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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

LUCAS JAMES SNYDER, a single man,

Appellant,

v.

LEO BUBLITZ and SUSAN BUBLITZ, husband and wife,

Defendants-Respondents.

OPENING BRIEF OF DEFENDANT-RESPONDENTS LEO AND
SUSAN BUBLITZ

Jess G. Webster
Miller Nash Graham & Dunn LLP
Pier 70
2801 Alaskan Way, Suite 300
Seattle, Washington 98121
206.624.8300

Attorneys for Defendants-Respondents
Leo Bublitz and Susan Bublitz

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I. INTRODUCTION

In response to the summary judgment motion of Mr. and Mrs. Bublitz, Mr. Snyder made a minimal and ineffectual effort to raise any issue of fact concerning the trespass of concentrated and channelized water onto the Bublitz' property, focusing primarily upon the assertion that he was not channelizing additional amounts of water beyond the amount that would otherwise migrate onto the Bublitz' property in a diffuse flow. On the record before the trial court, the trial court correctly found that plaintiff failed to raise a genuine issue of material fact and properly granted defendants' motion for injunctive relief.

II. PROCEDURAL HISTORY BELOW

Plaintiff Luke Snyder brought the action below against his next door neighbors, Leo and Susan Bublitz, seeking reformation of a view easement that had been granted to Snyder by Mr. Anthony Griswold, a common predecessor in title. As Mr. Snyder had modified the surface water drainage system on his property in 2015, resulting in the harmful, concentrated discharge of water onto the Bublitz' property that Mr. Snyder refused to abate, Mr. and Mrs. Bublitz counterclaimed for trespass and nuisance, and requested permanent injunctive relief.

After initial discovery, Mr. and Mrs. Bublitz filed their motions for summary judgement on September 21, 2017, seeking both the dismissal of Mr. Snyder's claim for reformation of his view easements and the issuance of an injunction compelling Snyder to abate his discharge of concentrated surface water onto the Bublitz' property. The motions were supported by the Declaration of Leo Bublitz, which included photographs of water that was concentrated by a new drainage system installed by Mr. Snyder and discharged onto the Bublitz' property. CP 63, 64, 76-79. Color copies of the photographs are attached hereto as Appendix A.

Plaintiff sought, and was granted, two continuances of the date for filing his response to the motions. On November 8, 2017, Snyder finally filed his response, consisting of only two declarations of Mr. Snyder, one to address the motion to dismiss the reformation claim, and another, one and a half pages in length, addressing the motion for injunctive relief. CP 88-89. Mr. Snyder's Declaration addressing the requested injunctive relief did not confirm that it was made upon Mr. Snyder's personal knowledge, did not properly authenticate a supposedly public record document attached to the declaration, and did not lay an adequate foundation for assertions contained therein. Nevertheless, Mr. Snyder did acknowledge

in his declaration that he made modifications to the drainage system on his lot. Plaintiff did not timely file any responsive memorandum addressing either motion.

On November 20, 2017, Mr. and Mrs. Bublitz submitted their Reply on Motions for Summary Judgment, noting that plaintiff had elected to not file a responsive memorandum, that the declaration of Mr. Snyder addressing the motion for injunctive relief failed to raise any issue of material fact, and that the undisputed facts before the court warranted the requested injunctive relief. CP 107, 113-115. Defendants also submitted the Supplemental Declaration of Leo D. Bublitz. CP 119-120. That same day, November 20, 2017, plaintiff filed its untimely Memo Response to Defendant Bublitz' Summary Judgment Motions. CP 102-106.

The motions were heard with oral argument on November 22, 2017. Upon the record before the trial court, both motions for summary judgment were granted. CP 124 - 126. The trial court also entered a Memorandum Decision, in which the court adopted the undisputed facts listed in the Bublitz' Reply memorandum with respect to their claim for injunctive relief. CP 127; CP 114. The court also noted that Snyder's response to the motions failed to set forth facts based upon personal

knowledge or provide adequate foundation to raise issues of material fact for purposes of the motions. On the undisputed, admissible facts before the trial court, the court found that Snyder's actions had increased and centralized the flow of water onto the Bublitz' property, damaging the Bublitz' property, and therefore granted the Bublitz' motion.

Plaintiff Snyder later filed a Motion for Reconsideration of the Court's grant of injunctive relief in which Snyder made new unsupported assertions of fact and raised new arguments not made to the court prior to its ruling on the motions. CP 130-135. One of the newly raised arguments was that Bublitz' showing of harm or necessity of injunctive relief was insufficient. In support of his new assertions of fact Snyder also appended an unsworn and inadmissible letter from a forester regarding a site visit to Snyder's property made subsequent to the court's ruling on the motions. Mr. Snyder also included a photograph taken on December 6, 2017, a day on which there was zero precipitation in the area¹, depicting water flowing out of his drainage pipe and onto the Bublitz property. Upon the request of the trial court, Mr. and Mrs. Bublitz filed their Response Upon

¹ Publically available online weather records confirm that the first week in December of 2017 had been very dry in the area, and that there had been zero precipitation in the area for several days as of December 6, 2017.

Plaintiff's Motion for Reconsideration. CP 142 - 152. The trial court agreed with all the arguments raised by the Bublitz in their Response memorandum and denied Snyder's Motion for Reconsideration. CP 153. This appeal follows. All remaining claims between all parties in the action below have subsequently been dismissed, such that the instant appeal is all that remains of the action.

III. SNYDER'S STATEMENT OF FACTS

Snyder incorporates into the "Background Summary," "Case Procedure in Trial Court," and "Argument" sections of his Opening Brief of Appellant many assertions of fact that were **not** properly presented to the trial court before it ruled on the motions for summary judgment.

The only facts before the trial court at the time of its ruling on the motion for summary judgement seeking permanent injunctive relief for the surface water trespass were contained in the two declarations submitted by Mr. Bublitz, CP 63, 64, 76-79; CP 119-120, and the admissible portions of the one declaration submitted by Mr. Snyder, CP 88-89.

Very little of Mr. Snyder's declaration contained admissible assertions of fact. As noted by the trial court, Mr. Snyder failed to affirm that any of the assertions made in his declaration were made on the basis

of personal knowledge. All assertions made in the third paragraph of his declaration reflect that lack of personal knowledge where each sentence is carefully prefaced by the qualifying words "It appears that..." CP 88, at lines 20-25. Mr. Snyder also goes on to make a number of assertions of fact based upon his interpretation of an attached hearsay document entitled "Forest Practices Application/Notification," which he fails to properly authenticate². The penultimate paragraph of the declaration, containing the only arguably admissible assertions of fact, states as follows.

Prior to the purchase of my lot, the water flowing on to my lot from Pope Resources had been ditched along the southwest lot boundary next to Pope Resources and then routed downhill about three quarters of the lot in a culvert. Recently when I installed a shop (for which I obtained from the County a drainage permit) on my lot, I discovered the culvert had been severely plugged. I installed catch basins (sediment traps) in the ditch and replaced the culvert. The water that runs off Pope Resources is a natural flow. I have not channeled additional water onto the Bublitz' lots.

Throughout the Opening Brief of Appellant Mr. Snyder conflates the undisputed and admissible facts that *were* properly before the court on the motions for summary judgment with a jumble of unsupported and

² RCW 5.44.040 provides the proper method for authentication of public record documents.

inadmissible assertions of fact that were either: 1.) unverified allegations contained in Mr. Snyder's Answer to Defendant Bublitz' Counterclaims and Crossclaims; 2.) inadmissible assertions contained in Mr. Snyder's initial Declaration; or 3.) presented to the trial court, again in inadmissible form, by way of Snyder's Motion for Reconsideration³.

³ The assertions of fact contained in Appellant's Opening Brief that were not before the trial court at the time of its ruling upon the Bublitz' motions for summary judgment are as follows:

- Page 9, first paragraph, first sentence. Mr. Snyder's declaration was not made upon personal knowledge. The declaration speaks to an existing stream that flows from the Pope Resources land onto the Bublitz' property. Mr. Snyder's declaration does not assert that this existing stream to have anything to do with his drainage system or its discharge onto the Bublitz' property.
- Page 9, first paragraph, second sentence, to wit "... where it flowed out onto the ground in a natural swale for about 50 feet and then onto the Bublitz lots, where it eventually feed into a stream in a natural ravine and a manmade dam reservoir on the Bublitz lot." None of this is contained in the Declaration of Mr. Snyder.
- Page 12, second full paragraph, first sentence: "... and that the runoff then flows out on the ground in a small natural swale on his lot, and then flows on down onto the Bublitz' lot." Not contained in Declaration of Mr. Snyder.
- Page 12, quoted portion from Snyder's Memo Response, second sentence: "...the runoff then continues downhill on Plaintiffs lot then feeds into a natural ravine along the South border of the Bublitz' lots." Not contained in Declaration of Mr. Snyder.
- Page 13, first paragraph of text, 2nd, 3rd and 4th sentences. Refers to unauthenticated Forest Practices Application and map, and contains Mr. Snyder's interpretations from such documents.
- Page 14, first paragraph, first full sentence: "...those streams of....," "...as shown on that stream map..," and "... so as to flow along the southern portion of the lot's west boundary next to Pope Resources some distance." Not contained in Mr. Snyder's declaration.
- Pages 17 & 18, entire quoted content of inadmissible letter from DNR forester, Mr. Goodwin. Letter from DNR forester not timely provided to trial court upon

motions for summary judgment. Letter also offered in unsworn, inadmissible form.

- Page 18, first full paragraph, second and third sentence. The subject photo and what it purports to depict was not timely provided to the trial court on the motions for summary judgment.
- Page 18, second full paragraph, second sentence, to wit: " Snyder pointed out that as Pope had recently logged the area it is to be naturally anticipated that the flow of water runoff, from the uphill, recently logged, Pope Resources land, would increase, especially when it rains." These assertions were not supported by any declaration and made only in Snyder's Motion For Reconsideration.
- Page 20, first paragraph, second sentence: " However Snyder denied installing a new drainage system, instead, he explained, he had only replaced the damaged and plugged drainage system that had been installed prior to his purchase;..." In his declaration Mr. Snyder did not deny installing a new drainage system, or that his replacement of an existing culvert was his "only" modification of the existing drainage system.
- Page 20, second paragraph, second sentence, to wit: "But Snyder noted that it is an 8 inch culvert, and that it does not run directly over the Bublitz lot, but rather runs off on the ground on the Snyder lot, flowing down a natural swale before flowing onto the Bultitz [sic] lot. And, as stated, Snyder noted that it was not a 'new' system, but a preexisting system he repaired." These assertions not contained in Declaration of Mr. Snyder.
- Page 21, first paragraph, second sentence, to wit: "it can be observed that on the Peninsula, in a heavy rain storm, there are streams of water flowing in lots of places, especially where there are surface depressions in of the ground, and Snyder pointed out the Pope had recently logged its uphill area. These assertions not contained in Declaration of Mr. Snyder or argued to the trial court upon the motions for summary judgment.
- Pages 25, second paragraph, third and fourth sentences. These assertions not contained in Declaration of Mr. Snyder nor otherwise presented to the trial court on motions for summary judgment.
- Page 31, second paragraph, last sentence, to wit: " especially in light of the recent logging activity on the uphill Pope Resources land." Not included in Declaration of Mr. Snyder or otherwise presented to trial court on motions for summary judgment.
- Page 32, last paragraph, concluding on page 33. Inadmissible letter from DNR forester not presented in admissible form to trial court on motions for summary judgment.
- Page 35, last paragraph, second sentence through end of paragraph on page 36.

For purposes of this appeal, this Court should not consider arguments based upon such new, inadmissible, assertions of fact, and consider only those admissible facts and arguments that were properly presented to the trial court on the motions for summary judgment.

IV. STATEMENT OF THE CASE

A. FACTS.

Plaintiff Luke Snyder filed the action below against his neighbors, Mr. and Mrs. Bublitz, seeking to burden the Bublitz' parcels of property with view easements far greater in size than what Mr. Snyder had negotiated and received from Mr. Anthony Griswold, who was the predecessor in title to the lots owned by Mr. Snyder and by Mr. and Mrs. Bublitz. Mr. and Mrs. Bublitz purchased their property and sited their home in reliance upon the view easement that Mr. Snyder negotiated with Mr. Griswold and recorded with the county auditor's office. Years later

Inadmissible letter from DNR forester not presented in admissible form to trial court on motions for summary judgment.

- Page 36, last paragraph, first sentence: "..., Snyder is faced with injunctive order that is nearly, if not totally, impossible to comply with." No evidence whatsoever of any burden or difficulty in complying with requested injunctive relief was included in the Declaration of Mr. Snyder or otherwise presented to the trial court.
- Page 36, last paragraph, third and fourth sentences, concluding on page 37, containing quoted portions from untimely and inadmissible letter from DNR forester Goodwin.

Mr. Snyder claimed that Mr. Griswold made a mistake in drafting the description of the recorded view easements, and demanded that the Bublitz agree to expand the scope of the view easements to such an extent that it would have encompassed portions of the Bublitz' home. Not surprisingly, the Bublitz declined Mr. Snyder's demands.

Mr. Snyder then commenced the action below against Mr. and Mrs. Bublitz, seeking to reform the recorded view easements. Mr. and Mrs. Bublitz opposed the claim for reformation and asserted counterclaims against Mr. Snyder for trespass and nuisance based upon Mr. Snyder's actions in modifying the drainage system on his property that concentrated what had previously been diffuse surface water runoff into an underground pipe installed by Mr. Snyder that discharged the concentrated water flow onto the Bublitz' property, causing flooding and erosion damage.

After initial discovery, Mr. and Mrs. Bublitz moved for summary judgment on both Mr. Snyder's claim for reformation of the view easement, and also seeking an injunction requiring Mr. Snyder to abate his discharge of concentrated surface water onto the Bublitz' property. The trial court granted both motions. Mr. Snyder did not appeal the dismissal

of his reformation claim, and only appealed the trial court's grant of injunctive relief.

The only facts that were properly presented to the trial court for consideration on the motion for the injunctive relief were as set forth in the Declaration of Leo D. Bublitz in Support of Motion for Summary Judgment, CP 61-79, the Supplemental Declaration of Leo D. Bublitz in Support of Motion for Summary Judgment Regarding Water Runoff Counterclaim, CP 119-123, and the admissible portions of the Declaration of Plaintiff Lucas James Snyder: Water Runoff, CP 88-92.

The facts established by the Declaration of Mr. Bublitz, *none of which were disputed or controverted by Mr. Snyder's Declaration* were:

- That in 2015 Mr. Snyder constructed a large new garage and workshop on Lot 67, which included the installation of a French drain system to collect rain and surface water.
- That Mr. Snyder routed the 10" outlet pipe for the new drainage system such that the outflow from the drainage system ran directly over Lot 66 of the Bublitz' property.
- That periodically the outflow from the drainage pipe results in a concentrated, channelized cascade of water several inches deep running over, and eroding, the Bublitz's property.

- That *before* Mr. Snyder installed his new drainage system, there was only diffuse natural flow of any unabsorbed surface water coming from Mr. Snyder's property onto the Bublitz' property.
- That since the installation of the new drain system the water from Mr. Snyder's property is now concentrated and, during rain storms, flows out of the outflow of Mr. Snyder's drainage pipe over the Bublitz' property like a small stream *that did not occur before* Mr. Snyder installed his French drain system.
- That at times the outflow from the drainage pipe now results in a flow and puddling of water several inches deep running over, and eroding, the Bublitz' property.
- That Mr. Bublitz requested repeatedly that Mr. Snyder modify his drainage system to stop the outflow of water from Mr. Snyder's property from running across the Bublitz' property and that Mr. Snyder has ignored those requests.

CP 61, 63, 64. Photographs depicting the concentrated flow from Mr. Snyder's drainage pipe and flooding of the Bublitz property were attached. CP 76 - 79. *See also*, Ex. A hereto.

In his Supplemental Declaration Mr. Bublitz reiterated:

3. I can unequivocally affirm that **before** Mr. Snyder built his new shop on his property in 2015 - 2016, the rain runoff

from his property onto ours was diffuse and spread out over the entire area of the gradient of the land, and did not run in a defined channel(s) or watercourse. In the summer months, the gradient is essentially dry and, absent an unusually heavy summer rain, there no noticeable flow of surface water from Mr. Snyder's property onto our property. **After** Mr. Snyder completed the construction of his shop and made what changes he did to the drainage system on his land, the surface water runoff has since come gushing out of a 10' diameter drainage pipe in a concentrated and channelized flow of water across our property that is eroding our land and cutting a flow channel across our property. That was never the case before Mr. Snyder built his shop and changed the flow of storm water runoff across or through his property and onto ours.

CP 120 (emphasis added). As noted by the Bublitz in their Reply memorandum on the motions for summary judgment, and as ruled by the trial court, the Declaration of Mr. Snyder was not made upon personal knowledge, and failed to provide adequate foundation for admission of attached exhibits and factual assertions made in his declaration. CP 108; CP 127. As such, the only relevant factual assertions made by Mr. Snyder in his Declaration were his admission of modifying the drainage system on his property, which included the replacement of a culvert; that the surface water that flows downhill from lands uphill of the Snyder and Bublitz parcels is "a natural flow," and the conclusory assertion that he had not channeled *additional* water onto the Bublitz' lots. Significantly, Mr.

Snyder did not challenge any of the above stated facts established by Mr. Bublitz' declaration.

Most significantly, Mr. Snyder did not contest the fact that before Mr. Snyder built his workshop building and modified the drainage system on his property the surface water (rain water) was a diffuse flow spread out over the entire area of the gradient of the land, such that it was not noticeable in any defined area or areas. CP 063, at ln. 21 -26. Or that after his modifications "the water from Mr. Snyder's property is concentrated and, during rain storms, flows out of the outflow of his drainage pipe over our property like a small creek." *Id.* Or that "At times the outflow from the drainage pipe results in a flow and puddling of water several inches deep running over, and eroding, our [the Bublitz'] property." *Id.*

On this record of undisputed facts, the trial court correctly determined that Mr. Snyder failed to raise by admissible evidence an issue of fact that would preclude the court from granting the requested injunctive relief ordering Mr. Snyder to abate the discharge of concentrated surface waters onto the Bublitz' property.

Snyder's emphasis upon his assertion that he did not divert "additional" water downhill onto the Bublitz' property misses the point. Albeit, there is only so much rain water that comes down the gradient from property owned by Pope Resources to the South and West of Mr. Snyder's property, across Mr. Snyder's property and onto the Bublitz' property, and only so much rain water falling onto Mr. Snyder's property and across to the Bublitz' property. Accordingly, other than what rain water is naturally absorbed into the ground, the Bublitz concede that Mr. Snyder has not added any additional water to the total amount of water naturally flowing down the gradient onto the Bublitz property.

Rather, what was changed by Mr. Snyder is the *manner* that the water is now collected, concentrated, and discharged onto the Bublitz' property. Mr. Snyder did not deny that he had installed a new drainage system in conjunction with his construction of a new large workshop building on his property. He also admitted to replacing a culvert that previously had not served to effectively discharge water onto the Bublitz property⁴. The undisputed facts before the trial court was that **before** Mr.

⁴ Mr. Snyder claimed to have found an old culvert that was "plugged," which he admits that he replaced. The letter from the DNR forester that Mr. Snyder offered in support of his Motion for Reconsideration also revealed that Mr. Snyder admitted to having enlarged the size of the culvert.

Snyder made his modifications to the drainage system on his property, the rainwater coming off the Snyder property onto the Bublitz' property was in a diffuse flow, spread out over the entire gradient of the hill slope, such that the rain water did not run in any defined channel(s) or watercourse. And that **after** Mr. Snyder made his modifications, what had been a diffuse flow was transformed into a concentrated, swift flowing discharge from a large culvert/pipe that was eroding the Bublitz' land and cutting a flow channel across the Bublitz' property. CP 063, 120.

V. AUTHORITIES AND ARGUMENT

A. The Common Enemy Doctrine and Its Exceptions.

The "common enemy" doctrine was adopted by the State of Washington in 1896 in *Cass v. Dicks*, 14 Wash. 75, 44 P. 113 (1896). In its purest form, the common enemy doctrine provides that surface water was "an outlaw and a common enemy, against which any one may defend himself, even though by doing so may injure others." *Id* at 78. The common enemy doctrine allows an upland landowner to increase the rapidity or amount of flow of diffuse surface water as long as it is not "channelized," i.e. as long as it continues to flow as diffuse surface water. *Halvorsen v. Skagit County*, 139 Wn.2d 1, 983 P.2d 643 (1999). Since

1896 several important qualifications and exceptions to the common enemy doctrine have evolved to ameliorate against harsh outcomes from application of the doctrine in its purest form. A major exception to the doctrine in Washington is that an artificial collection of surface water, followed by its discharge in a concentrated mass onto the land of another is an actionable wrong. "Surface waters may not be artificially collected and discharged upon adjoining lands in quantities greater than or in a manner different from the natural flow thereof." *Colella v. King County*, 72 Wn.2d 386, 390, 433 P.2d 154, 157 (1967) (source of quotation in text); *King County v. Boeing Co.*, 62 Wn.2d 545, 384 P.2d 122 (1963). "Liability arises if surface water is artificially collected and discharged on surrounding properties in a manner different from the natural flow of water onto those properties." *Burton v. Douglas Cty.*, 14 Wn. App. 151, 539 P.2d 97 (1975). *See also*, Diffuse Surface Water, 17 Wash. Prac., Real Estate § 10.7(2d ed.). That is just what happened here. Mr. Snyder installed a new drainage system or modified an existing drainage system in a manner that changed what had been merely diffuse surface water, which did not flow in any defined channel or watercourse into, a concentrated flow out of a large culvert (whether it was an 8" or 10"

diameter drainage pipe is immaterial) and onto the Bublitz' property, causing erosion and cutting a flow channel across the Bublitz' property.

B. The Trial Court Correctly Found and Relied Upon Undisputed Facts Supporting Its Decision.

Appellant asserts that the trial court erred in finding several findings of fact, to wit:

1. That in 2015 Mr. Snyder constructed a large new garage and workshop on lot 67 which included the installation of a French drain system to collect rain and surface water.
2. That Snyder routed a 10" outlet pipe for the new drainage system such that the outflow from the drainage system ran directly over lot 66 of the Bublitz' property.
3. That periodically the outflow from the drainage pipe results in a concentrated, channelized cascade of water several inches deep running over, and eroding, the Bublitz' property.
4. That *before* Mr. Snyder installed his new drainage system, there was only diffuse natural flow of any unabsorbed surface water coming from Mr. Snyder's property onto the Bublitz' property.

5. That since the installation of the new drain system the water from Mr. Snyder's property is now concentrated and, during rain storms, flows out of the outflow of Mr. Snyder's drainage pipe over the Bublitz' property like a small stream *that did not occur before* Mr. Snyder installed his French drain system.

6. That Mr. Bublitz requested repeatedly that Mr. Snyder modify his drainage system to stop the outflow of water from Mr. Snyder's property from running across the Bublitz' property and that Mr. Snyder has ignored those requests.

All six of these findings of fact was supported by the relevant portions of the Declaration of Leo Bublitz and the Supplemental Declaration of Leo Bublitz submitted in support of the motions for summary judgment CP 63-64 & 119-120, respectively.

The admissible portions of the Declaration of Mr. Snyder, and reasonable inferences therefrom, did not deny or contest any of these six findings of fact. As such, the trial court correctly accepted these six findings of fact as uncontested findings. Rather, Mr. Snyder now challenges these findings of fact, not upon the Declaration of Mr. Snyder submitted in response to the motion, but upon assertions made in the

pleadings, Mr. Snyder's untimely Response Memo, or in Mr. Snyder's Motion for Reconsideration, which, in turn, relied in part upon an inadmissible and unsworn letter from a DNR "forester" that inspected the parties' property long after the trial court made its findings and granted summary judgment. Such unsworn and inadmissible, after the fact, assertions failed to raise a material issue of fact. "Mere allegations, argumentative assertions, conclusory statements, and speculation do not raise issues of material fact that preclude a grant of summary judgment." *Greenhalgh v. Dep't. of Corr.*, 160 Wn. App. 706, 714, 248 P.3d 150, 154 (2011).

Appellant also challenges the sufficiency of the evidence of erosion and damage to Bublitz property. The appellate court reviews challenged findings for "substantial evidence," defined as the quantum of evidence sufficient to persuade a rational fair-minded person the premise is true. *Sunnyside Valley Irr. Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003). The photographs accompanying Mr. Bublitz' declaration speak for themselves. That such a concentrated flow of water would cause erosion is obvious. Upon the hearing of the motion, Mr. Bublitz further

established by his sworn testimony that erosion and damage to his property was occurring, which assertion was *not* contested by Snyder.

Appellant also complains that in granting injunctive relief the court failed to consider the relative hardship upon Mr. Snyder, but in response to the Bublitz' motion, Mr. Snyder made no showing of any hardship that would follow from the relief requested. Nor did he argue in his Response Memo of any hardship in complying with the injunction.

Appellant correctly acknowledges that in deciding a challenge to a grant of summary judgment, the appellate court reviews the same record of admissible evidence that was available to the trial court at the time of its decision granting summary judgment. *Shows v. Pemberton*, 73 Wn. App. 107, 868 P.2d 164, review denied, 124 Wn.2d 1019, 881 P.2d 254 (1994). Here, as the trial court noted in denying Snyder's motion for reconsideration, at the time of the court's ruling on the motion for summary judgment, Snyder failed to raise any material issue of fact by admissible evidence that would preclude the grant of the requested relief. CP 153. The record before the trial court at the time of the grant of summary judgment consisted only of the declarations of Mr. Bublitz and the admissible portions of Mr. Snyder's declaration. On that record, the

trial court correctly granted respondent's motion for summary judgment and granted defendants a permanent injunction.

C. The Propriety of Injunctive Relief When No Material Facts Are at Issue.

Injunctive relief is granted or withheld at the discretion of the trial court. *Washington Federation of State Employees v. State*, 99 Wn.2d 878, 887, 665 P.2d 1337 (1983). The trial court's decision exercising that discretion will be upheld unless it is based upon untenable grounds, is manifestly unreasonable, or is arbitrary. *Id.* at 887.

Respondents acknowledge that one who seeks relief by permanent injunction must show that he has clear legal or equitable right, that he has well-grounded fear of immediate invasion of that right, and that acts complained of are either resulting in or will result in an actual and substantial injury to him. As the trial court noted, and as case law has established, a downhill landowner has the right to be free from having his or her uphill neighbor collect and concentrate what was previously diffuse rain water runoff, and discharge it in a concentrated flow onto his or her

property⁵. By his declarations Mr. Bublitz confirmed that is exactly what was happening to him, that the concentrated flow was flooding and eroding his land, and that his neighborly efforts to have Mr. Snyder mitigate the situation proved fruitless. CP 63-64 & 120. That the discharges and damage would continue was obvious. As Mr. Snyder failed to raise any issue of material fact for the court's consideration that may have affected the trial court's evaluation of the appropriateness of permanent injunctive relief⁶, the court properly granted the requested permanent injunction. Injunctions to enjoin the improper diversion of waters onto lands of others are a common and appropriate remedy. See, e.g. *Colella v. King County*, 72 Wn.2d 386 (1967); and *Hedlund v. White*, 67 Wn. App. 409 (1992)(Permanent injunction prohibiting property owners from discharging water from drainage basin into swale was appropriate remedy for trespass. Trespass could not be remedied by award

⁵ Surface waters may not be artificially collected and discharged upon adjoining lands in quantities greater than or in a manner different from the natural flow thereof. *Colella v. King County*, 72 Wn.2d 386 (1967).

⁶ In deciding whether to grant or deny a request for a permanent injunction, a trial court must make a comparative appraisal of all of the factors in the case, including the character of the interest to be protected, the relative adequacy to the plaintiff of injunction and of other available remedies such as damages; plaintiff's delay in bringing suit, plaintiff's misconduct, if any; the relative hardship likely to result to defendant if the injunction is granted and to plaintiff if it is denied; the interest of third parties and of the public, and the practicability of framing and enforcing the order or judgment. *Seattle v. Nazarenius*, 60 Wash.2d 657, 669, 374 P.2d 1014 (1962).

of damages because trespass was not costing more than *de minimis* physical damage to plaintiff's property but absent an injunction, plaintiff would be forced to endure trespass for indefinite period in the future.).

D. Amount of Diverted Flow of Water is Not the Issue.

At the trial court and on appeal Appellant focused on the fact that there is only so much surface water migrating down the gradient, across Appellant's property and onto the Bublitz' property. The issue is not so much the amount of water but the *manner* in which the water been *concentrated* and discharged onto the Bublitz' property. Between the ditching of the boundary of Mr. Snyder's property and his upgrades of the drainage system he transformed what had been a diffuse flow of rain water into a concentrated discharge onto the Bublitz' property.

Appellant argues that the Bublitz failed to make a sufficient showing of a comparison of the amount of surface water coming onto their property before and after Mr. Snyder made his alterations to his drainage system, and cites *Ripley v. Grays Harbor County*, 107 Wn. App. 575 (Div.2, 2001). *Ripley* involved an alleged increase in the total amount of diffuse surface water flow onto the Ripley's property caused by road modifications performed by the County, such that the amount of flow of

water onto the Ripley's land was the principal issue. In reaching its determination relieving the County from liability, the court in Ripley distinguished *Burton v. Douglas County*, 14 Wn. App. 151, 539 P.2d 97 (1975), where liability of the County was found, as follows:

The facts are distinguishable from *Burton*. In *Burton*, the road had a slight crown in the center that prevented the surface water from crossing the road. As a result, the road acted as a conduit, channeling the water downhill until it gathered at a low point on the road where it flowed en masse across the road onto the plaintiff's property. *Burton*, 14 Wash.App. at 153, 539 P.2d 97.

Ripley, at 583.

The instant case, like *Burton*, involves a modification to a drainage system that collected what had been diffuse surface flow and disbursed the same, en masse, as a concentrated flow onto the Bublitz' property.

Mr. Snyder also argues that he is only making passive use of a pre-existing system, but he admitted to making modifications to the drainage system, including the installation of a new, larger, culvert. He did not deny that after his modifications what had previously been a natural diffuse flow of rain water that did not run in any channel was concentrated and disbursed en masse from his culvert and onto the Bublitz' property. Whatever the prior owner of Mr. Snyder's property did in terms of a

drainage system did not result in a concentrated and channelized discharge of rain water onto the Bublitz' property. Only after Mr. Snyder built his work shop and either installed or modified his drainage system did channelized flows commence to occur.

Finally, Appellant's reliance upon *Colwell v. Ezzell*, 119 Wash.App. 432 (2003), is entirely misplaced. *Ezzell* did not involve a trespass of surface water and its discussion of the due care exception to the Common Enemy Doctrine is entirely dicta. Moreover, Ezzell's interpretation of the due care exception as a carte blanche for avoidance of liability is incorrect. Rather, due care, as an exception to the carte blanche right to take action to divert surface waters downhill under the Common Enemy Doctrine, is properly interpreted to impose liability when such actions are taken either in bad faith or without due care. Such an exception is in addition to the other established exceptions to the Common Enemy Doctrine.

E. Attorney Fees on Appeal.

Even if Appellant were successful in convincing this court to reverse the trial court's order granting summary judgment, he would not be entitled to recover attorney fees on appeal under any of the cases cited by

Appellant. Washington courts follow the American rule in not awarding attorney fees as costs absent a contract, statute, or recognized equitable exception. *Rettkowski v. Department of Ecology*, 128 Wash.2d 508, 514, 910 P.2d 462 (1996). One recognized exception is for attorney fees incurred in dissolving wrongfully issued temporary injunctions or restraining orders. *Cecil v. Dominy*, 69 Wn.2d 289, 291–94, 418 P.2d 233 (1966); *Alderwood Assocs. v. Washington Env'tl. Council*, 96 Wn.2d 230, 247, 635 P.2d 108 (1981). All the cases cited by Appellant in his argument for an award of fees deal with fees incurred to dissolve wrongfully issued preliminary injunctions or temporary restraining orders issued under Rule 65. *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103 (1997) (trial court award of fees to city for dissolving TRO restraining city from enforcing adult cabaret ordinance provisions); *Parsons Supply, Inc. v. Smith*, 22 Wash. App. 520 (1979)(Employee entitled to fees for dissolving wrongfully issued TRO restraining competition with prior employer); *Doyle v. Lee*, 166 Wn. App. 397 (2012)(County prosecutor entitled to attorney fees in dissolving preliminary injunction against him obtained by police officer, and then prevailed on appeal in defending dissolution of preliminary injunction.); *Cecil v. Dominy*, 69 Wn.2d 289

(1966)(Counsel fees as damages recoverable only for services attempting to quash temporary injunction).

The purpose of the equitable rule permitting recovery for dissolving a preliminary injunction or restraining order is to deter plaintiffs from seeking relief prior to a trial on the merits. *White v. Wilhelm*, 34 Wn. App. 763, 773–74, 665 P.2d 407, review denied, 100 Wash.2d 1025 (1983). Here, Mr. and Mrs. Bublitz did not seek either a preliminary injunction or temporary restraining order pending trial. Rather, as they believe the material facts of the water trespass to be undisputable they requested that the court grant a permanent injunction on summary judgment. As Mr. Snyder failed to raise a material fact by admissible evidence, the trial court evaluated the circumstances shown by admissible evidence and granted the permanent injunction. In short, as Mr. Snyder failed to raise a material fact by admissible evidence essential to the relief requested, the trial court essentially found a full trial was not warranted.

Attorney fees should be awarded to Mr. and Mrs. Bublitz for a frivolous⁷ appeal under RAP 18.9(a). Here, based upon the record before

⁷ “An appeal is frivolous if, considering the entire record, the court is convinced that the appeal presents no debatable issues upon which reasonable minds might differ and that it

the trial court upon the motion for summary judgment and the applicable abuse of discretion standard, the appeal presents no debatable issues upon which reasonable minds might differ and is devoid of merit. Rather, only by arguing facts that were not timely presented to the trial court in admissible form does Appellant hope to persuade this court to reverse the trial court's permanent injunction.

VI. CONCLUSION

In 2015 Appellant installed, or made modifications to, a drainage system on his property, the effect of which was to transform what had previously been a diffuse flow of surface water into an accumulated, concentrated and channelized flow of water that discharged out of a large diameter culvert and onto the Bublitz property, causing flooding and erosion on the Bublitz' property. After being sued by Appellant on an untenable claim for reformation of recorded view easements, Mr. and Mrs. Bublitz made a counterclaim for the trespass by surface water and requested injunctive relief. After initial discovery Mr. and Mrs. Bublitz

is so devoid of merit that there is no possibility of reversal.” *Lutz Tile, Inc. v. Krech*, 136 Wn. App. 899, 906, 151 P.3d 219 (2007), *review denied*, 162 Wn.2d 1009, 175 P.3d 1092 (2008).

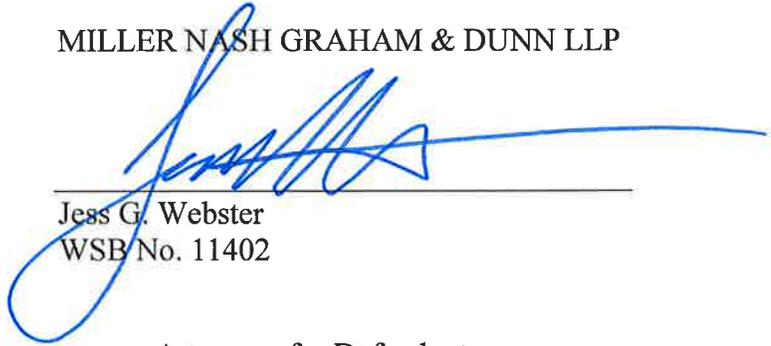
moved for summary judgment on both the Appellant's and the Bublitz' claims.

In responding to Mr. and Mrs. Bublitz motions for summary judgment, Mr. Snyder focused his attentions to his claim seeking to reform view easements. In addressing the Bublitz' motion for summary judgment upon their trespass claim, seeking a permanent injunction, Mr. Snyder failed to raise by admissible evidence any material issue of fact pertinent to the court's consideration of the circumstances and issuance of its permanent injunction. Having considered the undisputed facts and exercising its discretion, the trial court's issuance of the injunction is reviewed herein on an "abuse of discretion" standard. Appellant fails to show, based upon the record before the trial court at the time of entering its injunction, that the trial court abused its discretion. After the trial court made its ruling Mr. Snyder attempted to offer inadmissible information in an effort to persuade the trial court to reconsider its ruling. It is largely upon that same untimely and inadmissible information that Appellant now premises his arguments before this court. Based upon the record before it, the trial court properly enjoined Mr. Snyder's discharge of accumulate and concentrated surface water onto the Bublitz' property.

This court should affirm the decision of the trial court to issue the injunction.

DATED this 4th day of September, 2018.

MILLER NASH GRAHAM & DUNN LLP



Jess G. Webster
WSB No. 11402

Attorneys for Defendants-
Respondents Leo Bublitz and Susan
Bublitz

Declaration of Service

I declare that I served a copy of this document, by the method indicated below and addressed to:

Ted Knauss Peninsula Law Firm PLLC PO Box 59 Port Hadlock, WA 98339 <i>Attorneys for Appellant</i>	<u> X </u> U.S. Mail, Postage Prepaid
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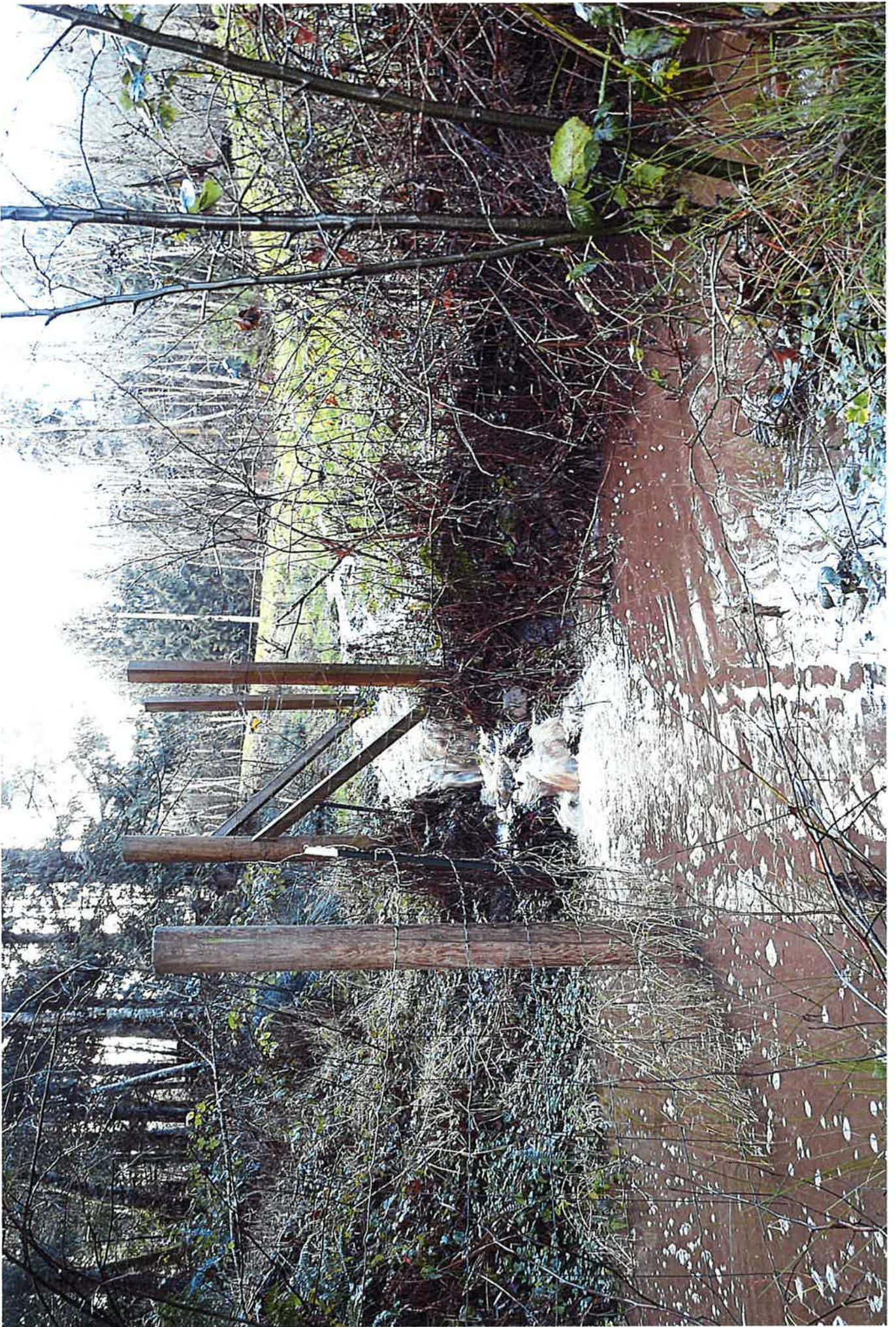
I declare under penalty of perjury under the laws of the State of Washington, that the foregoing is true and correct to the best of my knowledge.

EXECUTED this 4th day of September, 2018, in Seattle, Washington.


William McCorkle Legal Assistant

APPENDIX A to Opening Brief of Defendant-Respondents
Griswold and Bublitz.

Photographs of water discharge and flooding.





MILLER NASH GRAHAM & DUNN

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