (1983). A trespass claim requires "'an intentional or negligent intrusion onto or into the property of another.'" *Borden*, 113 Wn. App. at 373. "Negligent trespass" requires proof of negligence (duty, breach, injury, and proximate

cause). *Gaines v. Pierce County*, 66 Wn. App. 715, 719-20, 834 P.2d 631 (1992).

Property owners may allege both nuisance and negligence claims, even where claims are based on the same actions. *See Peterson*, 45 Wn.2d at 862-63. Washington Courts treat claims for trespass and negligence arising from a single set of facts as a single negligence claim. *Pepper v. J.J. Welcome Constr. Co.*, 73 Wn. App. 523, 546-47, 871 P.2d 601 (1994).

The trial court premised liability on several grounds, any one of which is supported by the evidence in the record. Any overlapping of the causes of the action for nuisance, negligence and/or trespass is incidental and not a ground for error that would warrant reversal. In any event, Petitioners failed to preserve this argument on appeal, because they neither briefed nor made to the trial court the arguments they now advance on appeal.

D. The Warners waived the argument on appeal that the permanent injunction was overbroad because they failed to raise such argument before the trial court. Even if they did not waive the argument, said injunction was a proper exercise of the trial court's discretion.

The requirements for issuance of an injunction are well established. RCW 7.40.020 provides in relevant part:

> When it appears by the complaint that the plaintiff is entitled to the relief demanded and the relief, or any part thereof, consists in restraining the commission or continuance of some act, the commission or continuance of which during the litigation would produce great injury to the plaintiff; or when during the litigation, it appears that the defendant is doing, or threatened, or is about to do, or is procuring, or is suffering some act to be done in violation of the plaintiff's rights respecting the subject of the action tending to render the judgment ineffectual; or where such relief, or any part thereof, consists in restraining proceedings upon any final order or judgment, an injunction may be granted to restrain such act or proceedings until the further order of the court ...

One who seeks relief by injunction must show (1) that he has a clear legal or equitable right, (2) that he has a well-grounded fear of immediate invasion of that right, and (3) that the acts complained of are either resulting in or will result in actual and substantial injury to him. *Federal Way Family Physicians, Inc. v. Tacoma Stands Up for Life*, 106 Wn.2d 261, 265, 721 P.2d 946 (1986); *Washington Fed'n of State Employees,* 99 Wn.2d 878, 888. 665 P.2d 1337 (1983). All three of these criteria must be satisfied to warrant preliminary injunctive relief. The party requesting the injunction must make out a prima facie case, based upon uncontroverted facts. *Isthmian Steamship Co. v. National Marine Engineers' Beneficial Assn.*, 41 Wn.2d 106, 117-18, 247 P.2d 549 (1952). The party seeking injunctive relief must demonstrate a likelihood of success on the merits. *Tyler Pipe Industries, Inc. v. State, Dept. of Revenue*, 96 Wn.2d 785, 793, 638 P.2d 1213 (1982).

In deciding whether to grant an injunction, a trial court may consider as circumstances and weigh as equitable factors: (a) the character of the interest to be protected, (b) the relative adequacy to the plaintiff of injunction in comparison with other remedies, (c) the delay, if any, in bringing suit, (d) the misconduct of the plaintiff if any, (e) the relative hardship likely to result to the defendant if an injunction is granted and to the plaintiff if it is denied, (f) the interests of third persons and of the public, and (g) the practicability of framing and enforcing the order or judgment. *Holmes Harbor Water Co., Inc. v. Page,* 8 Wn. App. 600, 630-31, 508 P.2d 628 (1973).

Warner failed to raise any objection before the trial court as to the scope of the injunction. At the hearing to present the findings, conclusions and judgment, defense counsel made no mention of any objection to the permanent injunction as being

impermissibly overbroad. Thus, the Petitioners failed to preserve this argument for appeal. Our Supreme Court has held many times that questions which are not raised in any manner before the trial court will not be considered on appeal. *Long v. Odell*, 60 Wn.2d 151,153-54, 372 P.2d 548 (1962). In any event, the court properly considered all of the relevant legal factors and properly entered a permanent injunction, as well as an order directing the Petitioners to present a plan of repair.

Hoover met all of the requirements for a permanent injunction in this case. He has the clear legal right to be free from flooding by his neighbors. The prospect of irreparable harm was demonstrated by the fact that if the flooding was not alleviated, his septic system would fail, his house would be "red-tagged" by the County, and he would be forced to suffer a permanent devaluation of the property. In this instance, the trial court appropriately weighed the *Holmes Harbor Water Co.* factors in deciding to award the permanent injunction, as well as in giving the Warners the opportunity to partially reduce the judgment if they were able to repair the drainage so that water can flow again off the Hoover property. The trial court did not abuse its discretion in granting the injunction.

E. The trial court did not err in awarding Hoover costs and attorneys' fees under CR 37(c).

This Court reviews the trial court's decision to award or deny costs under CR 37(c) under an abuse of discretion standard. Whether a denial of a request for admission is "of substantial importance" presents a question which the trial judge is best situated to resolve. *Reid Sand & Gravel, Inc. v. Bellevue Properties*, 7 Wn. App. 701, 703, 502 P.2d 480 (1972). Requests for admission are a procedure for obtaining admissions of fact to which there is no real dispute and which the adverse party can admit cleanly, without

qualifications. The purpose of Rule 37 is to make available to the Court the means of preventing injustice when one party has by its conduct placed the other party at an unfair advantage. *Reid*, 7 Wn. App. at 705.

Whether or not Warners imported rock and fill to the areas in question was integral to every phase of both pretrial discovery and the trial itself. The requested admissions were the type of clean, clear issue anticipated in *Reid Sand & Gravel, Inc.* Here, had the Warners been truthful, there would have been no dispute as to whether they had brought in and dumped fill material in the area in question. The requests could not have been clearer, and to the trial judge, it did not even present a close call. CR 37(a) expressly states that a party may not refuse to respond to a request on the sole ground that the "matter of which an admission has been requested presents a genuine issue for trial." Here, the Court's award of expenses under CR 37(c) was proper. The Warners failed to meet any of the exceptions specified in CR 37(c)(1) through (4). The Requests were not objectionable. The admissions sought were of substantial importance. Warners had no reasonable ground to believe that the fact was not true. Finally, there was no other good reason for their failure to admit.

Further there was no error in the way the Court apportioned the award of attorneys' fees for the failure to admit. The attorney billing records demonstrate that Plaintiff was represented by the law firm of Stone Novasky, LLC from 7/30/12 until June 2013, at which point the Worth Law Group opened its file on 6/7/13. The billing records verify that Plaintiff's counsel received the responses on 10/14/13. (CP 329) Hoover sought entry of judgment for attorneys' fees in the amount of $8,256.70 from the Stone Novasky firm and $57,173.80 from the Worth Law group, for a total of $65,953.23. The

Court added these amounts, reduced the figure by 50%, and awarded attorneys' fees in the amount of $32,714.85.

The methodology was proper, as is illustrated by the fact that when one adds all of the itemized attorney's fees charges prior to receipt of the responses to requests for admission on 10/14/13, the amount of such hourly charges is $30,347.41. When one subtracts this figure from the $65,430.50 that were requested, one arrives at a figure of $35,083.09 for attorneys' fees actually incurred after the requests for admission were received, which is slightly more than what was awarded by the Court. The Court was in the best position to make this apportionment, which was well within its discretion. There was no error.

In terms of the awarding of costs, it was similarly within the Court's discretion to award all of the requested costs, since all such costs were actually and necessarily incurred in the trial of the matter. The Court did not err in this regard.

F. <u>This Court should award Hoover his costs and attorneys' fees on appeal pursuant to CR 37(c) and RAP 8.1.</u>

This Court should award Hoover costs attorneys' fees pursuant to RAP 18.1(a), which provides in relevant part:

> If applicable law grants to a party the right to recover reasonable attorneys' fees or expenses on review before the Court of Appeals or Supreme Court, the Party must request the fees or expenses as provided in this rule, unless a statute specifies that the request is to be directed to the Trial court.

CR 37(c), qualifies as "applicable law" for purposes of an award of costs and attorneys' fees on appeal under RAP 18.1(a). The issue of dumping of fill was of critical importance to the trial and was highly relevant to all claims. While CR 37(c) provides an award of reasonable expenses incurred in the making of the proof of the truth of the

requested matter, there is no legal or logical reason why expenses should not be awarded when the making of that proof is challenged and must be defended at the appellate level.

G. The Court should award Hoover his attorneys' fees and costs to the extent that such were reasonably and necessarily expended to respond to Warners' appeal of Finding of Fact 1.11, on the basis that such portion of the appeal is frivolous.

The deceptive conduct and bad faith in connection with the Warners' denials of the Requests for Admission further makes their appeal of Finding of Fact 1.11 frivolous within the purview of RAP 18.9(a), which states:

> The appellate court on its own initiative or on motion of a party may order a party . . .who uses these rules for the purpose of delay [or] files a frivolous appeal . . . to pay terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply[.]

At a minimum, this Court should award reasonable attorneys' fees to Hoover and against Warner for their frivolous appeal of Finding of Fact 1.11.

H. The Warners waived their right to appeal the ongoing maintenance conditions stated in the 7/8/14 Stipulation and Order Approving the Completion of the Plan. Even if they preserved their right to appeal such provisions of the Order, the trial court properly exercised its discretion in accepting that condition.

Conclusion of law 2.12 specifies:

> Upon completion of the corrective work, the matter shall be submitted to the Court for determination that the work was completed and is successful in compliance with the Court's Order.

(CP 434) In accordance with the Court's Order, the Warners submitted a proposed remediation plan which was approved by the trial court on 3/7/14 (CP 504) subject to the field approval of the as-built system by the experts for each party. By terms of the 3/7/14 Order, it includes the provision that "Defendants shall regularly inspect and maintain the drainage system (at least annually) to ensure that it functions." Both the attorney and the expert for the Warners stipulated to this condition in the repair proposal, which then

became part of the Court-approved final acceptance of the as-built system per the Stipulation and Order Approving the Completion of the Remediation Plan (CP 506) that was entered on 7/18/14. If Warners had any objection to either the plan or the conditions agreed to by the experts in the plan, they were obligated to take their objection up with the trial court. Had they done so, the experts would have been directed by the parties to meet and try to resolve the issue(s) in a cooperative fashion, seeking a ruling as a last resort. This Court is not in a position to second guess the details of a repair plan that was voluntarily entered into by the Defendants via Stipulated Order. The Warners waived their right to appeal this issue by their failure to make a timely objection.

In any event, the ongoing maintenance provision ion the order was a legitimate exercise of the Court's discretion, for obvious reasons. Implementation of the entirely necessary permanent injunction precluding future adverse effects on Hoover's drainage would be meaningless if the court-ordered plan of remediation carried with it no obligation into the future for the Warners to reasonably maintain the drainage system on their property to be sure that it continued to work into the future. The trial court did not abuse its discretion in making the Order.

III. CONCLUSION

Based upon the above authorities and argument, Respondent Greg Hoover request that this Court affirm the trial court's Findings, Conclusions and Judgment in all respects, and that this Court further award him his costs and attorneys' fees on appeal.

DATED this 17 day of September, 2014.

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J. Michael Morgan, WSBA No. 18404
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CERTIFICATE OF SERVICE

I certify under penalty of perjury of the laws of the State of Washington that on September 17, 2014 I emailed a PDF copy of Reply Brief of Respondent Greg Hoover, to Petitioners' counsel Thomas F. Miller and David J. Corbett who have agreed to accept electronic service, at the following email addresses:

tfm@tfmillerlaw.com
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DATED this 17 day of September, 2014.

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