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NO. 53127-5-II

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

GERALDINE A. MANIATIS LIVING TRUST, et al.,

Respondent/Cross-Appellant,

v.

MALKIT SINGH, et al.,

Appellants/Cross-Respondents.

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

BRIEF OF APPELLANTS

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I. ASSIGNMENTS OF ERROR

1. The Record Lacks Substantial Evidence of Causation of Water on Plaintiffs' Properties.
2. The Court Erred in Finding Intentional Acts.
3. The Court Erred in Finding Defendants Liable for Waste.
4. The Court Erred in Failing to Apply the Common Enemy Doctrine.
5. The Court erred in denying Defendants' August 14, 2018 CR 41(b)(3) Motions to Dismiss.
6. The Court Erred in Issuing an Injunction.
7. The Court Erred in Denying Defendants' Motion for Fees and Costs.

II. 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.

This case arises from Plaintiffs' claims of water trespass. Plaintiffs allege water from Defendants' properties wrongfully flows onto their properties, causing damage. The Plaintiffs brought causes of action for waste, nuisance and trespass and requested monetary damages and injunctive relief. The Plaintiffs never identified any particular action or negligence they alleged caused the water, but rather assumed Defendants' construction activities were the cause, based on an alleged temporal relationship of the construction activities to the increased flow of water.

The Defendants denied liability for causing the water on the Plaintiffs' property. There was no evidence to prove that Defendants caused the water. Further, Defendants presented evidence to show any increased water was the result of inadequate drainage systems on the Plaintiffs' properties and changes to the topography of Plaintiffs' property by the Plaintiffs. Defendants also presented evidence to prove the water complained of existed prior to any construction work by Singh.

Defendants also argued, to the extent they did cause the water, they are not liable for trespass under the common enemy doctrine.

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. 27th Street (“Singh Property”).¹ 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”).²

1. 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 2018.³

Located on the northern portion of the Singh Properties is a wetland.⁴ As such, in order to develop the two parcels, a critical areas

¹ 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.

² CP 680 at Findings of Fact (“FOF”) 1-5.

³ CP 681 at FOF 6.

⁴ CP 681 at FOF 9

permit was required by the City of Tacoma.⁵ The permit was issued and the project was completed with approval by the City on August 28, 2017.⁶

2. 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 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.⁷

3. 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 drain line was

⁵ CP 682 at FOF 17.

⁶ CP 688 at FOF 45.

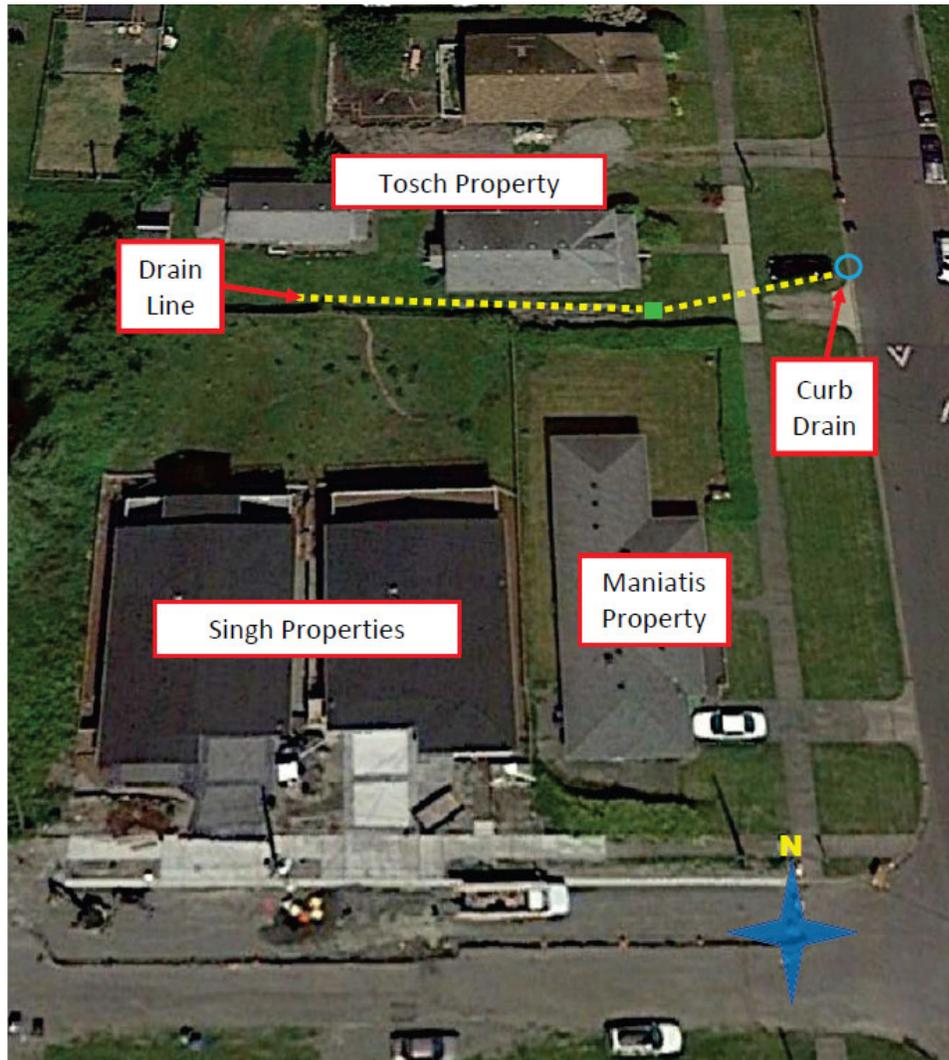
⁷ CP 681 at FOF 7, 10

installed by Tosch's predecessors in interest, the VanDoorens, sometime prior to 2008. Tosch's southern boundary line is in a wetland buffer area.⁸

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



⁸ CP 681 at FOF 8, 11



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C. Wetland History.

From the 1970s to 2007, Mr. Joe Hallberg resided at the Singh Properties. During Mr. Hallberg's ownership of the properties, a spring daylighted in the basement of his house and drained into the backyard. The water from the spring flowed year-round. In the backyard a pond

⁹ Ex. 120

collected the water from the spring. Once the pond filled up, the water would overflow into the backyard. The water was then channelized and traveled north to the Tosch property through a rock-lined swale and concrete pipe. During Mr. Hallberg's ownership, this area had not yet been designated as a wetland.¹⁰

In or around 2007, the City of Tacoma designated Mr. Hallberg's backyard as a wetland.¹¹ Shortly thereafter the property was sold to Mr. Bergman who planned to develop the property. Mr. Bergman and his developer, 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. Water from the wetland was directed into this drain via the Hallberg swale and pipe.¹²

¹⁰ CP 682-681 at FOF 13-16; *see also* CP 104-112 at Hallberg Testimony, CP 455, 551-552 at Kluge Testimony.

¹¹ CP 682 at FOF 16; *see also* CP 548.

¹² CP 682-683 at FOF 17-22; *see also* Ex. 11 (DEF 325).

When Mr. Singh began his efforts to develop the property, he had to comply with the City's rules and regulations regarding the wetland.¹³ 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.¹⁴

To accomplish this, Singh's contractors installed a dispersion trench which dispersed the water from the spring into the wetland.¹⁵ 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.¹⁶ The previous and current swale channeled the water to the north, despite the wetland's historical slope to the northeast.¹⁷ This plan was approved by the City.¹⁸

¹³ CP 682, 684 at FOF 17, 27.

¹⁴ CP 684 at FOF 29-30; *see also* CP 592-593, 605 at Kluge Testimony.

¹⁵ CP 685 at FOF 33.

¹⁶ CP 684, 686 at FOF 29-30, 36; *see also* CP 592-3, 605 at Kluge Testimony.

¹⁷ Ex. 111 (DEF 404, 413); Ex. 118 (DEF 581-584, 587); Ex. 11 (Maniatis 120, 132); CP 693-694 at Kluge Testimony; Brad Biggerstaff Deposition Published at Trial ("Biggerstaff Dep.") at pp. 84-87.

¹⁸ CP 683 at FOF 25.

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.¹⁹

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.²⁰

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.

¹⁹ CP 678-694.

²⁰ *Id.*

Defendants are also appealing the denial of their request for fees pursuant to RCW 4.84.250, 4.84.260, 4.84.270, 4.84.280, and 4.84.290.

IV. ARGUMENT

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 Wash. 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.²¹ 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 trial court's findings of fact initially assert that the water trespass was caused by regrading of the wetland. 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.²² There is no indication in the explaining how the court arrived at this conclusion. The findings later suggest the water on the Maniatis Property comes from the Singh drainage system.²³ The court does not explain how it arrived at this conclusion and does not explain how the water could be the result of both the regrade and the drainage system. Next the findings assert that the water was caused "by construction."²⁴ The court's findings do not provide any explanation for how these activities

²¹ 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.

²² CP 683-684 at FOF 26.

²³ CP 685 at FOF 35.

²⁴ CP 686 at FOF 37.

may have caused the water, or what evidence the court relied upon in making this determination.

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 diverting the same onto Plaintiff Maniatis’ Property and eventually onto Plaintiff Tosch’s property.”²⁵ The court goes on to conclude that the water from the Singh Properties through the drainage system constitutes a trespass, an ongoing trespass and alternatively an ongoing waste.²⁶ The court also concludes Defendants breached a duty by installing and continuing to permit the channelized flow of water to the Maniatis Property.²⁷ 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.

It is unclear what action the trial court believes caused the water, how these actions caused the water or what evidence the court relied upon. The findings of fact do not support a causal link between any of

²⁵ CP 691 at Conclusions of Law (“COL”) 4-5.

²⁶ CP 691 at COL 6-7.

²⁷ CP 692 at COL 12-15.

Defendants' actions and the water. This is not entirely surprising because there is insufficient evidence to support a finding that any of these actions caused the water.

Defendants advised the trial court that they were unclear about the court's findings on causation. In fact, based on the court's findings, Defendants assumed the trial court allowed Plaintiffs to rely upon the *res ipsa loquitor* doctrine and avoid the burden of proving causation.²⁸ During the January 25, 2019, hearing on Defendants' motion for reconsideration, Judge Murphy advised that he did not apply *res ipsa loquitor* and suggested the causal act was grading of the wetland, despite the multiple conflicting causal acts identified in the court's findings.²⁹

According to the court's findings, grading in the wetland changed the direction of the slope from a northerly to a northeasterly direction.³⁰ However, there was no evidence presented to establish that grading in the wetland caused the water to flow to the northeast, rather than the north or any other direction. There is no evidence establishing when the grading took place or how the grading changed the topography of the land, if at all. Even if we could assume grading changed the slope direction, there is no

²⁸ Defendants had previously raised the issue of *res ipsa loquitor*, asking the trial court to preclude the Plaintiffs from relying on the doctrine and ultimately never ruled on the motion until after the original findings of fact and conclusions of law were issued.

²⁹ CP 28, 70, 72.

³⁰ CP 683-684 at FOF 26.

evidence that it was changed in the direction of the Maniatis property. In fact, the evidence showed that the land historically sloped down hill towards the northeast- the direction of the Maniatis Property.

On July 25, 2007, and again in January 2014, Singh's hydrogeologist and engineering geologist, Brad Biggerstaff, confirmed that the topography of the site historically sloped down to the north and east.³¹ Karla Kluge, the City of Tacoma wetland biologist assigned to the project, agreed that the topography of the land was generally the same after grading. She testified that before and after grading, the land sloped to the north and northeast.³² There is simply no evidence to support the idea that grading in the wetland caused water to change directions and in fact the evidence overwhelmingly indicates otherwise.

Furthermore, the evidence shows that the wetland grading occurred *after* Maniatis began to experience water. On August 24, 2015, Jamie Maniatis emailed the City of Tacoma complaining that Defendants' construction had caused water on his property. Attached to the email was a photograph which showed water on his property as well as a fully vegetated and ungraded wetland. Several more photos taken by Mr. Maniatis conclusively show that he had water on his property before the

³¹ Ex. 111 (DEF 413); Ex. 11 (Maniatis 120, 132); Biggerstaff Dep. at pp 84-87; *see also* Ex. 118 (DEF 581-584, DEF 587), Ex. 111 (DEF 404).

³² CP 693-694.

wetland was graded, before the drainage system was installed and before the berm was built.³³

Plaintiffs did not put on evidence to prove when the grading occurred or how or whether the grading changed the slope of the land. The evidence convincingly proves the grading happened after Maniatis began to experience water and grading did not change the direction of the slope of the land.

Similarly, there is no evidence in the record to support the conclusion that excavation caused the water. The trial court's findings provide no support at all for the idea that excavations caused water. There is also no evidence to suggest that the excavations occurred before Maniatis' water problems. Nonetheless, even if they had, the unrefuted evidence presented at trial established that a daylighting spring existed on the property well before Mr. Singh purchased it or excavated.³⁴ There was no evidence that Defendants' excavation disrupted any water or did anything to change the flow of that historical spring. In fact, prior to excavation, Mr. Biggerstaff dug test pits to determine the depth and location of the water table to ensure excavation would not disrupt the water table.³⁵ There was no evidence whatsoever to support the

³³ Exs. 145-147.

³⁴ CP 681-685 at FOF 14-15.

³⁵ Biggerstaff Dep. at pp. 130-131; Ex. 118 (DEF 581-582, DEF 588, DEF 599-600).

conclusion that excavation is related to the water on Maniatis' Property. Maniatis did not even establish when the excavation occurred.

The drainage system on the Singh Properties, as well as the temporary berm, also could not have caused the Maniatis water because those were installed well after Maniatis started complaining of water.³⁶ Further, the berm was a temporary solution aimed at resolving Maniatis' complaints. It no longer exists and was only installed after his complaints started. It could not have been the cause.³⁷

Finally, there is no evidence to suggest that Defendants channeled the water onto the Maniatis Property. The findings of fact establish that the water was actually channeled to Tosch's Property.³⁸ The findings of fact also explain that the water leaving the Singh drainage system entered the wetland through a dispersion trench.³⁹ Defendants do not know what the trial court is referring to when it says that water was channelized onto the Maniatis property. There is no evidence to suggest Defendants channeled water onto the Maniatis Property and the court's own findings conflict with this conclusion.

The Plaintiffs did not put on evidence to establish when the Defendants' construction activities occurred. The findings of fact simply

³⁶ Exs. 145-147.

³⁷ CP 686 at FOF 38; CP 691 at COL 4-5.

³⁸ CP 684, 686 at FOF 29, 336.

³⁹ CP 685 at FOF 33.

suggest that demolition of the Hallberg house occurred in 2013 and all other construction started thereafter.⁴⁰ Defendants dispute this finding because there is no evidence to support it.⁴¹ Nonetheless, even if that date were verifiable, it does not establish when the grading, excavation, channelization, or installation of the drainage system or berm occurred. To the contrary, the evidence actually suggests these activities, to the extent they occurred at all, happened after Maniatis' water problems began.

There are no findings or evidence to support the idea that regrading, excavation, the drainage system or the berm caused water to channelize towards the Maniatis Property. The findings of fact and related conclusions of law conflict with one another and were not based upon any evidence. In fact, substantial evidence proved that these activities could not have been the cause.

This is not a case where there is no reasonable alternative explanation for the water on the Maniatis Property. In addition to pointing out Plaintiffs' failure to meet their burden of proof, Defendants presented compelling evidence to explain the water was caused by Plaintiffs' own failed drainage systems.

⁴⁰ CP 683 at FOF 26.

⁴¹ Finding of fact 29 also states that "Defendants Singh proposed a mitigation plan to the City of Tacoma in 2015 after regarding work had begun." Defendants dispute this finding because there is no evidence to support it.

During Mr. Hallberg's ownership of the Singh Properties, the property included a pond, which collected the water from the spring and carried it to the north via a swale and pipe. The water then entered the drain line installed by the VanDoorens. This man-made collection and channelization system created a water outlet point to the north.⁴² Nature did not choose that outlet point.

Defendants Singh's wetland mitigation plan included a similar swale to encourage the water to continue to outlet to the north, despite the natural northeasterly slope of the land.⁴³ However, the VanDooren drain line was not properly maintained and began to fail.

In March 2015, before Plaintiffs' allege the trespass began, Tosch obtained a home inspection report which recommended that she engage a drainage specialist to advise her on the inadequate drainage on the south side of her house. The home inspector noted a problem with moisture that was outside the scope of his inspection.⁴⁴ Tosch did not follow through on the recommendation to hire a drainage specialist.⁴⁵

At the time she moved into the house, Ms. Tosch was not aware of the drain line on the south side of her property. As such, she did not maintain it. She continued to allow grass and plants to grow on the surface

⁴² CP 683 at FOF 21-22; Ex. 11 (DEF 325); CP 401-402 at McCarthy Testimony.

⁴³ CP 684, 686 at FOF 29-30, 36.

⁴⁴ Ex. 101.

⁴⁵ CP 689-90 at FOF 54.

above the drain line.⁴⁶ However, allowing growth over-top of a curtain drain like this will cause it to fill with dirt and fail.⁴⁷

In March 2016, Ms. Tosch's engineer, Mr. Cash Carr, recommended a curtain drain along the southern boundary of her property to address the moisture. Mr. Carr was unaware of the existing drain line at the time he made this recommendation, which clearly indicates that drain line was not functioning.⁴⁸ Ms. Tosch did not follow through with Mr. Carr's recommendation.

In 2017, Ms. Tosch hired a contractor, Matt Simpson, to build an addition to the back (west side) of her home. While digging out the foundation for the addition, Mr. Simpson discovered significant groundwater infiltrating his excavation. As such, he was forced to pump water out of the foundation site three times each day. All of the water he pumped out of this foundation he put into the catch basin on the border of the Tosch and Maniatis Property.⁴⁹ Tosch's contractor also tied the roof gutter for the addition to the existing Tosch home gutters, although he did not know where the existing system outlets.⁵⁰

⁴⁶ CP 689-90 at FOF 54; CP 767, 815 at Tosch Testimony; CP 939-40 at Simpson Testimony.

⁴⁷ CP 983-984 at Humphrey Testimony; CP 1089, 1091 at Perrault Testimony.

⁴⁸ Ex. 106.

⁴⁹ CP 880-881, 893, 910 at Simpson Testimony.

⁵⁰ CP 935-937 at Simpson Testimony.

In late October 2017, Ms. Tosch directed Mr. Simpson and his employees to dig a trench along her south property line to catch water that was interfering with the construction.⁵¹ Although the trench was in the wetland buffer, Ms. Tosch did not obtain a permit for this work. Ms. Tosch claims it was an emergency.⁵² Upon digging the trench, they unearthed the VanDooren drain line.⁵³ This was the first time any of the parties became aware of the existing drain line. Inspection of the drain line confirmed that it had filled with silt and soil and had failed.⁵⁴

When the contractors dug the trench, they mounded the soil from the trench along either side of the trench. This created a berm, stopping the flow of water from the Singh Properties to the Tosch Properties.⁵⁵ The water therefore traveled northeast, to the Maniatis corner, with even greater intensity. The flow from the wetland to the drain line went from being limited by the malfunctioning drain, to almost completely blocked by the berm.

Not surprisingly, Mr. Maniatis testified that his property experienced more water after the berm was built.⁵⁶ Additionally, although the purpose of the trench was to catch water from the wetland, several

⁵¹ CP 887 at Simpson Testimony; CP 620 at Kluge Testimony.

⁵² CP 856 at Tosch Testimony; Kluge CP 564-565 at Kluge Testimony.

⁵³ CP 887 at Simpson Testimony.

⁵⁴ CP 683-684 at FOF 54; CP 903-904, 983-984 at Simpson Testimony.

⁵⁵ CP 903-904, 926, 978 at Simpson Testimony; CP 586 at Kluge Testimony; CP 411-412 at McCarthy Testimony; Ex. 109.

⁵⁶ CP 283-284 at Maniatis Testimony.

witnesses testified that the only water in the trench was coming from the Maniatis Property. The trench was dry where it ran parallel to the Singh Properties. The berm prevented the wetland water from entering the trench. Instead it flowed to the Maniatis Property and then onto the Tosch Property.⁵⁷

The evidence clearly shows the natural slope of the land is to the northeast.⁵⁸ However, the Hallberg and Singh swale directed the water to the north and into the drain line on the Tosch Property.⁵⁹ Because the drain line was not maintained, it ultimately failed. As a result, water backed up and started flowing to the Maniatis Property because the swale and drain line were inundated.

Ms. Tosch was put on notice of her drainage problems several times over the years, but she ignored the experts' recommendations. Instead, Ms. Tosch's contractor burdened the system even more by pumping water into the catch basin and allowing the new gutters to saturate the area in a manner he did not understand. Once the trench was dug and the berm created, Tosch no longer had an issue with water from

⁵⁷ CP 915, 955 at Simpson Testimony; CP 969, 975-976, 980 at Humphrey Testimony; CP 1088 at Perrault Testimony.

⁵⁸ Ex. 111 (DEF 404, 413); Ex. 118, (DEF 581-584, 587); Ex. 11 (Maniatis 120, 132); CP 693-694 at Kluge Testimony; Biggerstaff Dep. at pp 84-87.

⁵⁹ CP 684, 686 at FOF 29-30, 36.

the wetland. At that point she was only experiencing water from the Maniatis Property.

The evidence proves that grading did not and could not have caused the water on the Maniatis Property. The direction of the slope in the wetland did not change and Maniatis' water problem started before the grading. Further, although it was not their burden, Defendants put forth substantial evidence to prove the water was caused by the conditions on the Tosch Property.

The trial court erred in finding Defendants liable for trespass and waste because there was not substantial evidence to support a finding of causation. There is simply no causal link between water and the grading, excavation, drainage system or berm.

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

The intentional acts found by the trial court were regrading, excavating, installing a collector system and installing a berm.⁶⁰ However, there is no finding or evidence to suggest that there was an *intent to trespass*, which is required for a finding of intentional trespass. It is not enough that Defendants intended to do an act that resulted in trespass. There must be evidence that Defendants intended to trespass, or

⁶⁰ CP 691 at COL 4-5.

knew with substantial certainty their action would cause a trespass. No evidence was presented to suggest Defendants intended to trespass or knew their actions would result in a trespass. The court's conclusion that the intentional construction work constitutes an intentional trespass, without a finding of intent to trespass, was an error of law and not supported by substantial evidence.⁶¹

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 & Ref. 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

⁶¹ CP 691-692 at COL 4-5, 9-14.

his conduct and proceeds in spite of this knowledge” *Jackass Mt. Ranch* at 400–01 (internal citations removed).

It’s not enough that the act allegedly causing the trespass was done intentionally. The defendant must intend the consequences of the act. Here, there was no finding nor evidence that Defendants desired or were substantially certain that the consequences of their actions would be a change in direction of the water flow.

Before construction, hydrogeologist Brad Biggerstaff dug test pits to determine the depth of the water table to ensure excavation would not disrupt the groundwater.⁶² He also conducted a pre and post development flow analysis and determined that the flow rates into the wetland would remain the same. The goal of the City and Defendants Singh was to match pre-existing hydrology conditions.⁶³ Mr. Biggerstaff specifically concluded that the proposed development will not have a significant impact on the wetland hydrology or the downstream properties.⁶⁴

All of the work by Defendants Singh was monitored and approved by the City of Tacoma. The City required that Defendants Singh include a swale to direct the water in the same direction to the north as the Hallberg ditch and pipe. Defendants Singh complied with this requirement. In fact,

⁶² Biggerstaff Dep. at pp. 130-131; Ex. 118 (DEF 581-2 588, 599-600).

⁶³ Biggerstaff Dep. at pp. 32-33, 76-77; CP 570 at Kluge Testimony; Ex. 118 (DEF 581-2, 588).

⁶⁴ Ex. 118 (DEF 599-600).

the trial court explicitly found that Singh's wetland mitigation plan anticipated that the water would flow to the north – onto the Tosch property.⁶⁵ This finding is in direct conflict with the idea that Defendants' intended to redirect the water to the Maniatis Property.

There is simply no evidence to suggest Defendants intended that water would flow onto the Maniatis' Property as a result of construction.

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 construction 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.*, 175 Wash. App. at 402. Further, Plaintiff would still have to prove Defendants 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 negligent trespass.

Plaintiffs will be unable to point to any evidence in the record to suggest Defendants intended to cause a trespass because that was never the intent. Throughout the development process, significant effort was

⁶⁵ CP 684 at FOF 29-30; CP 686 at FOF 36.

made to maintain the historic hydrology conditions in the wetland, as required by the City.

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

The trial court's conclusion that Plaintiffs proved a cause of action for waste was an error in law.⁶⁶ Waste is a statutory cause of action which requires intrusion by a person onto the land of another, causing injury. Here there is no evidence, or even allegation, that the Defendants came onto the Plaintiffs' land and caused injury. Therefore, the trial court erred in finding Defendants liable for waste.

Waste is a statutory cause of action pursuant to RCW 4.24.630, which states in relevant part,

(1) Every *person* who goes onto the land of another *and* who removes timber, crops, minerals, or other similar valuable property from the land, or wrongfully causes waste or injury to the land, or wrongfully injures personal property or improvements to real estate on the land, is liable to the injured party for treble the amount of the damages caused by the removal, waste, or injury. (*emphasis added.*)

The statute unambiguously requires evidence that waste was caused by a person entering the land of another. In *Colwell v. Etzell*, the Court of Appeals confirmed the plain language of the statute, holding, "The statute's premise is that the defendant physically trespasses on the plaintiff's land." *Colwell v. Etzell*, 119 Wn. App. 432, 439, 81 P.3d 895

⁶⁶ CP 691 at COL 7.

(2003). Plaintiffs' failure to prove that Defendants went on the Plaintiffs' property and caused injury is fatal to their claims of waste under RCW 4.24.630.

Defendants also cannot be liable for waste because they did not act with intent to commit waste. RCW 4.24.630 requires a showing that Defendants *wrongfully* committed waste. To prove wrongful action, the Plaintiffs must prove intent, which they did not do, as explained above.

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

The common enemy doctrine has directed the law of surface water in Washington since 1896. *Currens v. Sleek*, 138 Wn.2d 858, 861, 983 P.2d 626, 628–29 (1999). Surface water is properly defined as “vagrant or diffused [water] produced by rain, melting snow, or springs.” *King Cty. v. Boeing Co.*, 62 Wash. 2d 545, 550, 384 P.2d 122 (1963) (emphasis added). “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. 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 v. Sleek*, 138 Wn.2d 858, 861, 983 P.2d 626,

628–29 (1999) (quoting *Cass v. Dicks*, 14 Wn. 75, 44 P. 113 (1896), internal quotations omitted).

In order to alleviate potential inequitable results under such strict application of this doctrine, Washington Courts have adopted several exceptions to the common enemy doctrine. The first exception provides that landowners may not inhibit the flow of a natural watercourse. *Island Cty. v. Mackie*, 36 Wash. App. 385, 388, 675 P.2d 607 (1984). The second exception prevents landowners from collecting water and channeling it onto their neighbors' land, unless that water is being discharged in a manner consistent with the natural flow thereof. *Currens v. Sleek*, 138 Wn.2d 858, 862, 983 P.2d 626, 629 (1999) (quoting *Wilber Dev. Corp. v. Les Rowland Const. Inc.*, 83 Wash. 2d 871, 875, 523 P.2d 186 (1974), *overruled by Phillips v. King Cty.*, 136 Wash. 2d 946, 968 P.2d 871 (1998)). The final exception allows landowners to alter the flow of surface water, so long as those alterations are done while exercising due care. *Id.*

The water at issue is surface water, not a natural watercourse. Surface water is defined as “those vagrant or diffused waters produced by rain, melting snow, or springs.” *King Cty. v. Boeing Co.*, 62 Wn.2d 545, 550, 384 P.2d 122, 126 (1963) citing *Alexander v. Muenscher*, 7 Wash. 2d 557, 110 P.2d 625 (1941) (emphasis added). See also, *Currens v. Sleek*, 138 Wn.2d 858, 861, 983 P.2d 626, 628, *as corrected* (Dec. 14, 1999),

amended, 993 P.2d 900 (Wash. 1999). The water at issue here emanates from a spring which daylights on the Singh property. After daylighting, the water then flows, absent any natural waterway, across the wetland following a general downhill direction.⁶⁷ This type of flow is commonly referred to as “sheet flow,” a layer of surface water that is diffused across the wetland top soils.⁶⁸ Thus, the water is properly classified as surface water and the common enemy doctrine allows the Defendants to dispose of it as they see fit, without liability for the damages caused to the neighbors.

Both Mr. Biggerstaff and Ms. Kluge testified that the water was surface water.⁶⁹ Even Maniatis’ hydrology expert confirmed that that the water leaving the wetland was surface water.⁷⁰ Ms. Tosch’s experts also classify the water as surface water.⁷¹ The court’s own findings of fact suggest that the water is surface water.⁷² Indeed, the idea that the change in the grade of the land caused the water to flow towards Maniatis is an acknowledgment that the water is traveling on the surface. A change in the direction of the slope would not cause the water to change directions if it were groundwater or channelized.

⁶⁷ CP 681-682, 685 at FOF 13-15, 33, 35.

⁶⁸ Biggerstaff Dep at pp. 51-52

⁶⁹ Biggerstaff Dep. at pp. 26-27, 32-33, 45; CP 456, 551 at Kluge Testimony.

⁷⁰ CP 429.

⁷¹ Ex.106 (DEF 227-228); Ex. 107 (DEF 233).

⁷² CP 685 at FOF 33 (“The dispersion trench is designated to disperse the spring water on the edge of the wetland.”)

Further, water emanating from springs does not fit into the definition of a natural watercourse. A natural watercourse “is defined as a channel, having a bed, banks or sides, and a current in which waters, with some regularity, run in a certain direction.” *King Cty. v. Boeing Co.*, 62 Wash. 2d 545, 550, 384 P.2d 122, 126 (1963). Here there was no evidence to suggest the water emanating from the spring was in a natural channel or within any regular defined course by nature. No evidence of a natural watercourse was presented. In fact, Mr. Biggerstaff and Ms. Kluge, the only people to investigate the issue, testified that no natural watercourse ever existed on the Singh Properties.⁷³

The trial court’s conclusion that the water emanating from the spring constitutes a natural watercourse and not surface water is contrary to the evidence, its own findings, and the law.⁷⁴ The water at issue is surface water and the common enemy doctrine protects landowners from liability for this common enemy.

Furthermore, none of the exceptions to the common enemy doctrine apply. Defendants did not inhibit the flow of a natural watercourse, did not collect and channel the water in a manner inconsistent with the natural flow thereof and acted with due care.

⁷³ Biggerstaff Dep. at p 46; CP 652-653 at Kluge Testimony.

⁷⁴ CP 688 at FOF 49; CP 690-691 at COL 3-4.

As explained above, there was no natural watercourse on the Singh Properties and therefore no natural watercourse for the Defendants to inhibit. The exception does not apply.

The second exception also cannot apply because Defendants did not channel the water to the Maniatis Property. The common enemy defense applies so long as landowners do not collect and channel the water it onto their neighbors' land in a manner that is inconsistent with the natural flow thereof. *Currens v. Sleek*, 138 Wn.2d 858, 862, 983 P.2d 626, 629 (1999) (quoting *Wilber Dev. Corp. v. Les Rowland Constr. Inc.*, 83 Wn.2d 871, 875, 523 P.2d 186 (1974)). Here, there is no evidence Defendants channelized water onto the Maniatis Property. In fact, the court concluded that the water found its way to the Maniatis Property due to the grade of the land, not channelization.⁷⁵

The water from the spring was disbursed into the wetland by a dispersion trench, which releases the water in a sheet flow to the wetland.⁷⁶ The only channelization occurred to the north, onto the Tosch Property.⁷⁷ Once that channel was blocked, the water flowed downhill in a northeasterly direction, consistent with the natural slope of the land. The Defendants did not channelize the water to the Maniatis Property and there

⁷⁵ CP 683-684 at FOF 26.

⁷⁶ CP 685 at FOF 33.

⁷⁷ CP 684 at FOF 29-30; CP 686 at FOF 36.

was no evidence presented at trial to suggest such. Similarly, there is no finding to support the conclusion that the water was channelized towards the Maniatis Property.

It is anticipated that Maniatis will argue the water eventually formed a channel when it eroded the surface of the ground very slightly. The court's findings refer to this as a stream from the Singh Property to the Maniatis Property.⁷⁸ There is no evidence to suggest a stream exists. Instead, that small rivulet, as it is properly characterized, does not constitute channeling and it was not created by the Defendants. *Healy v. Everett & Cherry Valley Traction Co.*, 78 Wash. 628, 634, 139 P. 609, 611 (1914). *See also*, § 10.7. Diffuse surface water, 17 Wash. Prac., Real Estate § 10.7 (2d ed.) (diffuse surface water is still characterized as surface water "though it may come together temporarily in rivulets."). To overcome the common enemy doctrine, Maniatis must show that *Defendants* channeled the water, not that the water eventually formed a rivulet on its own.

Moreover, there is no evidence to suggest the water flowed to the Maniatis Property in a manner inconsistent with the natural flow. As explained above, the slope of the wetland was historically to the northeast, where Maniatis complains of water. There is no evidence to suggest the direction of the slope changed and/or affected the flow pattern of the

⁷⁸ CP 685-686 at FOF 35-36.

water. Further, there is no evidence to suggest more water was entering or leaving the wetland as a result of Defendants' actions. Both Mr. Biggerstaff and Ms. Kluge testified that pre and post development flow analysis confirmed that development would not change the hydrology of the wetland.⁷⁹ There is no evidence to refute this finding. As such, there is insufficient evidence to support the court's findings and conclusions that more water is being captured by the spring or that the natural flow of the water was otherwise altered.⁸⁰

Finally, Plaintiffs did not provide any evidence to even suggest the Defendants did not act with due care in developing the property, as suggested in FOF 50 and COL 3.⁸¹ "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." *Currens v. Sleek*, 138 Wn.2d 858, 868, 983 P.2d 626, 632 (1999). The common enemy doctrine shields a landowner from liability where the changes in surface water flow are made both in good faith and in such a way as not to cause unnecessary damage.

⁷⁹ CP 570 at Kluge testimony; Biggerstaff dep. pp. 32-33; Ex. 118 (DEF 581-582, 588, 599-600).

⁸⁰ CP 689 at FOF 50; CP 691 at COL 3-4.

⁸¹ CP 689; CP 691.

Under this exception, the court “looks only to whether the landowner has exercised due care in improving the land” and the landowner’s duty is “not determined by weighing the nature and importance of the improvements against the damage caused to one’s neighbor.” *Id.* The Plaintiffs bear the burden of proof to show that the damage to their property was the result bad faith or in excess of that necessary for the completion of the project. *Id.*

Plaintiffs have the burden to prove the water was the result of bad faith or in excess of what was required to complete the development. However, they presented no evidence of such and there are no findings of fact to support the conclusion that Defendants’ lack of due care caused the water.

In order to develop the properties, it was necessary for Defendants Singh to comply with the City’s wetland regulations, which were primarily concerned with maintaining the historic hydrology of the wetland. Defendants Singh complied with these requirements and in doing so verified that the hydrology would not change and that the downhill neighbors would not be affected. The City monitored and approved Defendants wetland mitigation, drainage and development plans. The work was done pursuant to the City’s requirements and with the intent to maintain the hydrology status quo. There was nothing done in bad faith, or

unnecessarily.⁸² There was no evidence, nor any findings, to support the conclusion that Defendants failed to exercise due care.

The common enemy doctrine avoids the absurdity of imposing liability for surface water leaving an uphill property. Surface water has to travel downhill. Uphill neighbors cannot be expected to collect and store water to save their neighbors. Each property owner is expected to protect their own property by continuing to send the water downhill. This case presents exemplar circumstances for the logic and applicability of the common enemy doctrine and the trial court erred in finding that it did not apply.

F. 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).⁸³ 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.⁸⁴ This denial of Defendants' CR41(b)(3) motions was in err

⁸² Exs. 116, 117, 118 (DEF 599-600). CP 683-684 at FOF 25, 27, 29-31.

⁸³ CP 999-1024.

⁸⁴ CP 1073-1074.

because Plaintiffs failed to meet their burden of proof before resting their case.

G. The Court Erred in Issuing an Injunction.

The trial court issued conclusions of law which that do not compel Defendants to engage in, or refrain from, any particular action. Rather, the injunction requires Defendants to “abate the flow of water from the Singh Properties onto the Plaintiff Maniatis’ Property.”⁸⁵ There was no instruction or guidance provided by the court, or the Plaintiffs, to explain how Defendants could comply with this ruling. This puts the Defendants in a state of perpetual potential contempt and will result in ongoing litigation over what constitutes compliance with the court’s order. Further, there is a genuine concern that Defendants will be unable to comply with the injunction or that any compliance action would far outweigh the \$500.00 in damages asserted by Plaintiff Maniatis.

Injunctive relief is an “extraordinary equitable remedy, designed to prevent serious harm; its purpose is not to protect a plaintiff from mere inconveniences or speculative and insubstantial injury.” *Delong v. Parmelee*, 157 Wn. App. 119, 236 P.3d 936 (2010). In order to obtain an injunction, Plaintiffs must establish: (1) a clear, equitable right; (2) a well-grounded fear of immediate invasion of that right; and (3) that the acts

⁸⁵ CP 693 at COL 20.

complained of have resulted in substantial injury. *Id.* at 792. To determine whether an injunction is proper, the Court considers, among many factors: the adequacy of an injunction compared to other remedies, the plaintiff's misconduct, the relative hardship of each party, and the practicability of framing and enforcing the order or judgment. *Id.*

At no point during this litigation did the Plaintiffs present any proposed plan to stop the flow of water. The only plan offered was by the Defendants. However, Plaintiffs do not like Defendants plan because the solution shows that the problem exists on Plaintiffs Properties and remedies must be addressed on their properties. In order to "abate the flow of water," as ordered by the Court, there will need to be repairs to the drainage on the Plaintiffs' properties. No matter what Defendants do on their own property, drainage will not be adequate until Tosch removes the berm along her fence line and repairs and maintains the drain line on her property and until Maniatis fills in the depression in the corner of its yard. Defendants do not have the right to complete this work on the Plaintiffs properties and therefore cannot comply with the injunction.

The berm on the Tosch Property stops the water from flowing through the man-made outlet and instead the water follows gravity to the northeast. As long as that berm exists, Maniatis will have water. The Tosch drain line also needs to be repaired and maintained. If Tosch does

not repair and maintain the drain line, water will not flow into the storm drain and will continue to back up and Maniatis will experience water. The water pools at the property line because Tosch and her predecessors in interest allowed the drainage line to fall into disrepair and become unfunctional. The evidence presented that Tosch's drain line was malfunctioning and that caused pooling water, was unrefuted. Indeed, Maniatis testified that his water problems increased when Tosch created the berm. Defendants cannot complete work on the Tosch Property and have no ability to ensure that Tosch keeps her drain line in working order.

Additionally, Maniatis will continue to experience water on his property until and unless he fills in the depression that is in the corner of his yard. The depression puts the Maniatis' property at a significantly lower elevation and stops the water from draining from his property. If he does not fix this issue, he will have water on his property.⁸⁶ Defendants have no ability to make repairs to the Maniatis' Property.

Further, if the necessary repairs are to Plaintiffs' Properties, this is evidence that Defendants are not the cause of the water and therefore an injunction is inappropriate. To arrive at a solution to the problem, Plaintiffs would have to determine the cause. They did neither. Now, without providing any specific action at all, Defendants are supposed to

⁸⁶ Biggerstaff Dep. at p. 48.

determine what will stop the water. If the Plaintiffs and the trial court provide no guidance on what will stop the water, and Defendants' experts believe it is necessary to do work on the Plaintiffs' properties, how are Defendants supposed to comply with the injunction?

Compliance with the injunction is further complicated by the fact that the areas at issue are protected wetlands and wetland buffers. The Covenant and Easement recorded against Defendants' properties prohibits Defendants from altering the surface topography and hydrology of the land, or causing any significant soil degradation, erosion, or siltation or pollution of any surface or subsurface waters, including excavation, removal of any soil, sand gravel, rock or vegetation, except as required by activities expressly permitted by the City of Tacoma.⁸⁷ In determining whether to issue a permit, the City's primary concern is preservation of the wetland. Defendants will be limited in any proposed action that appears to be dehydrating the wetland.⁸⁸ Again, in order to address the water, without removing the water from the wetland, requires drainage work on the Plaintiffs' properties. The conditions on the Plaintiffs' Properties are causing the water to inadequately drain. Defendants did not cause this and cannot resolve it.

⁸⁷ CP 688 at FOF 48.

⁸⁸ Biggerstaff Dep. at pp. 32-33.

Even if Defendants were able to take some action on their Properties that would address the water, given the fact that the water has many sources and the injunction is so vague, compliance would be impracticable and likely cause ongoing disputes. Both Mr. and Mrs. Maniatis testified that at least some of the water in the depression in their yard was coming from the ground on their own property.⁸⁹ Further, the City of Tacoma has stated this wetland appears to be expanding to the east, towards the Maniatis Property. Expansion of a wetland is expected and acceptable. In this case, the final delineation of this wetland will not occur until 2022, once the wetland has settled into place.⁹⁰ Defendants cannot abate the water that is coming from Plaintiff's own property and cannot abate the flow of water caused by a naturally expanding, protected wetland.

The Maniatis Property is always going to have some amount of moisture because it is located downhill from a spring and is in a wetland buffer. Several witnesses testified that this neighborhood is wet, with many daylighting springs and groundwater streams.⁹¹ Ultimately the Maniatis Property itself could be part of the wetland. How are the parties or the court to determine whether Defendants are complying with the

⁸⁹ CP 281,284-285 at Mr. Maniatis testimony; CP 519 at Mrs. Maniatis testimony.

⁹⁰ CP 561, 624-626 at Kluge testimony; Ex. 131.

⁹¹ CP 254, 270 at Maniatis testimony; CP 648-650 at Kluge testimony.

injunction to abate the flow of water? What water are the Defendants expected to abate? What if the City denies any proposed action taken in an attempt to comply with the injunction? These will be ongoing questions and disputes for the trial court to resolve.

Plaintiffs provided no evidence whatsoever to suggest that there is something Defendants can do to “abate the flow of water.” They have not presented a plan that will resolve their complaints. Their injunctive request as not been proven. Because there is no specific action that Defendants are compelled to take, there can be no determination whether an injunction is proper in this case. What if it turns out the only option to stop the water that the City will sign off on costs \$100,000.00 to implement? Is this reasonable considering Defendants alternatively propose relevantly minimal action to be taken on Plaintiffs’ properties? Because there is no particular action that Defendants are compelled to take, the court cannot consider the necessary factors before issuing the injunction, which are: the adequacy of an injunction compared to other remedies, the relative hardship of each party, and the practicability of framing and enforcing the order or judgment. Further, what constitutes compliance is undefined and unknown.

An injunction should be issued to compel a certain action. *Hughes v. King Cty.*, 42 Wash. App. 776, 779, 714 P.2d 316, 318 (1986) (“The

trial court concluded that decisions regarding an increase in the capacity of the drainage system involved the exercise of discretion for which a mandatory injunction would not lie.”). Plaintiffs have not proved injunctive action is a remedy to their complaints. Further, because the injunction is so vague, it will require ongoing oversight by the trial court. 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.

Plaintiff Maniatis alleged only \$500.00 in damages as a result of its allegations of trespass, waste and nuisance. On November 13, 2017, Defendants Singh and Ranjit made an Offer of Settlement to Plaintiff Maniatis in the amount of \$16,000.00. Defendants’ offer explicitly advised Maniatis that the offer was being made pursuant to RCW 4.84.250-290, and that Defendants would seek their fees and costs

pursuant to RCW 4.84.270 if the offer was not accepted and Maniatis recovered less than \$16,000.00 at trial. Plaintiff Maniatis did not accept the Defendants' offer of settlement.

On February 25, 2019, the Court issued findings of fact and conclusions of law, finding that Maniatis was entitled to \$500.00 in damages and judgment on those damages was entered on March 29, 2019.⁹² As such, pursuant to RCW 4.84.250-290, Defendants are the prevailing party and are entitled to their reasonable attorneys' fees and costs.

Defendants' motion to the trial court requesting an award of fees and costs pursuant to RCW 4.84.250-290 was heard on April 19, 2019. In opposition to Defendants' motion, Plaintiff argued, and the Court ultimately agreed, that in an action for damages *and* injunction, RCW 4.84.250-290 does not apply unless the award of damages is less than the pre-trial offer *and* the request for injunction is denied.⁹³ This ruling is in direct conflict of the legal authority and Judge Murphy had no discretion to deny Defendants' motion.

RCW 4.84.250-290 is designed to encourage out-of-court settlements and penalize those who bring or resist small claims. *Hanson v. Estell*, 100 Wn. App. 281, 289, 997 P.2d 426, 431 (2000), citing *Pub.*

⁹² CP 1194-1238.

⁹³ April 19, 2019 Hearing Transcript p. 12.

Utilities Dist. 1 of Grays Harbor Cty. v. Crea, 88 Wash. App. 390, 394, 945 P.2d 722, 724 (1997) and *Beckmann v. Spokane Transit Auth.*, 107 Wash. 2d 785, 788–89, 733 P.2d 960 (1987). “These purposes apply to any action for damages, regardless of its nature.” *Kingston Lumber Supply Co. v. High Tech Dev. Inc.*, 52 Wash. App. 864, 867, 765 P.2d 27, 29 (1988) (emphasis added). The statute applies even if non-monetary relief, such as an injunction, is sought in addition to damages. *Id.*, see also, *Hanson* at 290. The award of attorney’s fees pursuant to this statute is mandatory. The trial court has no discretion to deny fees under this statute. *Kingston* at 867.

In *Hanson v. Estell*, the Estells made the very argument made by Maniatis, which the court rejected. “The Estells do not argue that the amount sought was more than \$10,000, but that by additionally seeking injunctive relief the Hansons (and they) are not entitled to fees under RCW 4.84.250. Nothing in the statute prohibits parties from seeking other relief besides damages and this court does not so construe its requirements.” *Hanson v. Estell*, 100 Wn. App. 281, 290, 997 P.2d 426, 431 (2000).

Similarly, the in *Kingston* case the court very explicitly held that an action for monetary damages that is combined with a request for equitable relief, is still an action for damages and the statute applies.

“Although Kingston Lumber's foreclosure action sought the equitable remedy of foreclosure, it also clearly sought monetary recovery on a debt, and thus was “an action for damages” *Kingston Lumber Supply Co. v. High Tech Dev. Inc.*, 52 Wn. App. 864, 867, 765 P.2d 27, 29 (1988).

Neither the *Hanson* nor *Kingston* court made any ruling, or even indication, that if the equity action was prevailed upon that the statute would no longer be applicable. To the contrary, both courts explicitly ruled that a request for equitable relief in addition to seeking monetary damages does not affect the application of the statute and that fees must be awarded if the moving party is considered the prevailing party pursuant to the statute. Whether or not equitable relief is granted has no bearing on who the prevailing party is under the statute. RCW 4.84.270. Further, the Plaintiff in *Hanson* was awarded equitable relief (a temporary restraining order) and the *Hanson* court still applied the statute. *Hanson* at 289.

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.⁹⁴

⁹⁴ 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.

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 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 or law. 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 reverse 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 SCHLEMLEIN FICK & SCRUGGS, 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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