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NO. 53127-5-II

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IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON,  
DIVISION II

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GERALDINE A. MANIATIS LIVING TRUST, et al.,

Respondent/Cross-Appellant,

v.

MALKIT SINGH, et al.,

Appellants/Cross-Respondents.

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Appeal from the Superior Court for Pierce County  
Cause No. 16-2-11515-8

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**BRIEF OF APPELLANTS TYE MINCKLER and KATHERINE  
MINCKLER**

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## **I. ASSIGNMENTS OF ERROR**

- A.** Appellants Minckler incorporate by reference all assignments of error stated in the Singh Appellant Brief to the extent they are in addition to following assignment of error regarding the trial court actions:

**Error No. 1** The trial court erred in entering the Findings of Fact 12.

There was no evidence presented at trial that “the Singh Properties are downslope of a daylighted portion of the stream that is still in its natural form.” The only testimony regarding a historical stream related to a stream near, but not adjoining the Defendants’ property. Further, several witnesses testified that the water leaving the wetland was surface water. This evidence was unrefuted.

**Error No. 2.** The trial court erred in entering the Findings of Fact 13.

There was no evidence presented of water “...traveling through underground channels connected to the upland drainage basin of north Tacoma.”

**Error No. 3.** The trial court erred in entering the Findings of Fact 15.

This FOF indicates that historically all water from the spring on the Singh lots went into a pond and was channeled to an outlet onto the Tosch property. While some of the water did enter the pond and travel to the Tosch property, the pond did not collect all of the spring water and the

water in the pond did not all go to the Tosch property. Mr. Halberg testified the water overflowed the pond and then ran over the ground.

**Error No. 4.** The trial court erred in entering the Findings of Fact 26. There was no evidence presented at trial that Defendant Singh regraded the wetland without a permit. City of Tacoma wetland agent Karla Kluge admitted on cross examination that Singh's wetland development permit allowed for grading of the wetland area. Also, Defendant Singh did not regrade the wetland buffer, as the wetland buffer exists on the Plaintiffs' and Defendants' properties. The grading that occurred did not destroy the pond and drainage system. The pond was removed because the City of Tacoma required it. *See Exhibit 41*, page 6 and Exhibit 111-Finding of Fact no. 11. Further, there was no evidence at trial to support the finding that the grading on the Singh lots changed the topography, or that any change in topography caused a change in the direction of the flow of water from north to northeast. Unrefuted the evidence presented at trial was that the slope of the land in question was always to the northeast.

**Error No. 5.** The trial court erred in entering the Findings of Fact 27. The City of Tacoma's approved wetland mitigation plan was in place to preserve **and enhance** the wetland, not prevent water from flowing off of the Singh properties. Unrefuted testimony at trial showed that the wetland was expanding to the east. This expansion of the wetland did not mean

Defendants were in violation of the mitigation plan. The City of Tacoma was aware of the expanding nature of wetlands, and specifically the fact that this wetland was moving east. The City of Tacoma does not view this as noncompliance with the mitigation plan. See *Exhibit 131*.

**Error No. 6.** The trial court erred in entering the Findings of Fact 29. This finding mischaracterizes the evidence because the 2015 documents were intended to address the City of Tacoma's requirement that the pond be filled in because the City said it was not in the original Wetland Development Permit. See testimony of Karla Kluge.

**Error No. 7.** The trial court erred in entering the Findings of Fact 31 and 32. The original 2008 Wetland Development Permit was not intended to preclude uncontrolled water from affecting neighboring properties. The record is clear that water runoff was affecting the Tosch property prior to development. Its purpose of the Wetland Permit was to assure sufficient water continued to run into the wetland. Brad Biggerstaff's reports in support of the Wetland Permit concluded that the development of the new homes would not cause any significant negative impact on surrounding properties.

**Error No. 8.** The trial court erred in entering the Findings of Fact 33. There was no evidence presented that supports a finding that Singh's work varied from the approved Wetland Mitigation plans regarding the

foundation drain collection system. Moreover, Brad Biggerstaff testified that the drainage system would not collect any more water than the previous system, absent increased rainfall. Further, testimony from all City witnesses was the Singh had completed construction of his homes including the drainage collection system and the wetland mitigation in compliance with all applicable permits, plans and regulations. This FOF implies the work was not in compliance with the City requirements and that is false.

**Error No. 9.** The trial court erred in entering the Findings of Fact 35 and 36. There was no evidence presented at trial that the water flowing onto the Maniatis Property came from the drainage system installed by Defendants Singh. The unrefuted evidence showed that the water from the drainage system around and under the homes was dispersed into the wetland. The water flowing from the wetland to the Maniatis property comes from the wetland, not the drainage system and there is no evidence this flow is greater than before the home construction.

**Error No. 10.** The trial court erred in entering the Findings of Fact 37 and 38. Defendants Singh offered to Plaintiffs to fix the Tosch drain line in order to alleviate the back up of water and allow it to flow as it historically did when the drain line on the Tosch Property was functioning. Both Plaintiffs rejected this attempt to address their drainage issues.

**Error No. 11.** The trial court erred in entering the Findings of Fact 41. The City of Tacoma October 5, 2015 stop work order was not specifically related to water going onto the Maniatis Property. It was issued on a false complaint of Tosch that Singh was operating a back hoe in the wetland.

**Error No. 12.** The trial court erred in entering the Findings of Fact 43. Mincklers are not aware of any evidence that supports a findings that the City made clear that wetland flows must not affect neighboring properties.

**Error No. 13.** The trial court erred in entering the Findings of Fact 49 and 50. There was no evidence of a natural watercourse on the Singh Properties and there is no evidence that “more of the spring water” was captured by the Singh foundation drains. Rather, there was unrefuted expert testimony Brad Biggerstaff that explained that no more water was being collected from the foundation drains than in the past. And there was also no evidence that Defendants were diverting the water in a different direction and no evidence of bad faith by Defendants nor evidence of a failure to avoid unnecessary damage to the properties of others. Furthermore, there was no evidence of damage to the Tosch Property and only nominal damage to the Maniatis Property.

**Error No. 14.** The trial court erred in entering the Findings of Fact 57. There was no evidence of any damage to the Tosch Property from any water running off the Singh lots, regardless of a specific dollar amount.

Water ran onto Tosch Property prior to any development of the Singh Properties and Plaintiffs provided no evidence of increase in that flow.

**Error No. 14.** The trial court erred in concluding (COL 10, 11, 12, 13, 14, 15, 19 and 18.) that Mincklers wrongfully caused water to trespass on the Plaintiffs' properties because there was no evidence of any action by the Mincklers to change the course of water on their lot after they purchased the Property in January 2018 or any other act affecting the water flow.

**Error No. 15.** The trial court erred in denying Defendants' Motion for reconsideration.

**Error No. 16.** The trial court erred in failing to apply the Common Enemy Doctrine to any water flowing off the Mincklers property.

**Error No. 17.** The trial court erred in denying Defendants' August 14, 2018 CR 41(b)(3) Motions to Dismiss.

**Error No. 18.** The trial court erred in issuing an Injunction.

**Error No. 19.** The trial court erred in denying Defendants' Motion for Fees and Costs.

**B.** Appellants Minckler incorporate by reference all issues pertaining to assignments of error stated in the Singh Appellant Brief to the extent they are in addition to following assignment of error regarding the trial court actions:

## **Issues Pertaining to Assignments of Error**

### **ISSUES PRESENTED**

- A. Was there substantial evidence to support a finding that Defendants actions caused the water complained of by the Plaintiffs? No.**
- B. Did the trial court err in finding the Defendants intentionally caused trespass or waste? Yes**
- C. Did the trial court err in failing to apply the common enemy doctrine? Yes.**
- D. Did the trial court err in denying Defendants CR 41 motions to dismiss? Yes.**
- E. Did the trial court err in awarding injunctive relief? Yes.**
- F. Did the trial court err in denying Defendants their fees and costs? Yes.**

### **III. STATEMENT OF THE CASE**

#### **A. Introduction of the Case.**

The TYE MINCKLER and KATHERINE MINCKLER are the owners of a residential lot in the City of Tacoma that they purchased from Appellants Singh. The Plaintiffs joined the Mincklers in the present litigation for the purpose of assuring any relief they obtained in the trial court would be enforceable against the owners of property they alleged was the source of water flowing onto their properties. The Plaintiffs asserted the same claims against the Mincklers as against Appellants Singh

including causes of action for waste, nuisance and trespass. Their requested relief included monetary damages and injunctive relief. The Plaintiffs never identified any particular action or negligence by the Mincklers that caused the water issues, but rather alleged the Mincklers failure to take action to stop water from running off the Mincklers' lot was an act of trespass nuisance and waste.

The Mincklers on the other hand, contend they are not responsible for any water running onto Plaintiffs' properties, because the condition pre-existed their ownership and they had no participation in any of the Singh's restoration of the wetland or his construction of their home on the property. At trial the Plaintiffs presented a theory of liability that was based on argument that before the Singh's performed wetland restoration work on the Singh's properties (two residential lots – one of which the Mincklers purchased after all work was completed by Singh) there was less water on the Plaintiffs' properties and that after the work the Plaintiffs claims there was more water.

During the Mincklers ownership of their lot, the wetland and buffer on their property has remained untouched. The Mincklers had no involvement in the Singh development and restoration work or the construction of the homes. The evidence presented at the trial did not identify anything Mincklers did to impact the water in the wetland and

buffer on their property or that caused water to flow onto the Plaintiffs' properties. The Plaintiffs never identified or gave notice to the Mincklers of any particular defect on their lot that was causing water to flow onto Plaintiffs' properties. The Plaintiffs simply told the Mincklers to stop the water from flowing onto their properties. However, Mincklers are legally prohibited from doing anything in the wetland or the buffer under the City of Tacoma Restrictive Covenant recorded on their lot as part of the Singh development permit requirements. During the Mincklers ownership their property has remained as it was when they bought it from Singh and the Plaintiffs presented no evidence of any change in the flow of water after Mincklers purchased of their home.

The Mincklers denied liability for causing the water on the Plaintiffs' property. There was no evidence to prove that Mincklers did anything to cause water to illegally flow from their property onto the Plaintiffs properties. To the contrary, Defendants Singh and Mincklers presented evidence to show any increase in water on the Maniatis property was the result of inadequate drainage systems on the Plaintiffs' properties and changes to the topography of Plaintiffs' property caused by actions of the Plaintiffs' themselves including Plaintiff Tosh berming up dirt along her property line so water flowed onto Plaintiff Maniatis' property and the Plaintiff Maniatis did nothing to drain the water off his property.

The undisputed evidence shows the Mincklers have maintained their portion of the wetland and buffer pursuant to the recorded Restrictive Covenant that prohibits any work in the Wetland and buffer. Further, there is no evidence of any code or permit violations regarding their home of the wetland on their property during their ownership. It is undisputed that Plaintiffs failed to give notice to the Mincklers of any specific defect in their property that is causing water to flow onto the Plaintiffs' properties. And finally it is undisputed that Mincklers were not involved in any way in preparing the plans, obtaining permits or constructing improvements on either of the original Singh lots including the lot they purchased in January 2018.

Both Defendants, Mincklers and Singh also argued, to the extent they did cause the water to flow onto the Plaintiffs properties, they are not liable for trespass under the common enemy doctrine.

**For Purposes of efficiency the Mincklers adopt and incorporate Appellant Singhs' briefing regarding the Parties, the Properties and the Trial Outcome as stated in Appellant Singh' Brief pages 6-10 which copied below.**

**B. Background of Parties and Properties.**

The parties in this matter own neighboring properties in Tacoma, WA. The Defendants own property commonly known as 2307 and 2315

N. 27<sup>th</sup> Street (“Singh Property”).<sup>1</sup> Plaintiff Kim Tosch owns 2712 N. Carr Street (“Tosch Property”). The Geraldine Maniatis Living Trust owns property commonly known as 2702 N. Carr Street (“Maniatis Property”). FOF 1-5 (680)

*i. Singh Property.*

Mr. Singh and Ms. Ranjit purchased the two subject matter parcels in August 2011. At the time of purchase, the east parcel had a dilapidated house on it. The western parcel was empty. Mr. Singh demolished the old house on the east parcel and built a brand-new home on each parcel. The eastern parcel was sold to the Mincklers in January 2018. FOF 6 (681)

Located on the northern portion of the Singh Properties is a wetland. As such, in order to develop the two parcels, a critical areas permit was required by the City of Tacoma. The permit was issued and the project was completed with approval by the City on August 28, 2017.

*ii. Maniatis Property.*

The Geraldine Maniatis Living Trust owns the home where Geraldine Maniatis and her adult son, Jamie Maniatis reside. The Maniatis family has owned this home for many years. The Maniatis property is located east of the Singh properties and south of the Tosch property. The

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<sup>1</sup> In January 2018, Defendant Singh sold the east parcel to the Mincklers. The Mincklers were added as Defendants in March 2018. The Mincklers are represented by Steve Burnham. To avoid confusion, the properties will be referred to as the “Singh Properties” throughout this brief.

Maniatis property is downhill from the Singh Properties. The Tosch Property is downhill from the Maniatis property. The west portion of the Maniatis Property is a wetland buffer area, which includes the northwestern corner that is at issue in this matter. FOF 7, 10 (681).

*iii. Tosch/Kerger Property.*

The Tosch property is located north of the wetland and north of the Maniatis property. Ms. Tosch's property is lower in elevation than the Singh and Maniatis properties. Located on the Tosch property is a curtain drain that runs along her southern boundary line. The drainline was installed by Tosch's predecessors in interest, the VanDorrens, sometime prior to 2008. Tosch's southern boundary line is in a wetland buffer area. FOF8, 11 (681)

As a convenience for the Court, below are labeled photos.



### **C. Wetland History.**

From the 1970s to 2007, Mr. Joe Hallberg resided at the Singh Properties. 104-105. At trial, Mr. Hallberg testified that a spring daylighted in the basement of his house and drained into the backyard. He said water flowed year-round from the spring. In the backyard he had a pond. This pond collected the water from the spring. Once the pond filled up, the water would overflow into the backyard. 105-112. The water was then channelized and traveled north to the Tosch property through a rock-lined swale and concrete pipe. 455, 551-552. During Mr. Hallberg's ownership, this area had not yet been designated as a wetland. (681-2).

In or around 2007, the City of Tacoma designated Mr. Hallberg's backyard as a wetland. 548, 682. Shortly thereafter the property was sold to Mr. Bergman who planned to develop the property. Mr. Bergman and Mr. Neely applied for a wetland development permit and submitted a wetland mitigation plan. As a result, Tosch's predecessor in interest, the VanDoorens, submitted a concern to the City regarding the water coming from the properties that are now the Singh Properties. The VanDoorens confirmed that Mr. Hallberg had been channelizing the water from his property to the VanDoorens property via a pipe. The VanDoorens had installed a perimeter drain sometime before 2008 to handle this water.

683. Exhibit 11, page 72 (DEF 325). Water from the wetland was directed into this drain via the Hallberg swale and pipe.

When Mr. Singh began his efforts to develop the property, he had to comply with the City's rules and regulations regarding the wetland. 682. The City's main concern was keeping the wetland hydrated. The City required that the water from the spring continue to hydrate the wetland as it always had. The City also required Singh to remove the pond and all other man-made features in the wetland, except the rock lined swale leading to the drain line on the Tosch Property.

To accomplish this, Singh's contractors installed a dispersion trench which dispersed the water from the spring into the wetland. The water was dispersed in a sheet flow manner in a northerly direction. As required by the City, Singh installed a rock lined ditch to encourage the water to continue to travel to the original output point, as created by the previous swale and pipe that existed under Hallberg's ownership. 472. The previous and current swale channeled the water to the north, despite the wetland's historical slope to the northeast. Exhibit 40, Exhibit 111 page 160 (DEF 413), Exhibit 118, page 7, Exhibit 11 page 2, 693-694. This plan was approved by the City.

#### **D. Trial Outcome.**

This matter was tried before the honorable Edmund Murphy in Pierce County Superior Court from August 6-16, 2018. Over 20 witnesses testified during this two-week bench trial. Four months after the conclusion of the trial, on December 19, 2018, Judge Murphy issued his Findings of Fact and Conclusions of Law. The trial court completely adopted Plaintiff Maniatis' proposed findings and conclusions on all substantive issues. Defendants, as well as Plaintiff Tosch, requested reconsideration and/or clarification of the Judge's rulings. Reconsideration was granted and the trial Court amended some of its findings and conclusions.

On February 25, 2019, Judge Murphy issued his final Findings of Fact and Conclusions of Law. The Court found that the flow of water from the Singh Property onto the Tosch Property was a condition that pre-existed Singh's ownership of its property. However, the Court also found that Defendants' grading in the wetland and buffer area altered the topography of the wetland, causing the flow of water to change from a northerly direction to a northeasterly direction, onto the Maniatis Property and then onto the Tosch Property, constituting an ongoing trespass and waste against both Plaintiffs and that the Common Enemy Doctrine did not apply. CP 678-694.

The Court also found Defendants liable for intentional trespass because Defendants' regrading, excavating, installing a collector system and installing a berm were done intentionally and done without authority. The court found negligent trespass in the alternative. Finally, the Court issued an injunction which requires the Defendants to abate the flow of water from the Singh properties onto the Maniatis' Property and awarded damages to Plaintiff Maniatis only. CP 678-694.

As will be explained below, there is no evidence in the record and no findings of fact to support the conclusion that Defendants' action caused the water on the Maniatis Property. The evidence simply is not there. Furthermore, the law does not provide for a finding of intentional trespass simply because the act causing the trespass was intentional. It is the consequence of trespass that must be intentional. Defendants also argue herein that even if there were evidence that they caused water to flow to the Maniatis Property, that was within their right to do under the Common Enemy Doctrine and that injunctive relief in this matter was improper.

Defendants are also appealing the denial of their request for fees pursuant to RCW 4.84.250-290.

**IV. ARGUMENT – Appellants’ Minckler incorporate by reference all Arguments of Appellant Singh and make the following additional argument. Some the Appellant Singh’s Argument is copied below for immediate reference.**

**A. Standard of Review.**

A trial court’s factual findings may be reversed when they are not supported by substantial evidence. Substantial evidence is said to exist if it is sufficient to persuade a fair-minded, rational person of the truth of the declared premise. *McGovern v. Dep’t of Soc. & Health Servs.*, 94 Wn. 2d 448, 451, 617 P.2d 434, 437 (1980). A trial court’s conclusions of law are reviewed de novo. *Scott’s Excavating Vancouver, LLC v. Winlock Properties, LLC*, 176 Wn. App. 335, 342, 308 P.3d 791, 796 (2013). The findings of fact must support the conclusions of law. Even when mislabeled as findings of fact, conclusions of law are reviewed de novo. *Miles v. Miles*, 128 Wn. App. 64, 70, 114 P.3d 671, 674 (2005).

**B. The Record Lacks Substantial Evidence of Causation of Water on Plaintiffs’ Properties.**

Plaintiffs had the burden to prove, by a preponderance of the evidence, that Defendants caused the water they complain of. However, the Plaintiffs failed to provide any evidence to prove Defendants’ action caused the water. Rather, Plaintiffs simply assumed some part of

Defendants' development activities caused the water because construction occurred around the time of the water.<sup>2</sup> The trial court's findings of fact do not provide any indication as to what evidence the court relied upon in finding causation. It is not even clear in the court's findings what the court found to be the cause. There are insufficient findings of fact and insufficient evidence to support the conclusion that Defendants caused the water.

The undisputed evidence shows the Mincklers have maintained their portion of the wetland and buffer pursuant to the recorded Restrictive Covenant that prohibits any work in the Wetland and buffer. Further, there is no evidence that the Mincklers know any code or permit violations regarding their home or the wetland. It is undisputed that Maniatis has not given notice to the Mincklers of any specific defect in their property that is causing water to flow onto the Maniatis Property. And finally it is undisputed that Mincklers were not involved in any way in preparing the plans, obtaining permits or constructing improvements on their property.

The Plaintiffs were required to prove the Mincklers ownership, use and/or maintenance of their home and the wetland and buffer on their lot was conducted in a negligent manner and in violation of a duty owed to

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<sup>2</sup> Work on the Singh Properties occurred over many years and started before Singh even owned the Properties. The previous developer of the Singh's Properties applied for the wetland development permit and submitted a wetland mitigation plan in 2008 and it was approved in 2009. The project was not complete until August 2017.

the Plaintiffs. Simply assuming ownership and maintenance of a home and pre-existing wetland does not impute liability on the new owners for any damages that may result from the new owners maintaining the home and wetland in a reasonable manner. *Jackass Mt. Ranch, Inc. v. S. Columbia Basin Irrigation Dist.*, 175 Wn. App. 374, 392, 305 P.3d 1108 (2013) The plaintiff must prove all the elements of negligence and in this case failed to do so.

The trial court's findings of fact fail to identify any act or omission by the Mincklers that caused any change in the water flows on their lot. The court concludes that the grading in the wetland caused the flow of the water to change from a northerly direction to a northeasterly direction, onto the Maniatis Property. FOF 26 683-4. The Mincklers did not grade their lot. The findings later suggest the water on the Maniatis Property comes from the Singh drainage system. FOF 35 685. However, the trial court fails to identify any specific defect in the system that Mincklers could have repaired to reduce the water flow. The trial court's findings assert that the water was caused "by construction." FOF 37 686. The Mincklers were not involved in any construction.

The court thereafter concludes "[b]y intentionally regrading the Singh Properties, excavating, installing a collector system to feed into the drainage system on the Property and installing a berm, Defendants Singh

unlawfully altered the flow of a natural watercourse [also channelized the flow from the Singh Property] and diverted the same onto Plaintiff Maniatis' Property and eventually onto Plaintiff Tosch's property." COL 4-5 691. The Mincklers had nothing to do with any of the Singh work and there was no finding of a defect or code violation in that work that existed after the Mincklers bought their property.

The court also concludes Minckler breached a duty by installing and continuing to permit the channelized flow of water to the Maniatis Property. COL 12-15 692. The court does not explain how the water could be caused by both changing the slope of the wetland and channelization. Nonetheless, neither is supported by the evidence or the findings. However, the Mincklers did not install any "channelized flow of water" and could not change anything regarding the drainage or the wetland due to the Restrictive Covenants.

**C. The Record Lacks Substantial Evidence of Intentional Acts and the Court Erred as a Matter of Law in Concluding Mincklers Committed an Intentional Trespass.**

The intentional acts found by the trial court were regrading, excavating, installing a collector system and installing a berm. COL 4-5 691. Mincklers were not involved in any of this work and this cannot be a basis for finding any intention by Mincklers to trespass. There must be

evidence that Mincklers intended to trespass, or knew with substantial certainty some action they were involved in would cause a trespass.

The elements of intentional trespass are: (1) an invasion affecting an interest in the exclusive possession of property; (2) an intentional doing of the act which results in the invasion; (3) reasonable foreseeability that the act done could result in an invasion of plaintiff's possessory interest; and (4) substantial damages to the res. *Seal v. Naches–Selah Irrigation Dist.*, 51 Wn.App. 1, 5, 751 P.2d 873 (1988) (citing *Bradley v. Am. Smelting & Refining Co.*, 104 Wash.2d 677, 691, 709 P.2d 782 (1985)). See also, *Jackass Mt. Ranch, Inc. v. S. Columbia Basin Irr. Dist.*, 175 Wn. App. 374, 400–01, 305 P.3d 1108, 1122 (2013). “The element of intent requires proof that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it. At a minimum, this requires proof that the actor has knowledge that the consequences are certain, or substantially certain, to result from his conduct and proceeds in spite of this knowledge” *Jackass Mt. Ranch* at 400–01 (internal citations removed). There is simply no evidence to suggest Mincklers did anything to change the flow or direction of water on their property or that there was any increase in water flow during their ownership.

It is anticipated that respondents will argue that the intentional element arises from Defendants' failure to stop the water, after it had started. Indeed, that would be the only basis to find intentional trespass on the part of the Minckler Defendants, who were not involved in the constructions process. However, a failure to act cannot satisfy the requirement for an intentional act, necessary to prove intentional trespass. A failure to act is affiliated with a negligence claim. *Jackass Mt. Ranch, Inc. v. S. Columbia Basin Irr. Dist.*, 175 Wn. App. 374, 402, 305 P.3d 1108, 1123 (2013). Further, Plaintiff would still have to prove Mincklers intentionally caused the trespass in the first place. There is no authority for the idea that one can be liable for intentional trespass for not stopping a pre-existing flow of water from a natural source, particularly when that source is protected by City of Tacoma wetland regulations and recorded Restrictive Covenants.

**D. The Court Erred in Finding Defendants Liable for Waste.**

Mincklers incorporate the arguments in Appellant Singh's briefing on liability for waste.

**F. The Court Erred in Failing to Apply the Common Enemy Doctrine.**

Mincklers incorporate the arguments in Appellant Singhs' briefing on the common enemy doctrine.

**E. The Court erred in denying Defendants August 14, 2018 CR 41(b)(3) Motion to Dismiss.**

On August 14, 2018, after Plaintiffs had rested their cases, Defendants brought motions to dismiss pursuant to CR 41(b)(3). 999-1024. Defendants argued that Plaintiffs had failed to put on evidence sufficient to meet their burden of proof. As explained throughout this brief, Plaintiffs did not prove causation or an intentional act.

The trial court denied Defendants' motions without any real explanation. 1073-1074. This denial of Defendants' CR41(b)(3) motions was an err because Plaintiffs failed to meet their burden of proof before resting their case.

**F. The Court Erred in Issuing an Injunction.**

Mincklers incorporate the arguments in Appellant Singhs' briefing on regarding the Court's error in issuing an injunction. The trial court erred in ordering an impractical, inequitable and unenforceable injunction.

#### **H. The Court Erred in Denying Defendants' Motion for Fees and Costs.**

RCW 4.84.250-290 allows for the recovery of reasonably attorneys' fees and costs by the prevailing party in matters where the damages alleged are less than \$10,000.00. For purposes of the statute, a Defendant will be considered the prevailing party if the Plaintiff recovers nothing, or if the recovery, exclusive of costs, is the same or less than the amount offered in settlement by the defendant. The Mincklers incorporate the arguments in Appellant Singh's briefing on regarding the trial court's denial of their motion for fees and costs. Plaintiff Maniatis did not and cannot provide any legal authority to support its position that his favorable injunction ruling nullifies RCW 4.84.250-290. The award of fees under this statute is not discretionary, but rather is mandatory. *Kingston* at 867, 765 P.2d 27, 29 (1988). As such, the Court's denial of Defendants' fees and costs was an error in law.<sup>3</sup>

#### **V. CONCLUSION**

The trial court waited four months after the conclusion of trial to issue its findings of fact and conclusions of law. Moreover, upon issuing its decision, the court failed to provide the parties with five days' notice

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<sup>3</sup> Moreover, if Defendants prevail in their appeal regarding the appropriateness of issuing an injunction in this case, Plaintiff's opposition to Defendants' motion is moot and Defendants should accordingly be awarded their fees and costs.

pursuant to CR 52(c). Instead, the trial court adopted Plaintiff Maniatis' proposed findings and conclusions almost completely.

While Defendants are sympathetic to the trial court's busy schedule and the amount of evidence in this case, the delay in issuing a ruling seems to have resulted in the trial court's undue reliance on Plaintiff's proposed findings of fact and conclusions of law. Unfortunately, Plaintiff Maniatis' proposed findings and conclusions conflict with one another and were not substantiated by the evidence. Burdened by a busy schedule and deadlines, the trial court simply adopted all of Plaintiff's findings and conclusions, without consideration for the actual evidence or whether those findings and conclusions were consistent with logic or the law.

For the reasons set forth above, Defendants ask the court to reverse those findings which are not supported by substantial evidence and reserve the errors in law.

Respectfully submitted this 9th day of August, 2019.

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**DECLARATION OF SERVICE**

I declare under penalty of perjury under the laws of the State of Washington that the following is true and correct.

I am employed by the law firm of CAMPBELL BARNETT PLLC.

At all times hereinafter mentioned, I was and am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and am competent to be a witness herein.

On August 9, 2019, I served one true and correct copy of the foregoing document with this Declaration of Service on the following parties via the method(s) indicated:

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DATED this 9 August 2019.

/s/ \_\_\_\_\_  
Lynell Bonnes, Legal Assistant

**CAMPBELL BARNETT PLLC**

**August 09, 2019 - 5:02 PM**

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**Appellate Court Case Title:** Geraldine A Maniatis Living Trust, et al, Resp/Cross-App v. Malkit Singh, et al,  
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**Superior Court Case Number:** 16-2-11515-8

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