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Case Number 53127-5 II

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

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THE GERALDINE A. MANIATIS LIVING TRUST, et Al.,  
Respondents, Cross-Appellants.

v.

MALKIT SINGH et Al., Appellants, Cross-Respondents.

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ON APPEAL FROM THE SUPERIOR COURT FOR PIERCE COUNTY

The Honorable Edmund Murphy  
Presiding at the Trial Court  
Superior Court Case No. 16-2-11515-8

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RESPONDENT/CROSS APPELLANT TOSCH'S  
OPENING BRIEF

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Elizabeth Powell, WSBA No. 30152  
Elizabeth Powell, PS Inc.  
535 Dock Street, Suite 108  
Tacoma, WA 98402  
(253) 274-1518

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A. Defendants Singh purchased property to develop in Tacoma. The Singh property is on a steep slope above Plaintiff Tosch and Plaintiff Trusts’ properties.	
B. The Singh property adjacent to the Trust property and above the Tosch property had an old house with a spring in the crawlspace. This spring had a channelized outflow to a pond, and a drain tile went from the pond downhill north to the Tosch property line. The Tosch southern property line has a drain which goes to a catch basin in the Tosch front yard, which empties to a curb drain.	
C. Singh’s development activities deliberately and intentionally destroyed his existing drain line, resulting in additional flow, which overwhelmed the Tosch drain line and surface flow of groundwater, which caused ponding on the Trust property.	
D. At trial, Defendant disavowed any knowledge of issues related to his construction activity, suggesting the Trust water is coming from the Trust’s downspouts, and that the water Tosch complains about is entering her foundation because she dug a ditch to control the water coming from Defendant’s property	

up the slope. Defendants raise a series of red herrings, including a phantom *res ipsa* argument, and argumentative assertions that this is surface water, subject to the Common Enemy Doctrine.

1. Defendants denied any knowledge of drainage issues.
  2. Defendants were ordered by the City to stop the flow of water onto their downslope neighbors, the Trust and Tosch.
  3. Tosch testifies to the origins of the groundwater, and her years of observation of the property and her drain line, which was functional until Singh's construction workers graded the wetland above her property. When the drain stopped working, she had a ditch dug, and "an open ditch is the best drain there is."
  4. Tosch's contractor testifies to the existence of groundwater in the foundation at the rear of Plaintiff's house, which is nowhere near the Trust property.
  5. Tosch's damages included her mushy side yard, which could no longer be mowed, and the damage to her foundation which was plumb and true when inspected initially.
- E. Plaintiffs (the Trust and Tosch) prevail at trial; the Court issues an injunction and orders the Defendants to pay fees and costs; the Court subsequently reversed itself on the Defendant's untimely motion for reconsideration, retaining the injunction, but removing the award of fees.

#### IV. ISSUES RELATED TO ASSIGNMENTS OF ERROR

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Did the trial court err in finding that the established groundwater changed course to only drain to the Trust property, and from the Trust Property to the Tosch property, when significant testimony demonstrated that the downhill flow to the Tosch property from the Defendants' property never abated?

Under RCW 4.24.630 will liability attach when the testimony showed Defendant, in the course of developing properties for profit, destroyed an established water channel that had been adequate for decades?

Did the trial court rule correctly that Plaintiff Tosch should receive her attorney fees and litigation costs?

Did the trial court err by granting Defendants' untimely Motion for Reconsideration which reversed the Court's award of attorney fees and litigation costs to the Trust and Tosch pursuant to RCW 4.24.630?

V. ARGUMENT

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- A. Standard of review
- B. The Court erred in finding that the ground water, historically channelized and heading straight north down the border between the two Singh properties, now only discharges onto the Trust property and from there to the Tosch property.
- C. The trial court erred by granting the Defendants untimely motion for reconsideration, finding the Defendants *not* liable under RCW 4.24.630, so not responsible for the successful Plaintiffs' attorney fees and costs of suit, even though the Plaintiffs' request for an injunction was granted.
  - 1. The plain language of RCW 4.24.630 imposes liability based on the intent to commit the acts that cause the harm. Liability does not turn on whether the intent was to actually cause actual harm. Tosch will defer to the Trust's briefing on this issue.
  - 2. When the Legislature has been clear, no further interpretation is necessary.
  - 3. The Court's determination that the groundwater from the spring and the wetland outflow changed its course to only run to the Trust property, and from there to the Tosch property is not supported by any evidence.
- D. Tosch requests her reasonable attorney fees on appeal.

VI. RESPONSE TO DEFENDANTS' BRIEFS

A. Even a challenge to the Trial Court's findings requires identification of the specific findings at issue.

B. Some of the evidence supports some of the Court's findings and conclusions; Tosch's specific objections are carefully detailed.

1. Defendant Singh testified that he was not involved in the construction activities. The Trust and Tosch were living in their properties and able to testify from direct personal knowledge about the effects of the construction.

2. The evidence established that Defendant Singh's construction activities disturbed the wetland and the groundwater flow because he removed a channel that had been in place and functioning for decades. The evidence did not establish that the groundwater ceased discharging due north towards Tosch's property.

C. The common enemy doctrine is inapplicable to ground water, and does not apply when Defendants destroyed an existing channel, and failed to use due care.

1. After destroying the original watercourse, the Defendants diverted some of the resulting water to the Trust property.

2. Defendants failed to use due care which resulted in water flowing to the Tosch property and the Trust property.

D. The injunction was the primary goal of the litigation, and the injunction was proper on the facts, except it doesn't address the groundwater flowing directly north, as it always has, to the Tosch property. Without an amendment to the injunction, Tosch prevails, but is left in the same position she was in when the development destroyed the wetland.

1. Defendant's impossibility argument fails, because water runs downhill, not up, and a ditch is the best drain there is.
2. The injunctive relief granted requires Defendants to develop an engineered plan to control the water emanating from Defendant's properties.
3. Defendant's argument that they "cannot comply" relies on the underlying assumption that the Trust's downspouts and the Tosch drain "caused" the water. Defendants have the causation backwards, because the water is coming down the slope from Defendant's house.
4. Defendant's balancing of the equities argument could apply if Defendants had acted without knowledge of the impact of their construction activity on the wetland and the neighbors. The voluminous records from the City clearly demonstrate that Defendant Singh was warned repeatedly that his water could not impact his neighbors.

## VII. CONCLUSION

This Court should reinstate the trial Court's initial, correct decision to award the Trust and Tosch their fees and costs at the trial court, and should also award Tosch her fees and costs on appeal.

TABLE OF AUTHORITIES

Washington Case Law

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## I. INTRODUCTION

This appeal is from litigation arising out of Defendant Singh's development of residential property located on a significant slope in Tacoma's Old Town neighborhood, and his neighbors' needs to control the resulting water trespassing onto and damaging their properties.

The original house on the 2307 lot had been there for nearly a hundred years with a spring in its basement. The basement spring was historically channelized to a pipe that exited the house to the rear, in a downslope northerly direction, leading to a pond located on the property line between the two Singh properties. This pond was approximately three feet deep.

A pipe outflow from the pond led directly north to the Tosch property line. At the Tosch property line, a drain ran west-east, depositing water in a catch basin in the Tosch front yard, and draining to a curb drain on Carr Street. This system worked perfectly before Mr. Singh's development destroyed the channelized system.

Post-development, the water from the Singh property flowed directly north to the Tosch property and also began flowing west to the Trust property.

The primary goal of this suit was injunctive relief, namely, an order requiring Defendant to stop flooding his downhill neighbors.

Trial was held from August 6 – 16th. Plaintiffs prevailed. The Court's findings and conclusions were filed December 19, 2018. The Court determined that Defendants were liable under RCW 4.24.630, and awarded fees and costs to both Plaintiffs pursuant to RCW 4.24.630. Both Plaintiffs filed their fee and costs requests timely.

The Defendants subsequently moved for reconsideration, more than ten days after the Court filed its Findings of Fact and Conclusions of Law. The trial court nonetheless reversed its decision to award fees and costs to both Plaintiffs while simultaneously finding Defendant completely liable for the trespass.

Plaintiffs were both awarded injunctions, but Tosch's injunction is for Defendants to stop the water flowing to her property from the Trust Property, leaving her in the same position as she was when Defendant dug up the wetland – defenseless against the groundwater flowing directly down the hill onto her property.

## II RESPONDENT /CROSS- APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court erred in finding that the groundwater flowing downhill from the Defendants' properties changed its course to travel uphill and to the east and enter Tosch's property only from the Trust property. Findings 26, 41, 44, 50, 54, and 56. Witnesses did not testify as the Court found.
2. The trial court erred in determining that the wetland ceased discharging water onto the Tosch property and instead commenced discharging water only onto the Trust property, from where the water then discharged onto the Tosch property. Findings 26, 41, 44, 50, 54, and 56. CP 684, 697
3. The trial court erred by amending its December 19, 2018, findings and conclusions, removing the award of fees and costs, on the Defendant's untimely motion for reconsideration. CP 964 (Conclusions of Law 23 and 24).

Specifically, Respondent / Cross-Appellant Tosch objects to the following Findings of Fact:

1. Finding of Fact 26 recites the water flow was redirected onto the Trust property. The groundwater discharge continues directly down the slope from the Defendants onto the Tosch property.

2. Finding of Fact 41 recites that the Stop Work orders posted by the City on October 5 told the Defendant to stop discharging water onto the Trust Property. The evidence was that the Stop Work order advised Defendant to stop discharging water onto “his neighbors” which clearly included Tosch. See Finding of Fact 43.
  
3. Finding of Fact 44 is silent as to the groundwater which continues to flow into Tosch’s property unabated as well as the Trust property, and that Singh took no corrective action as to the water flowing to Tosch’s property, either.
  
4. Finding of Fact 50 incorrectly states that the water flow only enters Tosch’s property through the Trust property.
  
5. Finding of Fact 54 says Tosch failed to maintain her drain line, and dug up her drain line, when the Trust’s expert testified “nothing is going to perform better than an open ditch.” McCarthy 42: 7-8

6. Finding of Fact 55 says Tosch's water is coming from the Trust property; while true, groundwater is coming directly downslope from the north from the Minckler/Singh properties as it always has.
  
7. Conclusion of Law 3 recites that the water flow is getting to the Tosch property only through the Trust property. This is not correct. Water is flowing, underground and on the surface, **directly** from the Minckler and Singh properties into the Tosch property.
  
8. Conclusions of Law 4, 5, 6, 11, 13, 14, 17, 19, 20, and 23 repeat the factual errors identified above, by systematically asserting the uncontrolled groundwater is completely re-routed through the Trust property to the Tosch property.

### **III. ISSUES RELATED TO ASSIGNMENTS OF ERROR**

Did the trial court err in determining that the established watercourse changed direction to only drain to the Trust property, and from the Trust Property to the Tosch property, when significant testimony demonstrated that the downhill flow to the Tosch property from the Defendants' property has never abated?

Will liability under RCW 4.24.630 attach when the evidence showed that Defendant, in the course of developing properties for profit destroyed an existing channel, causing the water flowing into the Tosch property on the downhill side of the drain increased as a direct and proximate result of Defendant's disturbance of the wetland, removal of the established

channel, and subsequent “corrective” work, which caused waste and injury to both Tosch and the Trust?

Should this Court reinstate the trial court’s initial and correct determination that the Plaintiffs Tosch and the Trust are entitled to their reasonable attorney fees and litigation costs as elements of damages pursuant to RCW 4.24.630?

#### IV. STATEMENT OF THE CASE

Malkit Singh developed two parcels of property located at 2307 and 2315 North 27<sup>th</sup> Street, in Tacoma, and in the process, destroyed a wetland located below those properties and destroyed an existing drain system that had worked for at least thirty years. The original house located on 2307 (now the Minckler property) was built early in the last century, and had a spring in the basement. That spring was historically channelized into a pipe leading to a pond that flowed into a pipe that ran downslope due north to the Tosch property, where it was intercepted by a drain that ran east to west along the Tosch southern property line, into a catch basin in the Tosch front yard, and then to a curb drain. Exhibit 111. VRP 110:18-110:4.

Singh’s property is upslope from the Tosch and the Trust properties. He graded the palustrine emergent wetland, located principally at the boundary between his two parcels, in a manner inconsistent with his own development plans and the City’s requirements; Singh removed the

outflow channel, placed a rip-rap outflow (which he was subsequently ordered to remove), so the groundwater from the spring under the original house has spread, and is now encroaching on the Trust property, in addition to inundating the Tosch property.

No evidence supported the trial court's determination that the wetland completely stopped discharging water onto the Tosch property and instead commenced discharging water only onto the Trust property, from where the water then discharged onto the Tosch property.

The Plaintiffs moved the court to inspect the property. The Court refused. Photographs were admitted showing the Tosch drain full of water, significantly west of the Trust property Exhibit 109. The location and placement of the Tosch drain is not "below" the Trust property, it is "below" the property line between the Minckler property and the Singh property, where the historical outflow has always been located. Exhibit 46, 53. The water being discharged onto the Tosch property increased as construction happened, and has never stopped, even when it hasn't been raining for months.

## V. ARGUMENT

This brief first addresses the standard of review, and then Tosch's assignments of error. Following analysis of Tosch's position, this

brief then addresses Defendants' briefs, and concludes with Tosch's request that this Court reinstate the trial court's original determination that the prevailing plaintiffs are entitled to their reasonable attorney fees and costs of suit under RCW 4.24.630.

Tosch joins in with and relies upon the Trust's briefing, but the gravamen of her appeal is the deficient findings and conclusions regarding the direction of the wetland water outflow and the trial Court's untimely reversal of its original correct decision to award reasonable attorney fees to the Trust and to Tosch.

#### A. STANDARD OF REVIEW

The standard of review of the trial Court's Findings of Fact and Conclusions of law is abuse of discretion.

“A trial court abuses its discretion if its decision is manifestly unreasonable or based upon untenable grounds or reasons.” (*internal citations omitted*).

*State v. Garcia*, 179 Wash. 2d 828, 318 P.3d 266 (2014)

It was manifestly unreasonable for the trial court to find that the ground water flowing downhill from the Defendant's development was completely diverted from its historical outflow to the Tosch property. The

evidence and the testimony showed Defendant's development additionally impacted the Trust property, not that the water flowing directly downslope stopped.

An appellate court reviews conclusions of law and questions of statutory interpretation de novo, as these are questions of law. *Bishop v. Miche*, 137 Wn.2d 518, 523, 973 P.2d 465 (1999); *State v. J.P.*, 149 Wn.2d 444, 449, 69 P.3d 318 (2003).

*In re Estate of Jones*, 152 Wash. 2d 1, 8-9, 93 P.3d 147, 151 (2004)

Tosch's assignments of error are limited to the specific issues of the Court's findings regarding the direction of the water flowing to her property, and the Court's reversal of its award of attorney fees and costs to the Trust and to Tosch.

### **ISSUE ONE**

DID THE TRIAL COURT ERR WHEN IT DETERMINED THAT THE WATER TRESPASS IMPACTING TOSCH'S PROPERTY IS ORIGINATING FROM HER NEIGHBOR THE TRUST, RATHER THAN ORIGINATING DIRECTLY UPSLOPE FROM THE SINGH PROPERTIES?

The Court's factual findings regarding the direction of the ground water travel are unsupported by the evidence and the testimony.

The Court's findings that the groundwater was re-routed to the east so Tosch's flood is only coming from the Trust property is not supported by the record.

Q. where did it [the water] leave the property, as far as you could tell?

A: It was close to the center of the two [Singh] lots . . .

VRP Kluge 21:14-17

The center of the two [Singh] lots is not the Trust's boundary with the Minckler property, it is further west, directly uphill from Tosch. Exhibit 53, 116, 117 and 120.

Q: Was it the City's objective that this water flowing down the slope feeding the wetland leave the Singh property in a channel?

A: The approved permitting decision included maintaining that riprap channel going into Tosch's property as the historic water course that should continue to be followed, yes.

Q: Has that happened?

A; Partially.

VRP Kluge, 27: 13-21

Ms. Kluge did not testify that the water was re-routed entirely to the Trust property. In fact, she testified repeatedly that the wetland was affecting Defendant's neighbors. Not one witness testified that the water was only entering the Tosch property through the Trust property. The Court's findings and conclusions that the groundwater was completely

redirected to the Trust, and only then flowing downhill to Tosch, is not supported by the evidence at trial, and is contrary to the evidence.

A trial court's findings may be reversed when they are not supported by substantial evidence.

We review the trial court's decision following a bench trial to determine whether the findings are supported by substantial evidence and whether those findings support the conclusions of law. *Dorsey v. King County*, 51 Wn. App. 664, 668-69, 754 P.2d 1255 (1988). "Substantial evidence" is the quantum of evidence sufficient to persuade a rational, fair-minded person the premise is true. *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). In determining the sufficiency of evidence, an appellate court need only consider evidence favorable to the prevailing party. *Bland v. Mentor*, 63 Wn.2d 150, 155, 385 P.2d 727 (1963)

*Endicott v. Saul*, 142 Wash. App. 899, 909, 176 P.3d 560, 566 (2008)

The Court's finding that the Singh water was completely re-routed to only discharge to the Trust property and from the Trust to the Tosch property is not supported by any evidence, which is an abuse of discretion.

The Court abused its discretion by finding that the water entering the Tosch property is only getting there via the Trust property. This finding is inconsistent with generally accepted principles of gravity and hydrology, and the testimony of experts, and is thus manifestly unreasonable. In determining the sufficiency of evidence, an appellate

court need only consider evidence favorable to the prevailing party. *Bland v. Mentor*, 63 Wn.2d 150, 155, 385 P.2d 727 (1963)

“A trial court's decision is manifestly unreasonable if it ‘adopts a view “that no reasonable person would take.” ’ ” *In re Pers. Restraint of Duncan*, 167 Wn.2d 398, 402-03, 219 P.3d 666 (2009) (quoting *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006) (quoting *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003))).

*Salas v. Hi-Tech Erectors*, 168 Wash. 2d 664, 669, 230 P.3d 583, 585 (2010)

No reasonable person would disregard the maps, including the topographic maps, admitted into evidence and showing, clearly, that the low point of the wetland drainage remains at the intersection of the Singh, Minckler and Tosch properties. Exhibit 111, Exhibit 118.

No reasonable person would disregard the testimony given from Richard Taylor that the runoff coming downhill from the Singh properties was “silty”, 113:4-9 and that runoff fouled the drain, causing “pluggage”. No reasonable person would believe that groundwater runs in any direction other than the path of least resistance. Ed McCarthy 103:22. The Trust and Tosch requested the Court visit the property. The Court did not visit the property. Every effort was made to describe for the Court the slope and the relationship between the three parcels of real property, and

yet, the Court found that subsurface groundwater flowed sideways and uphill.

“A trial court abuses its discretion when its decision or order is manifestly unreasonable, exercised on untenable grounds, or exercised for untenable reasons. Untenable reasons include errors of law.”

*Council House, Inc. v. Hawk*, 136 Wash. App. 153, 156, 147 P.3d 1305, 1306 (2006)

The Court’s factual findings regarding the direction of the water flow are unsupported by the evidence and the testimony.

“A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; and it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.”

*Keck v. Collins*, 181 Wash. App. 67, 325 P.3d 306 (2014)

The record shows that groundwater flows due north downhill as it has for years, and because of Singh’s construction activities, now additionally discharges to the Trust Property. Not all the groundwater has been totally diverted to the Trust property; water is still coming directly north off the Defendants’ properties into the Tosch property. *Perrault*, V 7 1106: 24-25. The Court found that the groundwater makes an abrupt turn across a grade to the Trust property, which is not consistent with the

physical topography of the land, either before or after Singh's regrading activities.

Defendant's witness Frank Fiedler testified that to fix the runoff would require drains "along the [Trust] property and along the back of the Singh property" Fiedler VRP V8 1132:16-17. This witness is describing a drain to prevent water flowing downhill directly to Tosch.

## ISSUE TWO

WILL LIABILITY UNDER RCW 4.24.630 ATTACH WHEN THE EVIDENCE SHOWED THAT DEFENDANT, IN THE COURSE OF DEVELOPING PROPERTIES FOR PROFIT DESTROYED AN EXISTING WATER CHANNEL, CAUSING THE WATER FLOWING INTO THE TOSCH PROPERTY ON THE DOWNHILL SIDE OF THE DRAIN, AND INCREASED AS A DIRECT AND PROXIMATE RESULT OF DEFENDANT'S DISTURBANCE OF THE WETLAND, REMOVAL OF THE ESTABLISHED CHANNEL, AND SUBSEQUENT "CORRECTIVE" WORK, WHICH CAUSED WASTE AND INJURY TO BOTH TOSCH AND THE TRUST?

The trial court specifically found that Defendants had acted wrongfully. See Conclusions 9 and 10, after reconsideration. CP 692. The Court therefore erred in refusing to follow the plain language of the statute. Neither the Trust nor Tosch challenges the findings and the conclusions regarding Defendant's wrongful activities, and Tosch joins in with the Trust's thorough briefing on this issue.

### ISSUE THREE

DID THE TRIAL COURT ERR, ON DEFENDANT'S UNTIMELY RECONSIDERATION MOTION, IN DETERMINING THAT TOSCH AND THE TRUST WERE NOT ENTITLED TO THEIR ATTORNEY FEES WHEN THE PLAIN LANGUAGE OF THE APPLICABLE STATUTE ALLOWS REASONABLE ATTORNEY FEES TO BE RECOVERED?

Every person who 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.

For purposes of this section, a person acts "wrongfully" if the person intentionally and unreasonably commits the act or acts while knowing, or having reason to know, that he or she lacks authorization to so act.

Damages recoverable under this section include, but are not limited to, damages for the market value of the property removed or injured, and for injury to the land, including the costs of restoration. In addition, the person is liable for reimbursing the injured party for the party's reasonable costs, including but not limited to investigative costs and reasonable attorneys' fees and other litigation-related costs.

RCW 4.24.630

Where a statute is unambiguous, the court assumes the legislature means what it says and will not engage in statutory construction past the plain meaning of the words. *Davis v. Dep't of Licensing*, 137 Wn.2d 957, 963-64, 977 P.2d 554 (1999).

*In re Estate of Jones*, 152 Wash. 2d 1, 11, 93 P.3d 147, 152 (2004)

There is nothing ambiguous about the plain language of this statute. The Court determined that Singh had conducted himself wrongfully by developing this property without due regard for either of his downslope neighbors. The Court's findings regarding the wrongfulness of the Defendant's actions are not challenged.

Attorney fees are authorized under RCW 4.24.630(1). Where a statute allows an award of attorney fees to the prevailing party at trial, the appellate court has inherent authority to make such an award on appeal. *Ur-Rahman v. Changchun Dev., Ltd.*, 84 Wn. App. 569, 576, 928 P.2d 1149 (1997); *Sarvis v. Land Res., Inc.*, 62 Wn. App. 888, 894, 815 P.2d 840 (1991). Standing Rock prevailed at trial and on appeal. Thus, it is entitled to attorney fees on appeal, provided it complies with RAP 18.1(d).

*Standing Rock Homeowners v. Misich*, 106 Wash. App. 231, 247, 23 P.3d 520, 529 (2001)

For the Court to determine after two years of litigation that the prevailing parties were subjected to wrongful conduct, denying their reasonable fees in a matter where the controlling statute says, in plain language, that the prevailing parties are entitled to their reasonable attorney fees is not consistent with Washington jurisprudence on trespass damages.

An appellate court reviews a trial court's factual findings "for clear error. . ." A clear error is "when the evidence in the record supports the finding but 'the reviewing court is left with a

definite and firm conviction that a mistake has been committed." *Amanda J.*, 267 F.3d at 887 (quoting *Burlington N., Inc. v. Weyerhaeuser Co.*, 719 F.2d 304, 307 (9th Cir. 1983)).

*N. Kitsap Sch. Dist. v. K.W.*, 130 Wash. App. 347, 360, 123 P.3d 469, 476 (2005)

Here, the trial Court insisted, in the face of contrary evidence, that Tosch's water intrusion was coming from the Trust, and not from Defendant's property. This is clear error, and this Court should reverse the trial Court as to findings 26, 41, 44, 50, 54 and 55.

The trial Court erred in finding and concluding that the only water trespass into Tosch's property is coming from the Trust property. This is groundwater, moving down the slope below the surface. The historical outflow has always been straight north downslope from the Singh and Minckler properties. The evidence showed that the historical channel was destroyed, not re-routed. The Defendant's development activities additionally directed water onto the Trust property, but the Trust is not the sole source of Tosch's water intrusion, and the findings which indicate the water is only coming to Tosch from the Trust property are clear error.

## VI. RESPONSE TO DEFENDANTS' BRIEFS

A challenge to the trial Court's findings requires identification of the specific findings at issue, not just a general challenge. RAP 10.3(g)

says “the appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto.

This, alone, is justification for refusing to consider an assignment of error. *E.g., In re J.K.*, 49 Wn. App. 670, 676, 745 P.2d 1304 (1987), *review denied*, 110 Wn.2d 1009 (1988).

*M/V La Conte nc. v. Leisure*, 55 Wash. App. 396, 401, 777 P.2d 1061, 1064-65 (1989)

RAP 10.3(a)(5) requires parties to provide "argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record." *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

*State v. Cox*, 109 Wash. App. 937, 943, 38 P.3d 371, 374 (2002)

Defendant Singh testified that he was not involved in the construction activities. VRP 38:17-23. Defendants Minckler did not offer any knowledge of the drainage issue. VRP 71:18-72:14. The Trust and Tosch were living in their properties and testified at length from direct personal knowledge about the effects of the construction. The City’s witnesses and Matt Simpson offered their observations from personal knowledge. Mr. Simpson testified that the addition he was building at the west end of Mrs. Tosch’s house had water entering the foundation from

18” below the surface of the ground. V6 881:6-11, which caused Tosch’s house to sink V6 887:16 888-889 894: 6-12.

The evidence established that Defendant Singh’s construction activities disturbed the wetland and the groundwater flow because he removed a channel that had been in place and functioning for decades. (Findings 12 and 13, which Tosch does not challenge). The evidence did not establish that the groundwater stopped flowing due north towards Tosch’s property.

The trial court correctly rejected the Defendant’s arguments regarding the common enemy doctrine. The common enemy doctrine is inapplicable to ground water. This court specifically found this is ground water. Even if it was surface water, the common enemy doctrine does not apply when Defendants destroyed an existing channel, collected and distributed water to his neighbor’s lands, and failed to use due care.

After destroying the original watercourse, the Defendants diverted some of the resulting water to the Trust property. Tosch does not challenge this finding, as it is true. Tosch objects to the finding that the Defendant diverted *all* the water to the Trust property, as that is not consistent with the evidence.

There was no evidence that Singh made any effort to stop the flow of water onto his downslope neighbor’s properties.

The trial court's injunction was the primary goal of the litigation, and the injunction was proper on the facts, it just doesn't address the groundwater flowing under the surface directly north, as it always has, to the Tosch property. Without an amendment to the injunction, Tosch prevails, but is left in the same position she was in when the development destroyed the wetland outflow point.

Defendant's "impossibility" argument is strained when Defendant's engineer has proposed solutions, and the City and Tosch are open to those solutions. The injunctive relief granted does not require the Trust and Tosch to develop an engineered plan to control the water emanating from Defendant's properties; to the contrary, the injunction requires Defendant to develop a plan. The Trust and Tosch are not at fault for the water coming down the slope to their properties, and the consequences of that water.

Defendants next argue that they "cannot comply", relying on the false underlying assumption that the Trust's downspouts and the Tosch drain "caused" the water. This argument ignores the evidence regarding the hydrology of the site. Several witnesses established the water is coming from the spring under the 2307 house. The Court properly rejected the argument that the water is coming from the Trust's downspouts and Tosch's drain.

Defendant's balancing of the equities argument could apply if Defendants had acted without knowledge of the impact of their construction activity on the wetland and the neighbors. The voluminous records from the City clearly demonstrate that Defendant Singh was warned repeatedly that his water could not impact his neighbors.

Water continues to flow downslope from Singh and Minkler's properties directly to Tosch. If this Court does not correct this clear error, or remand this error to the trial Court for correction, the result is that Tosch is afforded no relief from the ongoing water trespass coming from her uphill neighbors.

Finally, reasonable attorney fees are recoverable on appeal if allowed by contract or statute and a request for fees is made in compliance with RAP 18.1. The appeals court should determine that the trial court made errors in its findings of fact and its conclusions of law, however denominated.

The appeals court should reinstate the trial court's original determination that Tosch and the Trust are both entitled to their reasonable attorney fees. This Court should reinstate the trial Court's initial, correct decision to award both Plaintiffs their fees and costs at the trial court, and should also award Tosch her fees and costs on appeal.

## VII. CONCLUSION

The Court's findings of fact create two absurd outcomes. First, defendants are free to continue dumping as much groundwater on the Tosch property as they can, but must only stop the flow that goes to the Trust property and thence to the Tosch property. Second, defendants acted wrongfully, yet are not responsible for the fees and costs of the Plaintiffs. These are absurd outcomes.

Reasonable attorney fees are recoverable on appeal if allowed by statute and a request for fees is made in compliance with RAP 18.1. The appeals court should determine that the trial court made errors in its findings of fact and its conclusions of law, however denominated. Finally, the appeals court should reinstate the trial court's original determination that Tosch and the Trust are both entitled to their reasonable attorney fees.

Respectfully submitted this 9<sup>th</sup> day of October, 2019.

*Elizabeth Powell, PS Inc*

*Elizabeth Powell*  
Elizabeth Powell, WSBA No. 30152  
For Appellants Kerger and Tosch

DECLARATION OF SERVICE

Elizabeth Powell on oath states: On this day, I caused to be delivered to the Court, and to the persons listed below, the attached document via the Washington State Appellate Court's Portal:

Colleen Lovejoy, WSBA No. 44386  
James Fick, WSBA No. 27873  
Schlemlein Fick & Scruggs, PLLC  
66 S. Hanford St., Ste 300  
Attorneys for Singh and Ranjit  
[c.lovejoy@soslaw.com](mailto:c.lovejoy@soslaw.com)  
[jgf@soslaw.com](mailto:jgf@soslaw.com)

Stephen A. Burnham, WSBA No. 13270  
Campbell Dille Barnett  
3175 Meridian Ave  
Puyallup, WA 98371  
Attorney for Appellants/Cross-Respondents  
Minckler  
[steveb@cdb-law.com](mailto:steveb@cdb-law.com)

C. Tyler Shillito  
Matthew C. Niemela, WSBA No. 49610  
Smith Alling, P.S.  
1501 Dock Street  
Tacoma, WA 98402  
[tyler@smithalling.com](mailto:tyler@smithalling.com)

Amy Pivetta Hoffman, WSBA No. 35494  
APH Law PLLC  
PO Box 73040  
Puyallup, WA 98373  
[amy@aphoffman.com](mailto:amy@aphoffman.com)

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Signed at Tacoma, Washington this 9<sup>th</sup> day of October, 2019.

  
Elizabeth Powell WSBA No. 30152

**ELIZABETH POWELL PS INC**

**October 09, 2019 - 9:45 AM**

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