No. 92276-4

SUPREME COURT
OF THE STATE OF WASHINGTON

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.

PETITION FOR REVIEW BY SCOTT AND ERNEST WARNER

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I. IDENTITY OF PETITIONERS

The Petitioners are Scott Warner and Ernest Warner (the "Warners"), who were the appellants in the Court of Appeals and defendants in the underlying Superior Court action.

II. CITATION TO COURT OF APPEALS DECISION

The Warners seek review of the Court of Appeals' published opinion in *Greg Hoover v. Scott Warner et al.*, No. 45742-3-II, initially filed July 14, 2015 and ordered published on August 18, 2015 (the "Opinion").[1] The Court of Appeals denied the Warners' Motion for Reconsideration on August 18, 2015.[2]

III. ISSUES PRESENTED FOR REVIEW

1. Under *Currens v. Sleek*, 138 Wn.2d 858, 983 P.2d 858 (1999), is a landowner liable under the due care exception to the common enemy doctrine only if she knew or should have known, at the time and "in the course of making" improvements, that the improvements posed a risk of "unnecessary damage" to another landowner?[3] *Yes.*

2. Did the Court of Appeals contradict *Currens*, and effectively replace the common enemy doctrine with a rule of strict liability for damage caused by altering the flow of surface water, when it affirmed the trial court's judgment against the Warners on the grounds that the Warners had failed to mitigate the damage caused by their grading project, even

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[1] The Court of Appeals' Opinion is attached hereto as Appendix A.
[2] The Court of Appeals' Order Denying Motion to Reconsider and Granting Motion to Publish is attached hereto as Appendix B.
[3] *Currens*, 138 Wn.2d at 867-68.

though the trial court had made no findings that the Warners knew or should have known about the risk of that damage at the time of they conducted their project? *Yes.*

3. Does proper application of *Currens* require that the trial court judgment be reversed, or at least that this case be remanded for further proceedings to determine whether the Warners knew or should have known at the time they undertook their grading project that it would cause "unnecessary damage" to Plaintiff Greg Hoover ("Hoover")? *Yes.*

4. When a trial court imposes sanctions under CR 37(c) for failure to make an admission in response requests for admission, does it err if it includes in the sanction "expenses incurred prior to the filing of the answers to the requests for admission?"[4] Is clarification of Washington law on this point to insure consistency between CR 37(c) and the essentially identical Fed.R.Civ.P 37(c)(2) a matter of substantial public interest? *Yes.*

IV. STATEMENT OF THE CASE

This case arose from Hoover's allegations that the Warners improperly blocked the surface and subsurface drainage of water off of his property. CP 275-76.[5] Hoover owns an approximately 7.5 acre parcel

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[4] 8B Charles A. Wright *et al.*, *Federal Practice and Procedure: Civil*, § 2290 (3rd ed. 2010)(interpreting Fed. R. Civ. P. 37(c)(2), and noting that "[t]he expenses that may be assessed [as a sanction] are only those that could have been avoided by the admission, and do not include expenses incurred prior to the filing of answers to the requests for admission").

[5] 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 did not appeal that decision.

located at 16547 Smith Prairie Road S.E. in Yelm, Washington. To the north and west, his parcel abuts the larger Warner parcel. RP (10/28/13) at 26:15-21.

As the trial judge found, "[t]he slope of the land [in the relevant area] is very gentle." CP 277. However, 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, toward the Warner parcel. Ex. 13; Ex. 39 at p. 4, 7; CP 277; CP 429 at ¶ 1.4; and RP (10/29/13) 145:6-10.

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. 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. In its Opinion, the Court of Appeals noted that "[w]ith soil such as Hoover's, water typically drains by flowing through the uppermost organic layers until it reaches the impermeable silt loam, where it then travels [underground] in whichever direction is naturally sloped downward."[6]

Starting around 2006, however, the drainage characteristics of the Hoover parcel began to change. Hoover alleged that the Warners built a new road running more or less adjacent to the entire common boundary of

[6] Opinion, at p. 2.

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 alleged 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.[7]

According to the Warners and their experts, Hoover's drainage problems traced to his over-grazing the property. RP (10/30/13) at 365:1 to 368:6; Ex. 45.[8] 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.

The Court of Appeals summarized the ensuing developments as follows:

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[7] This passage contains Hoover's testimony that "[t]he compaction of driving dump trucks and bulldozers over the top of it are what stopped the underwater [sic] flow").
[8] The Warners' theory is briefly summarized in the Letter Decision at CP 276.
[9] Opinion, at p. 3.

> Shortly after the Warners completed their work, Hoover began to notice water collecting on his property. Hoover informed Scott that his property would not drain properly and requested that Scott do something to alleviate the growing problem. Over the course of the next few years, the Warners dug a series of ditches along the road to attempt to mitigate Hoover's drainage issues. While these ditches removed some of the pooling water, the Warners refused Hoover's request to dig additional ditches, citing their ineffectiveness.[9]

Ultimately, Hoover filed suit against the Warners in 2012. CP 12.

On September 24, 2013, little more than a month before trial commenced, Hoover served Requests for Admissions on the Warners. CP 297-99. The Requests asked the Warners to admit "that in 2006 you or others under your control caused rock and fill material to be brought in 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.[10] 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

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[9] Opinion, at p. 3.

[10] 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").

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.

The trial court also rejected the Warners' contention that they were protected from liability by the common enemy doctrine, holding as follows:

> 1.15 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. Based on its findings and conclusions, 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. The trial court also imposed a permanent injunction, prohibiting the Warners from "undertaking any further actions on [their] property that adversely affect the drainage on the Hoover property." CP 433 at ¶ 2.10. Finally, the trial court awarded Hoover $32,714.85 in attorneys' fees and $17,933.60 in 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.

The sanction award included expenses Hoover incurred before the Warners submitted their answers to the requests for admission.[11]

The Warners appealed, challenging the sufficiency of the evidence to support the findings that: 1) water had drained off on the surface of Hoover's parcel prior to 2006; and 2) water drained under the surface of the Hoover parcel in the direction of the Warner parcel. The Warners also argued that the trial court had rejected the common enemy doctrine, and replaced it with the reasonable use rule, by basing its decision about the Warners' lack of due care on a comparison of the utility of the project with the damages caused to Hoover. Among other assignments of error, the Warners also objected to the breadth of the permanent injunction and the imposition of an amount of CR 37 sanctions that included expenses incurred prior to the filing of their answers to the requests for admission.

In its Opinion, the Court of Appeals affirmed as to all points, except as to the permanent injunction. The Warners moved for reconsideration. In the meantime, a third party had moved for publication of the Opinion. The Court of Appeals denied reconsideration, but decided that the Opinion should be published, in an order dated August 18, 2015. The Warners now petition the Supreme Court for Review.

[11] The details are spelled out in both the Opening Brief of Appellants at pp. 37-43 and the Warners' Motion for Reconsideration at pp. 2-7.

IV. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. Overview

This case poses two clusters of issues which this Court should review pursuant to RAP 13.4(b).

First, the Court of Appeals erred, and contradicted both *Currens v. Sleek* and *Borden v. City of Olympia,* by holding that an *ex post* failure to mitigate the drainage consequences of a non-negligent action suffices to impose liability on a landowner under the due care exception to the common enemy doctrine.[12] The Opinion effectively replaces the common enemy doctrine with a rule of strict liability, because under its holding even non-negligent improvers will be found liable if they subsequently fail to correct the adverse drainage consequences of their actions. This issue is also one of substantial public interest, since conversion of the common enemy doctrine into a rule of strict liability would have significant consequences for landowners throughout the state.

Second, the Court of Appeals erred by affirming a sanction under CR 37(c) that includes expenses incurred prior to the filing of the answers to the requests for admission at issue. There is little Washington case law that interprets the scope of a trial court's discretion to award sanctions under CR 37(c), so the Warners do not maintain that the lower courts' decisions on this issue in this case conflict with binding Supreme Court precedent, or other decisions by the Court of Appeals. But the sanction

[12] *Compare* Opinion, at pp. 15-17 *with Currens,* 138 Wn.2d at 867-68, *and Borden v. City of Olympia,* 113 Wn. App. 359, 371-72, 53 P.3d 1020 (2002).

award in this case *does* contradict the terms and logical structure of CR 37(c) itself, as well as federal precedent and authoritative secondary sources interpreting the substantially identical Fed. R. Civ. P. 37(c)(2). The proper scope of sanctions under CR 37(c) is an issue of substantial concern to lawyers and judges throughout this state, and one which should be clarified by this Court.

2. The criteria governing acceptance of review.

Pursuant to RAP 13.4(b), a petition for review will be accepted by this court only:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
> (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

As explained in detail below, the issues presented for review here satisfy one or more of these criteria.

3. The Opinion of the Court of Appeals conflicts with *Currens v. Sleek* and as well as with decisions by the Court of Appeals.

The common enemy doctrine, to which Washington still adheres, is a defense to liability: under its original terms, "a landowner may develop his or her land without regard for the drainage consequences to other landowners." [13] There have long been exceptions to this defense, and

[13] *Currens,* 138 Wn.2d at 861. *See also Lord v. Pierce Cnty.,* 166 Wn. App. 812, 820, 271 P.3d 944, 948 (2012) (noting that the original formulation of the common enemy doctrine held that "surface water, caused by the falling of rain or the melting of snow, and that escaping from running streams and rivers, is regarded as an outlaw and a common

in *Currens v. Sleek* this Court articulated a new one known as the "due care exception."[14]

Under the due care exception to the common enemy doctrine, 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."[15] Critically, even as supplemented by the due care exception, the common enemy doctrine is not a rule of strict liability for damage caused by impeding the flow of diffuse surface waters. It remains the case that a landowner "is not liable . . . for flood damage caused by her improvements, unless, in the course of making those improvements, she . . . failed to exercise due care in preventing unnecessary damage."[16] Effectively, this means that "Washington now recognizes a negligence cause of action for altering the flow of naturally occurring surface and ground water."[17]

The elements of negligence are duty, breach, causation, and injury.[18] Although *Currens* establishes that each landowner owes other landowners a duty of due care with regard to actions affecting surface water, whether given actions constitute a breach of that duty depends on what the actor knew or should have known about the likely consequences

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enemy against which anyone may defend himself, *even though by so doing injury may result to others*") (emphasis in original).
[14] *Currens*, 138 Wn. 2d at 865.
[15] *Id.*
[16] *Currens*, 138 Wn.2d at 867-68 (emphasis added).
[17] *Borden v. City of Olympia*, 113 Wn. App. 359, 368, 53 P.3d 1020 (2002).
[18] *See, e.g., Keller v. City of Spokane*, 146 Wn. 2d 237, 242, 44 P.3d 845 (2002).

of those actions at the time she undertook them.[19] If what an actor learned about the consequences of his actions after they occurred could turn an innocent action into a negligent one, negligence would simply become strict liability under a different name.[20]

This conclusion is not only required by application of standard negligence principles to the surface water context, it clearly underpins the holdings of both *Currens* and *Borden.* In *Currens*, as previously noted, this Court rested possible liability under the due care exception on the absence of due care "in the course of making" the improvements in question.[21] Clearly, a subsequent failure to mitigate the consequences of an action that was taken with due care does not suffice to create liability under *Currens.* Moreover, *Currens* reversed a grant of summary judgment to a landowner who had clear-cut her property without complying with an Environmental Checklist she had submitted prior to undertaking her improvement.[22] This Court held that the defendants' failure to comply with mitigation measures the defendant herself had specified in advance of her actions created a genuine issue of material fact as to whether she had acted with due care.[23]

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[19] *See, e.g., Young for Young v. Key Pharm., Inc.*, 130 Wn. 2d 160, 168-69, 922 P.2d 59 (1996) (discussing the difference between negligence and strict liability in the context of products liability, and noting that imposing liability "only if the manufacturer knew or should have known of the defect at the time the product was sold or distributed" is a key feature of a negligence approach).

[20] Conceivably, an actor could attempt to defend herself by claiming that she never learned or should have learned about the consequences of her actions, but any such attempted defense would fail in light of the notice provided by the initiation of a lawsuit.

[21] *Currens*, 138 Wn.2d at 867-68.

[22] *Currens*, 138 Wn.2d at 859-60.

[23] *Id.* at 868.

Similarly, in *Borden*, the Court of Appeals reversed a grant of summary judgment for the City of Olympia because "the record supports inferences that the City knew or should have known [at the time it undertook its project] that the water table would rise; that surrounding properties would be adversely affected; and that alternatives were reasonably available."[24] In both cases, the existence of a genuine issue of material fact regarding what the defendant knew or should have known about the consequences of the project at the time the project was conducted was critical to the court's holding.

In the current case, by contrast, the trial court did not properly apply the due care exception to the common enemy doctrine. It made no findings about what the Warners knew or should have known about the likely consequence of their project at the time they undertook it. Given the fact that virtually all (if not all) of the water draining off Hoover's property prior to 2006 did so underground, where no one could see it or confidently predict its direction of flow, it is not surprising that the trial court did not find that the Warners knew or should have known that driving heavy equipment on their road and adding material to pre-existing fill areas would impair Hoover's drainage.[25] Instead of making such

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[24] *Borden*, 113 Wn. App. at 371-372.

[25] In their appeal to the Court of Appeals, the Warners challenged the sufficiency of the evidence to support the trial court's findings suggesting that there was any water draining off on the surface of Hoover's property prior to 2006. *See* Opening Brief of Appellants, at pp. 11-13. The Court of Appeals rejected this challenge. In their Motion for Reconsideration, the Warners pointed out that even if there was sufficient evidence in the record to support finding that there was *some* surface water run-off prior to 2006 (and this was all the trial court had found), this was not enough to support an inference that the Warners knew or should have known about such flows. *See* Motion for Reconsideration,

findings, the trial court based its holding that the Warners had acted without due care on a comparison of the utility of the project to the Warners with the damages inflicted on Hoover. CP 431 at ¶ 1.15.

The Court of Appeals acknowledged in its Opinion that the trial court's reliance on the utility comparison was an error.[26] As this Court established in *Currens*,

> 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.[27]

However, the Court of Appeals advanced what it described as two reasons why the trial court's error was harmless.

First, according to the Court of Appeals, "the trial court's references to 'utility' and 'impact' were superfluous because the court also considered (consistent with what the due care exception contemplates) the

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at pp. 12-14. In this Petition for Review, the Warners do not allege that the Court of Appeals committed reviewable error by finding sufficient evidence of some pre-2006 surface flows (because, although the Warners continue to believe that this was error, they acknowledge that this error does not meet the criteria of RAP 13.4(b)), but they do maintain the position adopted in their Motion for Reconsideration: even if there was some drainage on the surface off of Hoover's parcel prior to 2006, since no witness claimed to have ever seen it and all lay witnesses denied its existence, one cannot infer that the Warners knew or should have known that their actions would impede Hoover's surface drainage.

[26] Opinion, at pp. 15-16.

[27] *Currens*, 138 Wash. 2d at 866-67.

fact that the Warners took no action to mitigate the damages from the grading project until Hoover requested their assistance to alleviate the adverse drainage consequences."[28] Unfortunately for the Court of Appeals, for the reasons stated above, this consideration is not consistent with understanding the due care exception to the common enemy doctrine as creating a negligence cause of action: if mere failure to mitigate the consequences of a non-negligent action renders the actor liable, negligence collapses into strict liability. Because the reasoning of the Court of Appeals reduces the due care exception to the common enemy doctrine into a rule of strict liability, it directly conflicts with both *Currens* and *Borden.*

Second, the Court of Appeals noted that it could "affirm based on any ground supported by the record."[29] It then proceeded to analyze *Borden,* asserting that in that case it had "reversed an order granting summary judgment in favor of the city in part because the city could have taken measures to properly analyze the drainage capabilities and could have realized that alternatives existed." [30] Although correct as far as it goes, this statement overlooks the critical fact that in *Borden,* the Court of Appeals also found that "the record supports inferences that the City *knew or should have known* [at the time it undertook its actions] *that the water table would rise; that the surrounding properties would be adversely*

[28] Opinion, at p. 15.
[29] Opinion, at p. 16.
[30] Opinion, at p. 16 (emphasis added).

affected; *and* that alternatives were reasonably available."[31] Without the finding that the City knew or should have known that the surrounding properties would be adversely affected by its actions, the finding that the City could have conducted further analysis and could have taken mitigating measures would have been essentially irrelevant.[32] Similarly, the fact that the Warners did no investigation prior to their project (other than being aware that no surface water had ever been seen flowing in the affected area) is meaningless in the absence of any finding that they knew or should have known enough about the likely consequences of their project to impose a duty to thoroughly investigate.[33]

In the end, the Court of Appeals' second reason for affirming the trial court on the breach of the duty of due care is the same as their first reason:

> [O]nce they became aware of the issue, the Warners did little to mitigate the damage. In fact, Scott contacted Thurston County to levy a complaint against Hoover for septic failures stemming from the flooding that his own project caused.
>
> And despite some suggestion that the Warners initially agreed to remove the road, Ernest testified that they refused to continue cooperating with Hoover after Hoover levied

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[31] *Borden*, 113 Wn. App. at 371-72 (emphasis added).

[32] The key to any determination that a defendant has failed to act with due care is not a finding that the defendant could have acted differently (or even knew that she could have acted differently), but rather that she should have acted differently, given what she knew or should have known at the time. *See, e.g., Burr v. Clark*, 30 Wn.2d 149, 190 P.2d 769 (1948).

[33] The due care exception to the common enemy doctrine itself imposes duty on all landowner to take "due care." But whether the duty of due care requires an extensive pre-project investigation depends on the facts of the case; it is not a necessary implication of the duty of due care.

> complaints against them. Consequently, the Warners cannot be said to have used due care to avoid unnecessary damage to Hoover.[34]

In short, the Court of Appeals found that the Warners were negligent because "once they became aware of the issue" *after* they completed their project (and at least in part *years* after), they failed to mitigate the damage or "continue cooperating" with Hoover. [35] Because the common enemy doctrine, as supplemented by the due care exception, simply does not impose on a landowner an abiding duty to correct the drainage consequences of non-negligent actions, this was error. Moreover, it was not only error, but is directly contradictory to *Currens* and *Borden.* This Court should accept review to clarify that a refusal to cooperate in mitigating non-negligently caused water damage is not enough to support liability under the due care exception to the common enemy doctrine.

In responding to a similar argument the Warners made in their Motion for Reconsideration, Hoover strikingly did not try to argue that failure to mitigate the effects of a non-negligent action could in fact support liability under the due care exception.[36] Instead, he argued that the record supports the conclusion that the Warners knew or should have known about the likely adverse consequences of their action at the time they undertook it.[37] However, although an appellate court can affirm on

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[34] Opinion, at p. 17.
[35] *Id. See also id.* at p. 3, noting that it was not until "after the Warners completed their work" that Hoover made any comments to the Warners about drainage consequences, and that ditches were dug "over the course of the next few years" (emphasis added).
[36] Answer of Respondent Greg Hoover to Motion for Reconsideration, at pp. 4-9.
[37] *Id.*, at pp. 6-9.

any ground supported by the record, it cannot make credibility determinations where the trial court has not done so.[38] Hoover and Warner presented diametrically opposed testimony about when the ditches were dug through the road.[39] The trial court neither explicitly nor implicitly resolved this credibility issue. It also explicitly rejected Hoover's contention that the Warner's project was illegal. CP 433, at ¶ 2.8. In this context, it would be improper for this Court to affirm the trial court on the grounds that the record supports a finding that the Warners knew or should have known about the likely consequences of their action before they undertook it. More importantly for this Petition for Review, even if the published Opinion reached a proper conclusion on liability (which the Warners deny), review is still proper since the Opinion fundamentally misstates the law and conflicts with *Currens* and *Borden.*

4. Clarifying the proper scope of a sanction award under CR 37(c) is an issue of substantial public importance.

The trial court in this matter awarded Hoover $32,714.85 in attorney's fees and $17,933.60 in costs as sanctions under CR 37(c). CP 435-436. A substantial part of the costs awarded were demonstrably incurred before the Warners denied the requests for admission at issue.[40]

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[38] *See, e.g., State v. Bencivenga*, 137 Wn. 2d 703, 709, 974 P.2d 832 (1999) (noting that "the finder of fact is the sole and exclusive judge of . . . the credibility of witnesses"). *See also Grundy v. Brack Family Trust*, 151 Wn. App. 557, 569-70, 213 P.3d 619, 625-26 (2009) (noting that appellate courts "defer to the finder of fact on issues of credibility and weight of the evidence").

[39] The Opinion states that the ditches were dug "[o]ver the course of the next few years" and at all events "after the Warners completed their work." Opinion, at p. 3.

[40] The details are spelled out in both the Opening Brief of Appellants at pp. 37-43 and the Warners' Motion for Reconsideration at pp. 2-7.

As for the fee component of the award, it exceeded the entire fees charged by Hoover's counsel for the period between the date the Warners submitted their denial and the end of trial.[41]

In its Opinion, the Court of Appeals upheld the sanction award in its entirety, noting that "trial courts are permitted to award 'reasonable' expenses and attorney's fees," that "[w]hat is reasonable depends on the circumstances of each case," and that appellate courts "do not substitute [their] judgment for that of the trial court."[42] This was error, because CR 37(c) expressly limits the scope of the fee award to "the reasonable expenses incurred in making th[e] proof" of what should have been admitted, and the proof is necessarily "made" *after* the request for admission is denied (the rule refers to party making a request for admission "thereafter prov[ing]").[43]

However, although there is language in one of this Court's opinions to the effect that "reimbursement [under CR 37(c)] is limited to the costs associated with the time period after which a reasonable person . . . should have conceded the issues," it is not clear whether this language is part of the Court's holding.[44] Nor is there any other Supreme Court or

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[41] Counsel for the Warners objected in the trial court to awarding fees incurred "predecessor to" service of the Warners' denial of the requests at issue. *See* RP (12/23/13) at 632:22 to 633:17.

[42] Opinion, at p. 20.

[43] CR 37(c).

[44] *See Thompson v. King Feed & Nutrition Serv., Inc.*, 153 Wn.2d 447, 452, 105 P.3d 378, 380 (2005). The quoted language summarizes the trial court's decision, but appears to do so with approval. However, interpreting *Thompson* is complicated by the fact that the lead opinion is not the majority opinion on the issue of CR 37(c) sanctions. *See Thompson*, 153 Wn.2d at 389-91. The relevant part of the Court of Appeals opinion which this Court reviewed in *Thompson* is unpublished.

Court of Appeals opinion that definitively addresses the issue of whether a CR 37(c) sanction may include expenses incurred before the requests for admissions are denied.[45] This is thus a point where the procedural rules applied in the Superior Courts in this state are in need of clarification, which makes this "an issue of substantial public interest that should be determined by" this Court.[46]

Clarification of the allowable scope of sanctions under CR 37(c) will also serve the purpose of harmonizing the interpretation of identical state and federal civil rules. This Court has held that "[w]here a federal rule is adopted as the state rule, the construction of the former should be applied to the latter."[47] It is well established under Fed. R. Civ. P. 37(c)(2) that only "the expenses that flow[] directly from the improper answers" that can properly be included in a CR 37(c) sanction.[48] As Wright and Miller put it, "[t] he expenses that may be assessed are only those that could have been avoided by the admission, and do not include expenses incurred prior to the filing of the answers to the requests for admission."[49]

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[45] *See, e.g., Clausing v. Kassner*, 60 Wn.2d 12, 20, 371 P.2d 633 (1962) (approving sanction fixing a "fee . . . only for that portion of the trial made necessary by defendant's . . . abuse of the rule," but not directly stating that a fee for some other part of the trial would have been improper).

[46] RAP 13.4(b)(4).

[47] *Harding v. Will*, 81 Wn.2d 132, 135 note 2, 500 P.2d 91, 95 (1972).

[48] *Marchand v. Mercy Med. Ctr.*, 22 F.3d 933, 939 (9th Cir. 1994). *See also* 7 *Moore's Federal Practice*, §37.73 *(3rd ed. 2015)* (noting that "courts must look for a sufficient causal nexus between the expense claimed, and the failure to admit"). A failure to admit cannot cause an expense that was incurred prior to the failure to admit.

[49] 8B Charles A. Wright *et al.*, *Federal Practice and Procedure: Civil*, § 2290 (3rd ed. 2010) (emphasis added).

Because Fed.R.Civ.P. 37(c)(2) was the model for, and remains virtually identical to, CR 37(c), *Harding* requires that "the construction of the former should be applied to the latter."[50] Accordingly, this Court should grant review on the issue of the proper scope of expenses that may be awarded as part of a CR 37(c) sanction, reverse the Court of Appeals, and remand to the trial court with instructions to set a sanction that does not include expenses (costs or fees) incurred prior to the filing of the answers to the requests for admission.

V. CONCLUSION

For the foregoing reasons, this Court should accept review, reverse the Court of Appeals holding that an *ex post* failure to mitigate damages suffices to support liability under the due care exception to the common enemy doctrine, and either reverse the trial court or remand to the trial court for further proceedings to determine whether the Warners knew or should have known at the time they undertook their project that it would cause unnecessary damage to Hoover. This Court should also accept review of the CR 37(c) issue, clarify that sanctions under that rule may not include expenses incurred prior to the filing of the answers to the requests for admission, and remand to the trial court for the calculation of a proper sanction.

[50] *Harding*, 81 Wn.2d at 135 note 2. *Compare* Fed. R. Civ. P. 37(c)(2) and CR 37(c).

DATED this 17th day of September, 2015.

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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, 2015 I emailed a PDF copy of the attached Petition for Review, with Appendices, 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.

Dated this 17th day of September, 2015.

By: David J. Corbett
David J. Corbett

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

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, and WARNER FARMS, Appellants.	No. 45742-3-II (consolidated with No. 46562-1-II) UNPUBLISHED OPINION

JOHANSON, C.J. — Scott and Ernest Warner appeal a trial court's ruling finding them liable for negligence, nuisance, and trespass after their road grading project caused damage to Greg Hoover's property by impeding the natural flow of surface and subsurface waters. The Warners also appeal the permanent injunction entered in connection with the trial court's ruling, the court's decision requiring them to design and implement a remediation plan, and the court's award of fees and sanctions in Hoover's favor.

We hold that (1) substantial evidence supported each of the trial court's critical findings of fact, (2) the common enemy doctrine does not shield the Warners from liability because the "due care" exception applies, (3) the trial court properly found the Warners liable for damages caused

to Hoover, (4) the trial court abused its discretion by granting an overly broad injunction, (5) the trial court did not abuse its discretion by awarding sanctions under CR 37(c), and (6) the Warners have waived any challenge to the remediation plan. Accordingly, we affirm in part and reverse in part.

FACTS

I. BACKGROUND

Hoover purchased 7.5 acres of property in Yelm in 1999. Ernest[1] owns a 20-acre parcel that borders the west and north sides of Hoover's property. Water naturally drains downward from Hoover's property onto Ernest's property in a north by northwest direction, with some of the water draining across Hoover's western-most boundary.

Before 2006, Hoover's property did not suffer from "ponding" or standing-water accumulation because of the natural composition of the surrounding soil. The soil on Hoover's property comprises a permeable layer of organic material on top of an impermeable layer known as "silt loam," which developed from sediment in a glacial lake bed. With soil such as Hoover's, water typically drains by flowing through the uppermost organic layers until it reaches the impermeable silt loam, where it then travels in whichever direction is naturally sloped downward.

In 2006, the Warners commenced a development project on the portions of their property abutting Hoover's. According to Hoover, the project involved the creation of a new road adjacent to the western property line. Hoover understood that the Warners intended to clear the road as a way to gain access to a segment of their property that the Warners intended to subdivide. Hoover

[1] Where necessary we refer to Scott and Ernest Warner by their first names for clarity. We intend no disrespect.

witnessed the Warners using dump trucks and heavy equipment to deposit and compact fill material to form the road. Hoover believed that the Warners knew that filling and grading that area would result in adverse drainage consequences to Hoover's property.

But according to the Warners, they transported no fill material into the area and they used heavy equipment only to "blade" vegetation off an existing roadway. The Warners claimed that they did nothing to change the grade on either the north or west property lines.

Shortly after the Warners completed their work, Hoover began to notice water collecting on his property. Hoover informed Scott that his property would not drain properly and requested that Scott do something to alleviate the growing problem. Over the course of the next few years, the Warners dug a series of ditches along the road to attempt to mitigate Hoover's drainage issues. While these ditches removed some of the pooling water, the Warners refused Hoover's request to dig additional ditches, citing their ineffectiveness. Instead, according to Hoover, the Warners promised to remove the road.

Ultimately, however, the Warners declined to remove the road, in part because Hoover complained to the Department of Ecology and the Department of Labor and Industries regarding the Warners' projects. Meanwhile, Hoover's drainage problems worsened.

The saturated soil caused the well that served Hoover's home to collapse and his septic system to fail. The encroaching water cracked the foundation in Hoover's home and invaded his crawl space. The water also reduced Hoover's available space to graze his horses. Thurston County then served Hoover with a violation notice after Scott complained that Hoover's septic tank failure caused waste to spill into roadside ditches.

In 2013, Hoover brought suit alleging several causes of action, including timber trespass, statutory waste, nuisance, trespass, and negligence. Hoover also sought temporary and permanent injunctive relief to preclude the Warners from continuing to impede his property's ability to drain and to prevent ongoing damage.

II. PROCEDURE

Before trial, as the parties conducted discovery, the Warners responded to two requests for admission from Hoover that are relevant to this appeal:

> **REQUEST 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 attached Exhibit 1.
> **RESPONSE:**
> **DENY**
> **REQUEST 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 attached Exhibit 1.
> **RESPONSE:**
> **DENY**

Clerk's Papers (CP) at 430-31.

At trial, the court heard extensive testimony involving several critical issues. Among these were the existence and use of fill material; the natural pattern of water flow between the two properties; whether the Warners' grading work did in fact impede that natural flow to cause Hoover's drainage complications; the efficacy of existing remedial measures and the availability of future remedial efforts; and what, if any, damages Hoover suffered.

A. USE OF FILL MATERIAL

As to the use of fill material, Hoover explained that during the Warners' 2006 project, he observed the Warners using dump trunks and heavy machinery to dump, spread, and compact an

extensive amount of foreign fill material along the western boundary of his property to create a new road. In 2006, this new road raised the level of the ground as much as two feet. Hoover estimated that he saw the Warners use as many as 30 to 50 dump truck loads of material for this purpose.

Several of Hoover's current and former neighbors corroborated his version of the events. Scott Hyderkhan, who owned property north of Hoover's in 2006, recalled witnessing the Warners "continuously" dump loads of large rock for what in his view was "hundreds of feet." 1 Report of Proceedings (RP) at 65. Linda Seamount, Hyderkhan's girlfriend, also noticed Ernest dumping truckloads of rocks and gravel. Likewise, Jerry Hoover,[2] another nearby property owner, saw the Warners dumping fill dirt and rock in connection with the grading activity in 2006.

Other qualified witnesses also testified in support of Hoover's allegations. Joseph Vincent McClure, a structural engineer, opined that the road comprised recent fill. Similarly, Robert Manns, a Thurston County land use compliance coordinator, explained that he observed two or three feet of fill material, which he noticed because of the difference in height between the fill and the natural ground. Finally, Lisa Palazzi, Hoover's soil physics and hydrology expert, determined that fill material had been deposited as part of the 2006 project on a "more-probable-than-not" basis. 2 RP at 275.

But the Warners denied having brought fill material in, claiming instead that they were simply performing maintenance work on an existing road.[3] William Halbert, the Warners' expert

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[2] Jerry Hoover is not related to Greg Hoover.

[3] Later in trial, Ernest admitted that he remembered hauling some rock to cover a culvert. This admission appears to relate to work performed on the north property boundary.

hydrologist, acknowledged the presence of fill by digging several "test pits," but he opined that the material existed in the subject locations for at least 20 years. In Halbert's view, the material looked consistent with ground having been disturbed by "blading."

B. PROJECT'S IMPACT

As to the project's impact, Halbert and Palazzi generally agreed that the direction of the drainage and water flow is north and northwest across Hoover's property, but they disagreed regarding the extent of the impact that the Warners' grading project had on the otherwise natural occurrence. According to Halbert, the material in the western road was highly permeable and would not have been compacted enough by the heavy machinery to obstruct natural drainage.

In Halbert's view, it was not the Warners' project that caused the ponding and other adverse drainage issues. Instead, he opined that the source of the problem was overgrazing and compacting of the surrounding soil by Hoover's several horses, a problem that could be remedied by "rip[ping]" and revegetating the surrounding soil. 3 RP at 427. Halbert also believed that the existing ditches appeared to be sufficiently deep to alleviate ponding problems.

Palazzi was of a different mind. She observed standing water on Hoover's property and opined that the 2006 fill material had blocked natural flow pathways. Palazzi explained further that compacting and "smearing" by the Warners' heavy machinery exacerbated the drainage issues. Specifically, Palazzi testified that the presence of additional fill and the accompanying increased elevation impeded the surface water flow while the heavy machinery compaction obstructed the subsurface flow. According to Palazzi, an engineering solution was necessary to restore the normal drainage pathways because the existing ditches were not adequate to allow

water to drain west of Hoover's property. Palazzi also suggested future monitoring as part of any remedial effort.

Furthermore, Martha Carroll, from whom Hoover had purchased his property, explained that she had never experienced problems with standing water or flooding during her time living on the property. During a recent visit to the property, she observed standing water and noticed that the land had sunk "a lot." 2 RP at 119. Carroll also remarked that the "berm" on the west side of the property had not been there when she owned the home and that there was never a road on the western property line.

C. RULING AND FINDINGS

Following trial, the court issued a letter ruling. The trial court concluded that it was persuaded by a preponderance of the evidence that the Warners had brought in rock or other material to perform significant work along the north and west boundaries of Hoover's property in 2006. The court acknowledged that because of the gentle slope of the land, even a slight impact would have a "significant effect on the flow of rainwater off the Hoover parcel." CP at 277.

The trial court also found that Hoover did not have considerable problems with standing water until after the Warners' 2006 project and that Hoover's adverse surface and subsurface drainage situation starting immediately thereafter did not appear to be coincidental. Of the two experts, the trial court found more credible Palazzi's explanation that surface and subsurface water flow from Hoover's property to Ernest's had been reduced or eliminated.

Regarding the Warners' assertion that they were shielded from liability by the "common enemy" doctrine, the trial court ruled that the Warners took no action to mitigate the damage until Hoover brought it to their attention, at which point they dug, or allowed Hoover himself to dig,

rudimentary ditches. The court considered the low level of utility of the project, the minimal mitigation efforts, and the significant impact on Hoover to support its conclusion that the Warners' actions were not reasonable and that they did not act in good faith and in a manner to avoid unnecessary damage to Hoover's property.

The trial court awarded Hoover $156,000 representing the diminution in value of his property, but it conditioned that award on the Warners' inability to remedy the damage. The court permitted the Warners to purge the judgment by retaining a professional and designing a plan to restore the drainage pathways. Additionally, the trial court awarded Hoover $25,000 in general damages, $12,000 for repairs, and $60,000 for loss of use and enjoyment.

The trial court also awarded Hoover attorney fees under CR 37(c)—the rule that governs a party's failure to admit the truth of a matter during discovery—because the Warners denied using fill materials in their responses to Hoover's requests for admission. Moreover, the trial court permanently enjoined the Warners from undertaking any further action to adversely affect the drainage on Hoover's property.

The trial court entered findings of fact and conclusions of law consistent with the foregoing. Ultimately, the court found the Warners liable on Hoover's theories of negligence, nuisance, and trespass.

In compliance with the trial court's order, the Warners submitted a remediation plan, which the court approved. But the trial court then imposed a requirement that the Warners regularly inspect and maintain the drainage system—at least annually—to ensure its function. The parties later stipulated to the success of the remediation plan. The Warners appeal.

ANALYSIS

I. SUBSTANTIAL EVIDENCE TO SUPPORT THE TRIAL COURT'S FINDINGS OF FACT

The Warners contend that substantial evidence does not support the trial court's finding of fact that water drained off the surface of the Hoover parcel to the north or northwest prior to 2006. The Warners assert further that substantial evidence does not support the trial court's finding of fact that subsurface water drained underground from the Hoover property to the Warner property. We hold that substantial evidence supports each challenged finding because the evidence demonstrates that a rational trier of fact could conclude that both surface and subsurface water flowed as described.

We review a trial court's findings of fact for substantial evidence to support the findings and then determine whether those findings of fact support its conclusions of law. *Scott's Excavating Vancouver, LLC v. Winlock Props., LLC*, 176 Wn. App. 335, 341, 308 P.3d 791 (2013), *review denied*, 179 Wn.2d 1011 (2014). "Substantial evidence" is the quantum of evidence "sufficient to persuade a rational fair-minded person the premise is true." *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003).

We make all reasonable inferences from the facts in Hoover's favor as the prevailing party below. *Scott's Excavating*, 176 Wn. App. at 342. We review the trial court's conclusions of law de novo. *Scott's Excavating*, 176 Wn. App. at 342. We will not "disturb findings of fact supported by substantial evidence even if there is conflicting evidence." *Merriman v. Cokeley*, 168 Wn.2d 627, 631, 230 P.3d 162 (2010). And we defer to the trial judge on issues of witness credibility and persuasiveness of the evidence. *Boeing Co. v. Heidy*, 147 Wn.2d 78, 87, 51 P.3d 793 (2002).

A. SURFACE WATER

The Warners challenge the trial court's findings that surface and subsurface water drained naturally from the north and northwest, across Hoover's property and onto the Warners' property before 2006. Regarding drainage of surface water, the Warners appear to challenge finding of fact 1.4. Finding 1.4 provides in pertinent part,

> 1.4 Surface and sub-surface drainage runs naturally across the Hoover property to the north and northwest. From the time of his purchase until 2006, Hoover did not have any problems with flooding or water gathering on his property.

CP at 429. The crux of the Warners' challenge is that the evidence does not support the finding that surface water drains in this direction because Hoover did not actually see surface water draining from his property to the Warners' property.

But experts who testified on behalf of both Hoover and the Warners agreed that water naturally flowed across Hoover's property in a north by northwest direction. And both Palazzi and McClure, a structural engineer, spoke specifically to the fact that this drainage pathway includes surface waters. Specifically, according to McClure, "the vast majority of the flow on this site would be on the surface." 2 RP at 159. Accordingly, a rational trier of fact could conclude that water drained off the surface of the Hoover property to the north and the northwest and, therefore, we hold that substantial evidence supports the trial court's finding.

B. SUBSURFACE WATER

The Warners also contend that because no party undertook an investigation specifically to determine whether subsurface water traveled in the same direction as surface water, the trial court's causation findings regarding the subsurface water flow are not supported by substantial evidence. The relevant findings of fact are findings 1.12 and 1.13, which provide,

> 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.

CP at 431.

But practically speaking, the Warners' assertion is essentially that because there is no direct evidence that subterranean water traveled north and west from Hoover's property onto the Warners' property, substantial evidence necessarily does not support the trial court's finding to that extent. The Warners rely in part on *Nejin v. City of Seattle*, 40 Wn. App. 414, 698 P.2d 615 (1985), to support their claim.

In *Nejin*, Valentina Nejin sued the city of Seattle for negligence alleging that a broken sewer line in the vicinity of her property caused landslide damage. 40 Wn. App. at 415. But expert testimony revealed that although excess water from a broken sewer could cause landslides, the effect of escaping water would be substantially diminished beyond 50 feet and the landslide occurred 240 feet from the broken sewer. *Nejin*, 40 Wn. App. at 420. Moreover, experts testified that the landslide could have been caused by other soil problems. *Nejin*, 40 Wn. App. at 420.

Division One of this court reversed the trial court's award of damages because although the broken sewer pipe could *theoretically* have contributed to Nejin's landslide, there was no direct evidence that it had done so and, thus, a causation theory based on circumstantial evidence that the broken sewer caused the damage was purely conjecture. *Nejin*, 40 Wn. App. at 421. And where liability is premised on a theory of causation based on circumstantial evidence, no factual

determination may rest upon conjecture. *Nejin*, 40 Wn. App. at 420 (citing *Sanchez v. Haddix*, 95 Wn.2d 593, 599, 627 P.2d 1312 (1981)).

Here, however, the experts agreed that water flowed downhill from Hoover's property to the Warners' property. There is no disagreement that Hoover's property slopes to the north and west and no dispute that water drains through the soil to reach an impermeable layer and then travels "downslope." Palazzi testified specifically regarding the need to restore the original drainage pathways, including the subsurface pathways, towards the north and the northwest. In Palazzi's view, the 2006 grading project impacted both surface and subsurface drainage pathways. From this evidence, a rational finder of fact could conclude that the asserted premise (that subsurface water flows in the same direction as the surface water) is true.

Furthermore, although Hoover may have relied on circumstantial evidence to establish that the Warners' grading project impeded the flow of subsurface water from his property, such a theory was not purely conjecture. It was the unequivocal opinion of an expert witness. Moreover, even had the subsurface water from Hoover's property drained in a direction away from the Warners' property, substantial evidence would nevertheless support the trial court's finding regarding the grading project as the cause of Hoover's standing water. This is so because Hoover has shown that the obstruction of surface water alone supports such a finding. Accordingly, we hold that substantial evidence supports the challenged findings.

II. COMMON ENEMY DOCTRINE

The Warners next argue that even if substantial evidence exists to support the trial court's finding that the grading project caused Hoover's damage, the Warners are nevertheless absolved from liability by virtue of the common enemy doctrine. Hoover responds that the common enemy

doctrine does not shield the Warners from liability because the trial court correctly concluded that the "due care" exception to the doctrine applied. We assume, as the parties and the trial court did, that the common enemy doctrine applies here. And we agree with Hoover that the "due care" exception to the doctrine applies.

"In its strictest form, the common enemy doctrine allows landowners to dispose of unwanted surface water in any way they see fit without liability for resulting damage to one's neighbor." *Currens v. Sleek*, 138 Wn.2d 858, 861, 983 P.2d 626, 993 P.2d 900 (1999). "The idea is that 'surface water . . . is regarded as an outlaw and a common enemy against which anyone may defend himself, even though by so doing injury may result to others.'" *Currens*, 138 Wn.2d at 861 (alteration in original) (quoting *Cass v. Dicks*, 14 Wash. 75, 78, 44 P. 113 (1896)). However, because a strict application of this rule is widely regarded as inequitable, our Supreme Court has adopted exceptions to the common enemy doctrine over the years. *Currens*, 138 Wn.2d at 861-62.

Although landowners may block the flow of diffuse surface water onto their land, the first exception provides that landowners may not inhibit the flow of a watercourse or a natural drainway.[4] *Island County v. Mackie*, 36 Wn. App. 385, 388, 675 P.2d 607 (1984). Another exception prevents landowners from collecting water and channeling it onto their neighbors' land. *Currens*, 138 Wn.2d at 862 (citing *Wilber Dev. Corp. v. Les Rowlands Constr. Inc.*, 83 Wn.2d 871,

[4] We note that a viable argument could be made that the Warners' project inhibited the flow of a natural drainway such that the first exception may also apply under the circumstances present here. But no party argues or otherwise suggests that it does, and the trial court made rulings concerning only the due care exception discussed herein. Therefore, we limit our review accordingly.

875, 523 P.2d 186 (1974), *overruled by Phillips v. King County*, 136 Wn.2d 946, 968 P.2d 871 (1998)).

Our Supreme Court first recognized a third exception—the exception at issue here—in *Currens*. There, the Currenses urged the court to formally recognize that the common enemy doctrine shields only reasonable conduct; that is, a landowner who acts unreasonably may be liable for damages caused by surface water flooding. *Currens*, 138 Wn.2d at 863. The Supreme Court agreed, concluding, with regard to the third exception, that "[a]lthough it does not affect a landowner's ability to alter the flow of surface water, it does require avoidance of unnecessary infringement upon a neighbor's free enjoyment of his or her property." *Currens*, 138 Wn.2d at 864.

Therefore, according to this "due care" exception, a landowner may improve their land free from liability for damages caused by the change in the flow of surface water[5] onto neighboring property so long as the landowners act in good faith and by avoiding unnecessary damage to the property of others. *Currens*, 138 Wn.2d at 864. The due care exception "thus serves to cushion the otherwise harsh allocation of rights under the common enemy doctrine." *Currens*, 138 Wn.2d at 864.

At the same time that the *Currens* court unequivocally adopted the due care exception, it also rejected an invitation to depart from its common enemy doctrine jurisprudence in favor of the "reasonable use rule." 138 Wn.2d at 866. The hallmark of the reasonable use rule is that it requires

[5] Assuming that any change in flow is not caused by inhibiting the flow of a natural watercourse or drainway. *Mackie*, 36 Wn. App. at 388.

courts to weigh the utility of the improvements against the resulting damage to adjacent properties. *Currens*, 138 Wn.2d at 866.

Here, it is precisely because the trial court apparently indulged in this consideration of the project's utility that the Warners allege error. Regarding the due care exception, the trial court found as follows:

> 1.15 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 at 431. Because the trial court referenced the utility of the project and the impact it had on Hoover's property, the Warners contend that, in effect, the trial court erroneously adopted the reasonable use rule and, therefore, reversal is required.

But we decline to reverse on this ground for two reasons. First, the trial court's references to "utility" and "impact" were superfluous because the court also considered (consistent with what the due care exception contemplates) the fact that the Warners took no action to mitigate the damages from the grading project until Hoover requested their assistance to alleviate the adverse drainage consequences. And in doing so, the trial court also noted that the ditches in the roadway were "rudimentary" and "largely ineffective." The court then concluded that the Warners' actions

were not reasonable and were not taken in good faith and in a manner to avoid unnecessary damage to Hoover.[6]

Second, we may affirm on any ground supported by the record. *Wash. Fed. Sav. & Loan Ass'n v. Alsager*, 165 Wn. App. 10, 14, 266 P.3d 905 (2011). To the extent that the trial court erred by referring to the "utility" of the grading project, the record nevertheless contains facts to support the application of the due care exception.

Our decision in *Borden v. City of Olympia*, 113 Wn. App. 359, 53 P.3d 1020 (2002), is instructive.[7] There, the Bordens, whose property lay in a drainage basin, sued the city of Olympia when the city assisted a private developer's efforts to build a stormwater drainage project. *Borden*, 113 Wn. App. at 363. The Bordens experienced considerable flooding each winter for several years after the project's completion. *Borden*, 113 Wn. App. at 364. The city ultimately remedied the problem, but the Bordens brought suit in part based on the common enemy doctrine. *Borden*, 113 Wn. App. at 365. The Bordens asserted that the drainage system created additional discharges into the surrounding wetlands which exceeded the soil's capacity to accept them and resulted in raising the water table under the Bordens' own property. *Borden*, 113 Wn. App. at 365.

We reversed an order granting summary judgment in favor of the city in part because the city could have taken measures to properly analyze the drainage capabilities and could have realized that alternatives existed. *Borden*, 113 Wn. App. at 372. We concluded that a rational trier

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[6] In its letter ruling, the trial court also clearly cited the correct passage from *Sleek* setting out what courts must find to apply the due care exception.

[7] We also mentioned in *Borden* that the adoption of the due care exception essentially signifies that Washington now recognizes a negligence cause of action for altering the flow of naturally occurring surface and ground water. 113 Wn. App. at 368.

of fact could find that the city did not use due care to minimize the Bordens' damages. *Borden*, 113 Wn. App. at 372.

Similarly, here, the record contains no facts to support the notion that the Warners did any investigation or conducted any study to determine whether their grading project would have any adverse impact on the ability of Hoover's property to drain. And as the trial court recognized, once they became aware of the issue, the Warners did little to mitigate the damage. In fact, Scott contacted Thurston County to levy a complaint against Hoover for septic failures stemming from the flooding that his own project caused.

And despite some suggestion that the Warners initially agreed to remove the road, Ernest testified that they refused to continue cooperating with Hoover after Hoover levied complaints against them. Consequently, the Warners cannot be said to have used due care to avoid unnecessary damage to Hoover. Accordingly, we hold that the Warners' argument fails for one of the two aforementioned reasons.

III. TRESPASS

The Warners next argue that because they caused no intentional or negligent intrusion of water onto Hoover's property, the trial court erred by ruling that they committed trespass. But Washington courts treat claims for trespass and negligence arising from a single set of facts as a single negligence claim. *Hurley v. Port Blakely Tree Farms L.P.*, 182 Wn. App. 753, 772, 332 P.3d 469 (2014) *review denied*, 182 Wn.2d 1008 (2015). Because the trial court here found liability under trespass and negligence, reversal is not required even if trespass was not committed.

IV. INJUNCTIVE RELIEF

The Warners further argue that because the trial court's ruling precludes the Warners from engaging in activity that has any adverse effect on Hoover's drainage, the trial court entered an impermissibly broad injunction. We agree.

We review a trial court's decision to grant an injunction and the terms contained in the injunction for abuse of discretion.[8] *Kucera v. Dep't of Transp.*, 140 Wn.2d 200, 209, 995 P.2d 63 (2000). Trial courts have broad discretionary power to fashion injunctive relief to fit the particular circumstances of the case before it. *Rupert v. Gunter*, 31 Wn. App. 27, 30, 640 P.2d 36 (1982). A trial court necessarily abuses its discretion if the decision is based upon untenable grounds or the decision is manifestly unreasonable or arbitrary. *Kucera*, 140 Wn.2d at 209.

"'[O]ne who seeks relief by temporary or permanent 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.'" *Kucera*, 140 Wn.2d at 209 (alteration in original) (quoting *Tyler Pipe Indus., Inc. v. Dep't of Revenue*, 96 Wn.2d 785, 792, 638 P.2d 1213 (1982)). Here, regarding injunctive relief, the trial court concluded as a matter of law that "[d]efendants are permanently enjoined from undertaking any further actions on the Warner property that adversely affect the drainage on the Hoover property." CP at 433.

Hoover fails to establish the first factor and, therefore, the trial court abused its discretion by granting the injunction insofar as it is currently written. As mentioned, unless one of the three

[8] We exercise our discretion under RAP 2.5 to review this arguably unpreserved error.

recognized exceptions applies, the common enemy doctrine entitles property owners to develop their land without regard for the drainage consequences to other landowners. *Currens*, 138 Wn.2d at 861.

Accordingly, the enjoining language is overly broad because it precludes the Warners from engaging in conduct to which they are entitled by law. Although Hoover has a legal right to be free from *negligent* acts that adversely affect his property's drainage, he is not entitled to injunctive relief that precludes *all* or *any* act that may cause such results. Therefore, the trial court abused its discretion by granting an overly broad injunction. We vacate the injunction.

V. ATTORNEY FEES UNDER CR 37(C)

The Warners next contend that the trial court abused its discretion by awarding attorney fees pursuant to CR 37(c) because (1) the admission sought was of no substantial importance, (2) the Warners' failure to admit did not cause Hoover to incur additional expenses, and (3) even if warranted, the expenses exceeded a reasonable amount. We disagree.

We review a trial court's decision to impose discovery sanctions under CR 37(c) for an abuse of discretion. *Rivers v. Wash. State Conference of Mason Contractors*, 145 Wn.2d 674, 684, 41 P.3d 1175 (2002). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds. *Thompson v. King Feed & Nutrition Serv., Inc.*, 153 Wn.2d 447, 460, 105 P.3d 378 (2005).

CR 37(c) provides that if a party fails to admit the truth of any matter as requested under a CR 36 request for admission and the matter is subsequently proved, the party may apply to the trial court for an order requiring the other party to pay reasonable expenses incurred in making that proof, including attorney fees. The trial court may then order payment unless it finds that (1) the

request was held objectionable pursuant to CR 36(a), (2) the admission sought was of no substantial importance, (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. CR 37(c); *Thompson*, 153 Wn.2d at 460.

Here, the trial court found by a preponderance of the evidence that some rock and/or other material was brought in and deposited in the areas to the north and to the west of the Hoover property. The court concluded that the requests for admission were of substantial importance and that none of the exceptions in CR 37(c)(1)-(4) applied. The trial court awarded fees in the amount of $32,714.85.

The record supports these findings. Hoover's allegations depended almost entirely on the fact that the Warners dumped, spread, and compacted fill material along the natural drainage paths abutting his property. The existence of fill material was an issue of substantial importance for Hoover's case. The Warners' contention that Hoover incurred no additional expenses is equally unavailing. Hoover took depositions and called additional witnesses at trial solely so that the court could hear testimony regarding fill material from someone other than Hoover himself.

Finally, pursuant to CR 37(c), trial courts are permitted to award "reasonable" expenses and attorney fees. CR 37(c). What is reasonable depends on the circumstances of each case and we do not substitute our judgment for that of the trial court. We hold that the trial court did not abuse its discretion by awarding fees under CR 37(c) because the fill material issue was central to the resolution of the case, Hoover incurred additional expenses in making his proof, and the trial court did not abuse its discretion in ordering a reasonable amount.

VI. MAINTENANCE AND INSPECTION

Finally, the Warners argue that the trial court erred by requiring them to inspect and maintain the ditches built as part of the remedial plan to abate Hoover's drainage complications. The Warners assert that because they are not liable for Hoover's damages, there is no basis on which the trial court could fairly impose the inspection condition. We disagree.

After the trial court ordered a remedial plan as an alternative to damages, the parties agreed upon a plan that called for a drainage system to ameliorate Hoover's water damages. The court-approved order contained the condition that "[d]efendants shall regularly inspect and maintain the drainage system (at least annually) to ensure that it functions." CP at 504. This order became part of the court-approved final acceptance order signifying the completion of the remediation plan. Both parties stipulated to the final order with its accompanying conditions. We hold that the Warners waived the right to challenge those conditions for the first time on appeal.

VII. ATTORNEY FEES

Hoover requests additional attorney fees pursuant to CR 37(c) on appeal. But we may award such fees as an additional sanction if the appeal of the trial court's sanctions is frivolous or taken for delay. *Rhinehart v. KIRO, Inc.*, 44 Wn. App. 707, 711, 723 P.2d 22 (1986). Here, the Warners' challenge to the amount of fees was a reasonable challenge and was, therefore, not frivolous. Accordingly, we award no additional fees.[9]

[9] Similarly, Hoover requests fees for his efforts to respond to the Warners' challenge to the trial court's finding of fact 1.11, which he deems frivolous. But that is the same finding on which the trial court based its award of fees under CR 37(c). For the reasons explained above, we decline to award additional fees on this basis.

In conclusion, we vacate the impermissibly broad injunction, but we affirm the trial court in all other respects. Additionally, we decline to award attorney fees on appeal.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Johanson, C.J.
JOHANSON, C.J.

We concur:

Bjorgen, J.
BJORGEN, J.

Sutton, J.
SUTTON, J.

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

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, and WARNER FARMS, Appellants.	No. 45742-3-II (consolidated with No. 46562-1-II) ORDER DENYING MOTION TO RECONSIDER AND GRANTING MOTION TO PUBLISH

WHEREAS, the appellants have filed a motion for reconsideration of the unpublished opinion filed July 14, 2015, and

WHEREAS, third party Michael B. King filed a motion to publish the unpublished opinion in this case that was filed on July 14, 2015, it is now

ORDERED, that the motion for reconsideration is denied. It is further

ORDERED, that the final paragraph, reading "A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered." is deleted. It is further

ORDERED, that the opinion will be published.

DATED this 18th day of August, 2015.

Johanson, C.J.
CHIEF JUDGE