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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.,

Respondents/Cross-Appellants,

v.

MALKIT SINGH et al.,

Appellants/Cross-Respondents.

Appeal from the Superior Court for Pierce County Cause No. 16-211518-2

RESPONDENT/CROSS-APPELLANT OPENING BRIEF

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I. INTRODUCTION

This appeal stems from litigation involving reckless development of residential property located in Tacoma's North End and the downhill neighbor's attempts to stop the resulting water trespass from that development. The developer, Defendant Singh is a successful, sophisticated, businessman who charged forward with his project even when it resulted in disruption of a wetland, a spring, and its outflow spring. Singh's portfolio included, among other highly regulated ventures, gas stations, and currently includes marijuana dispensaries and numerous rental properties.

In 2013, Singh purchased two water view lots located at 2307 North 27th Street and 2315 North 27th Street, Tacoma Washington (collectively the "Singh Properties") with the intent to develop them. The Singh Properties sit uphill from the properties owned by the Geraldine Maniatis Living Trust (the "Trust") and Kim Tosch ("Tosch"). Prior to Singh's development, a spring ran from the Singh Properties through a channel and into detention ponds. Historically, the water from the Singh Properties flowed onto Tosch's property. In pursuit of a profit, Singh consciously disregarding environmental and development protections imposed by the City of Tacoma, regraded the existing wetlands on the Singh Properties and re-channelized the spring's outflow point from the Tosch Property to the

Trust's Property. In addition, Singh installed a curtain drain system on top of the spring's "well-up point." The drain captured the spring water, ultimately depositing it into a dispersion trench that terminated feet uphill of, and adjacent to, the Trust Property. Predictably, following Singh's work the Trust's Property flooded.

Powerless to stop Singh's diversion of water, the Trust filed the instant litigation. The litigation primarily sought an injunction to stop the flooding. Only days before the planned trial, Singh sold one of the Singh Properties to the Mincklers. The Mincklers subjectively knew of the Trust's litigation and the causes before purchase; however, they took no steps to stop the trespass themselves. Singh and the Mincklers executed an indemnity agreement designed to insulate the Mincklers. The Mincklers never investigated or took any other steps to stop the flow of water themselves.

The parties proceeded to trial over a span of 8 days. The Trust prevailed. The trial court's original Findings of Fact and Conclusions of Law found liability pursuant to RCW 4.24.630. The trial court further awarded fees and costs pursuant to RCW 4.24.630(1) in its written conclusions. The Trust timely filed the supporting pleadings for its request of fees and costs.

After the Trust filed its fee affidavit, the Defendants moved for reconsideration. The Defendants motion for reconsideration came more than ten days after the trial court filed its original Findings of Fact and Conclusions of Law. The trial court granted the Defendants' untimely motion in part and revised its Findings to omit liability pursuant to RCW 4.24.630, which originally provided an award of fees. Despite this amendment, the trial court still found complete liability against the Defendants for common law trespass and, alternatively, negligent trespass. The trial court ultimately entered judgment and directed the Defendants, at the Defendants' cost, to abate the flow of water by September 15, 2019. As of the date of this Brief, water continues to run onto the Trust Property unabated. This appeal follows.

II. RESPONDENT/CROSS-APPELLANTS ASSIGNMENTS OF ERROR

1. The trial court erred in granting the Defendants' Motion for Reconsideration filed January 2, 2019 more than ten days after entry of the Findings of Fact and Conclusions of Law.

2. The trial court erred by amending its original Findings of Fact and Conclusions of law, entered December 19, 2018, to omit liability under RCW 4.24.630 (CP 964 (Conclusions of Law 23 and 24)).

3. The trial court erred in denying the Trust's Motion for fees and costs originally awarded in the Trial Court's December 19, 2018 Findings of Fact and Conclusions of Law and further supported by affidavit and briefing filed December 28, 2018 (CP 964 (Conclusions of Law 23 and 24); 966-1019).

4. The trial court erred by excluding evidence proffered by the Trust's expert Edward McCarthy as untimely despite permitting equally untimely testimony by Defendants' expert (VRP 1127:2-1129:6).

III. RESPONDENT/CROSS-APPELLANTS STATEMENTS OF ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. May a trial court enlarge the time and consider a Motion for Reconsideration subject to CR 59 filed more than ten (10) days after entry of the order subject to reconsideration?

2. Will liability for statutory trespass under RCW 4.24.630 attach where, like here, a party causes the entry upon the land of another by channelizing ground water that ultimately causes waste or injury to the land?

3. Should a trial court award fees and costs to the party that prevails in a claim for trespass under RCW 4.24.630, in this case the Trust, where the statute specifically provides for an award of fees and costs to the injured party?

4. May a trial court arbitrarily deny admission of evidence obtained after a discovery cutoff date while simultaneously allowing the opposing party to admit similarly untimely evidence?

IV. STATEMENT OF THE CASE

A. Defendants Singh, a sophisticated businessman, purchases property in Tacoma to develop adjacent to the Trust's Property.

This appeal stems from a lengthy trial and judgment in favor of the Trust. CP 697-702. At issue, Defendants Ranjit and Singh (collectively “Singh”) acquired the real properties commonly located at 2307 N. 27th Street and 2315 N. 27th Street, Tacoma Washington (the “Singh Properties”). Exs. 6, 21; CP 680. Singh purchased the properties with the intent to demolish the then existing home, develop the properties and sell the finished product for a profit. VRP 11:15-19; 104:20-105:5. In addition to real estate ventures, Singh, a sophisticated businessman, operated a series of other business ventures. VRP 8:19-10:21. Singh’s portfolio included a series of gas stations from 1993 through 2014. VRP 7:24-8:10. After 2014, Singh entered the recreational marijuana business operating highly regulated cannabis shops. VRP 8:13-22. These ventures augmented Singh’s portfolio that also included approximately six rental properties. VRP 9:25-10:9.

The Singh Properties sit up gradient from, and immediately adjacent to, the property owned by the Trust (the “Trust Property”).¹ CP 681. An illustrative exhibit juxtaposes the properties, reproduced in part below:



See Ex. 51.

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¹ For reference, the Trust Property bears the address 2702 N. Carr Street, Tacoma, WA. CP 680.

B. The Singh Properties contain a spring that historically flowed downhill into a small pond and then out a channel away from the Trust Property; the existence of the spring and stream ultimately caused the City of Tacoma to impose a mitigation plan for the wetland it created that Singh disregarded.

The Singh Properties bear a unique hydrology. The City of Tacoma (the “City”) designated a wetland area, and wetland buffer on the Singh Properties since at least 2008. VRP 452:13-18, 453:23-454:5, 455:2-5.

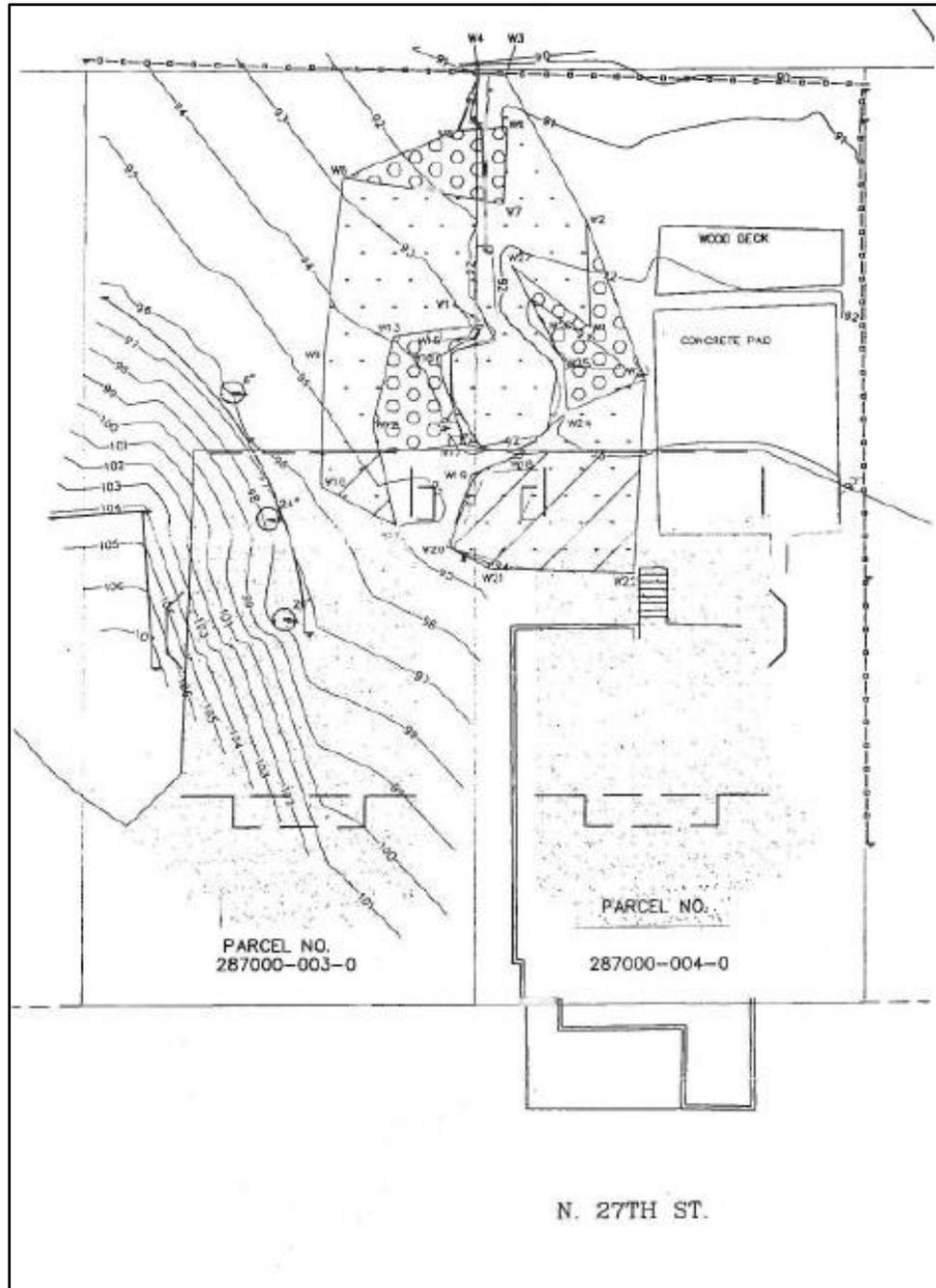
In addition, a natural spring existed on the Singh Properties since at least the 1970s. VRP 455:17-456:5; VRP 105:1-12. Historically, that spring day lighted from the crawl space of the then-existing home. VRP 105:1-17, 107-109 (Halberg testifying about Ex. 111 “DEF 000404”) The water flowed downhill and then, generally, onto the Trust’s neighbor’s property occupied by Kim Tosch (the “Tosch Property”).² VRP 110:16-22; CP 680. The prior owner of the Tosch Property installed a catch basin to contain the runoff from the Singh Properties that included the spring. VRP 110:18-22. Historically, and before Singh’s development, water from the spring, or the Singh Properties generally, never reached the Trust Property. VRP 109:18-110:4; 512:8-23; 513:13-17; 456:6-11; 6:2-8.

Singh began his development of the Singh Properties in 2013. In 2015, as part of the development, Singh regraded the wetland and buffer

² For bearing purposes, the Tosch Property bears the address 2712 N. Carr Street, Tacoma, Washington. CP 680.

areas without approval from the City of Tacoma. VRP 464:3-6. The regrading also destroyed the existing pond and drain system that historically captured water from the Singh Property and transferred the water onto the Tosch Property. VRP 465:13-25. The image below shows the condition and topography of the Singh Property before the regrade and removal of the pond:

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Ex. 111 ("DEF 000404").

flow of water back to the Tosch Property. CP 684. The City approved this version of Singh's proposal. CP 684; VRP 481:15-23.

Singh, however, failed to abide and comply with his mitigation plan. VRP 481:15-23; 483:16-20. In addition, Singh never repaired the errant flow of water and instead installed what the trial court called "a variation of the approved drainage." CP 685; VRP 481:15-23. Singh, instead, installed a series of collector drains to funnel water from the Singh Properties, including the stream, into a dispersion trench. VRP 316:9-317:3. The dispersion trench terminates adjacent to and up gradient from the Trust Property. VRP 193:1-16, 316:21-317:2. The outflow of the dispersion trench results in an unabated stream of water flowing from the Singh Properties onto the Trust Property. VRP 189:19-190:7; Exs. 46-47. Immediately after installation of Singh's collector drain, the Trust and the City began to notice the Trust Property become soggy and damp. VRP 505:5-10. The Trust then notified Singh of the presence of water because it was clearly a result of the spring's diversion and Singh's construction; during the dry month of August a small pond was forming in the Trust property. VRP 128:15-131:6. Singh never corrected or diverted the water from the Trust property following his work. VRP 142:1-5. Instead, what began as a trickle of water now presents itself as a visible stream or flow of water onto the Trust Property. *See* VRP 183:2-184:3; Ex. 46. This unabated

stream of water continues even in the dry summer months years after construction was completed. VRP 190:6-7, 173:9-174:9. Due to the continual flow of water, a portion of the Trust remains submerged in a year round pond, and surrounding the pond the Trust property remains soggy and swamp like. VRP 184:14-187:11. These conditions never existed prior to Singh's construction, and the trial court found that the conditions were obviously caused by Singh. CP 686, 688-89.

C. Following Singh's development, redirection of water, and ultimate flooding of the Trust Property, the Trust files litigation.

The Trust ultimately filed the underlying Complaint on September 28, 2016. CP 804-08. The Trust's Complaint alleged four (4) causes of action: (1) Trespass, (2) Waste, (3) Nuisance, and (4) Permanent Injunction. CP 806-07. The Trust sought relief pursuant to RCW 4.24.630. CP 807.

Tosch herself filed a complaint individually. In March 2017, Singh moved to consolidate the claims filed by the Trust and Tosch. CP 809-12. The trial court granted Singh's request and consolidated both actions on April 28, 2017. CP 813-15.

A series of unsuccessful dispositive motions followed. *See e.g.*, CP 823-830, 831-34. After consolidation and prior trial continuances, the trial court set trial for February 6, 2018. CP 873. By deed recorded on January 22, 2018, Singh sold one of the Singh Properties - 2307 North 27th Street,

Tacoma (the “Minckler Property”), to the Mincklers. CP 855-58. At the time of sale, the Singh and the Minckles entered into an indemnity agreement specifically related to the claims filed by Tosch and the Trust. Ex. 48. The Mincklers subjectively knew of the litigation, the claims made, but never investigated the flow of water or sought to stop the flow. VRP 71:18-72:14, 74:14-19.

Because the Trust sought injunctive relief to stop of the flow of water from the property now owned by the Mincklers, the Trust moved to amend its Complaint and add the Mincklers to the litigation. CP 835-48. The trial court granted the Trust’s Motion to Amend and continued the trial date to its eventual August 2018 date. CP 885-87.

D. At trial, the party Defendants disavow any knowledge of construction or drainage issues while the Trust’s witnesses establish Singh’s development altered the flow of water and flooded the Trust Property.³

The Parties proceeded to trial from August 6 through August 18. CP 949. The trial court heard testimony from twenty-two (22) witnesses. CP 950-51. Further, consistent with the pre-trial order, the Trust submitted and served proposed Findings of Fact and Conclusions of Law on the first day of trial. CP 1049-94.

³ Because the Defendants primarily challenge the trial court’s findings, the Trust factual recitation heavily focuses on the testimony and facts established during trial.

1. Defendant Singh testifies at trial and testifies to a lack of involvement on his part.

At trial, Singh testified on his own behalf. *See* VRP 4-68. Mr. Singh testified to his business sophistication, including his experience in the gas station industry, cannabis shops, and rental properties. VRP 7:24-8:10, 8:13-22, 9:25-10:9. Mr. Singh testified he purchased the Singh Properties with the intent to develop the properties and later sell them for profit. VRP 11:15-21. Mr. Singh knew that at least back to 2009 the City imposed wetland development restrictions upon the properties and provided a wetland development permit. VRP 11:22-24, 12:14-20. Mr. Singh testified that he originally hired an unlicensed contractor, Ed Dorland, to develop the Singh Properties and otherwise “manage” construction. VRP 13:20-14:2, 14:16-22. Mr. Dorland, not Mr. Singh, oversaw the day-to-day operations of construction; neither holds a contractor license, however. VRP 10:22-23, 13:22-14:2, 15:4-11.

Mr. Singh largely admitted that he could not recall the specifics of construction or the hydrology work. VRP 28:20-22, 38:17-23. When asked whether he watched workers “in the wetland” Mr. Singh responded, “Don’t remember, but maybe, maybe not, because I was not there all the time.” VRP 21:14-17. Mr. Singh admitted when he purchased the property he did

not know what features existed in the wetland or if a pond was ever installed. VRP 25:14-26:2.

Mr. Singh also testified his engineer, Mr. Brad Biggerstaff developed the hydrology and drainage plans for the Singh Properties. VRP 27:12-17. According to Mr. Singh, Mr. Biggerstaff developed and worked with the City on the drainage issues without his involvement. VRP 28:20-22, 34:3-10. When asked about the drainage system, Mr. Singh admitted, “I have no knowledge [of] this kind of stuff.” VRP 28:15-19.

According to Mr. Singh, he also never read correspondences from his geology consultant, GeoResources and Mr. Biggerstaff, addressed to him. VRP 30:20-31:3. Mr. Singh nevertheless recalled complaints and stop work orders issued by the City. VRP 33:1-15, 39:8-41:5. Mr. Singh also recalled offering to place “a couple wheelbarrows” dirt in the Trust Property though he failed to remember why he extended the offer. VRP 43:12-44:16. Other than a “couple” wheelbarrows of dirt, Mr. Singh testified he never took any steps to stem the water flowing onto the Trust Property despite actual knowledge of the flow since August 2015. VRP 56:4-10.

On the whole, Singh testified in a way which was clearly designed to feign any involvement with his development:

- Q. How involved in this construction project were you?
A. Not at all.

- Q. You were not involved in it at all?
A. No.
Q. Is that a fair statement to say you were not very involved in the construction of this home?
A. I was not very involved in the construction.

VRP 38:17-23.

2. Defendant Katherine Minckler testified to a lack of involvement or investigation of the Trust's claims though she knew of their existence.

Ms. Minckler then testified at trial. In her testimony, Ms. Minckler testified that she “found out about the lawsuit [with the Trust] at the end of December” 2017 but closed in January 2018. VRP 69:22-24, 68:18-23. As a result, the Mincklers and Singhs executed an indemnification agreement and holdback. VRP 70:4-16, Ex. 48. Despite actual notice of the Trust's claims, the Mincklers never: (1) investigated the flow of the water, (2) investigated the wetlands, or (3) retained someone to conduct an investigation. VRP 71:18-72:14. Moreover, Ms. Minckler also testified that the Mincklers never took any steps to address the water flowing onto the Trust Property. VRP 74:14-19.

3. The City of Tacoma's senior environmental specialist, Ms. Kluge, testifies to Singh's disregard of the City's development permits and resulting flooding of the Trust Property.

At trial, Ms. Karla Kluge, the City's senior environmental specialist, testified at the Trust's behest over a span of two days. VRP 450:14-15;

VRP 530:9-13. Ms. Kluge's involvement with the Singh Properties began due to a prior owner's wetland violation on the subject properties. VRP 451:19-25. During her inspection around 2006 or 2007, Ms. Kluge noted the existence of both wetlands and a pond on the Singh Properties. VRP 452:12-18. Ms. Kluge testified that she remembered a spring under the former house on the Singh Properties which fed the pond. VRP 455:13-25. The water from the pond, prior to Singh's construction, diverted into a ditch, not onto the Trust Property. VRP 455:2-12.

Ms. Kluge, prior to Singh's purchase of the Singh Properties, conducted a "face to face" conversation with Mr. Singh about the then existing wetland permit and permitting process. VRP 457:21-458:12. After Mr. Singh's purchase, Ms. Kluge continued her involvement with Mr. Singh due to "violations regarding the groundwater," work orders and the home. VRP 462:13-20. The City further issued correction notices for the noncompliant work. VRP 462:21-24; Ex. 47G. Ms. Kluge and other City officials continued to work with, and meet with, Singh regarding the development and noncompliant work. VRP 471:3-19.

Among the City's grievances, Singh regraded the wetland and wetland buffer area. VRP 463:3-25, 491:2-14. Ms. Kluge testified, however, that Singh "never had permits to do gradings in the wetland." VRP 464:3-6.

In 2015, while Singh continued with construction, Ms. Kluge witnessed the beginning stages of water intrusion on the Trust Property. VRP 464:11-19. Unequivocally, Ms. Kluge testified that “[t]here was certainly groundwater in the ground, but it wasn’t pooling on top at that point.” VRP 464:18-19, 473:24-474:2. In later trips to the Trust Property, Ms. Kluge identified that, “There’s more water, and it’s now actually ponding.... ponding or inundated on the top of soils.” VRP 465:5-7.

The City subsequently worked with Singh to develop a wetland mitigation plan. VRP 478:6-10; Ex. 19. However, the City recognized Singh’s development as installed “didn’t really conform to anything that had been approved.” VRP 481:14-23. Even subsequent to the City’s objections, Singh installed an unpermitted fence in the wetland area and a berm between the dispersion trench and wetland. VRP 483:12-485:21. Singh’s berm, contrary to the City’s approval, actually “filled in what was supposed to be part of the mitigated wetland.” VRP 485:17-18. With Ms. Kluge’s oversight, the City asked Singh to reverse the effects of his fencing and grading to allow the water from his properties to flow “to the north in the same place and in the same way it did before the fencing and planning filled in the outlet.” VRP 498:5-500:6. Ms. Kluge testified however, that even though she would handle a permit to address the flow of water onto the Trust Property, Singh failed to file for any permit. VRP 508:9-17.

Ms. Kluge then testified the outflow of the water from the Singh Properties changed, including towards the Trust Property, following Singh's work. VRP 546:3-547:11, 552:16-21, 553:17.

4. The Trust's expert, Edward McCarthy testifies to the groundwater, tight-line channelization created by Singh's development and resulting flooding of the Trust Property.

The Trust called its expert witness at trial, Mr. Edward McCarthy. Mr. McCarthy both reviewed the property personally, reviewed reports and records regarding the Singh Properties, and interviewed Mr. Biggerstaff, the individual who designed the offending drainage system. VRP 299:21-300:6, 300:19-23, 305:16-306:1, 314:22-315:12.

Mr. McCarthy testified Singhs' work caused the flooding on the Trust Property. VRP 301:10-22. Without equivocation, when asked the cause of water on the Trust Property, Mr. McCarthy testified:

Aside from direct rainfall, I think the most significant source of water coming into this wetland source is the roof water from the Singh property and the groundwater being intercepted by the foundation drain and the slab drain and the interceptor curtain drain.

VRP 320:23-321:3 (emphasis added). When asked to clarify between the amount of rainfall and "groundwater" in Singh's curtain drain, Mr. McCarthy testified:

In the summer, at least on the days I was there, around the day I was there in July 2017, there had been no rain on that

day or subsequent. And so really, it's -- groundwater was the source. The groundwater, from what I can tell, is a perennial source going into that wetland. And so during the dry time of the year, it's exclusively groundwater.

VRP 321:17-23. Mr. McCarthy's testimony at trial continued:

Q [Mr. Shillito]. Have you drawn any collusions [sic] about where the water goes from the dispersion trench?

A [Mr. McCarthy]. Yes.

Q. What have you done to draw those conclusions?

A. I've conducted site observations, looked at site topography, reviewed previous engineering reports.

Q. And what is your conclusion as a result of those reviews as to where the water goes when it leaves the dispersion trench?

A. So the purpose of the trench is to disperse the water evenly over the surface of the ground down gradient, and -- and that typically works without failure, but then what happens is if there's any point in the topography that would cause that water to concentrate, then the water's going to go that direction.

So in my opinion, there had been changes in the topography within the wetland with all the activity that's occurred on the site, and that water has been diverted from its original outlet, which was marked on this exhibit as a four-inch concrete pipe and was later changed to a rock swale, but now a significant outlet is in the -- what would be the northeast corner of the Singh property, which happens to discharge to the northwest corner of the Maniatis property. And that's -- in my opinion, that's indisputable because I've seen it coming down that direction.

VRP 322:9-323:11 (emphasis added); see also VRP 326:12-21.

Mr. McCarthy continued and further testified regarding a potential remedy for Singh's flooding of the Trust Property. VRP 328:5-15. In short, Mr. McCarthy advised Singh could install a separate drainage system that connected to Tosch's system that ultimately "drain[ed] out to the street." VRP 328:5-15.

Finally, McCarthy testified he investigated and ruled out other causes of water including: (1) irrigation systems, (2) utility lines, and (3) septic systems. VRP 301:10-302:23.

5. The Maniatises testify at trial regarding the historically dry nature of the Trust Property and notice of the redirection of water from the Singh Properties on to the Trust Property.

During the trial, both Geraldine Maniatis and her son, Jaime Maniatis, testified. According to Ms. Maniatis, she lived at the Trust Property for approximately 56 years. VRP 511:1. During the more than half-century of occupation, Ms. Maniatis testified she never saw flooding on the Trust Property until Singh's development. VRP 512:19-513:17. Ms. Maniatis further testified she observed water coming from the Singh Property onto the Trust Property. VRP 516:4-8.

Mr. Maniatis likewise testified, since he began to live at the Trust Property in 1962, he never saw water on the Trust Property before Singh's construction. VRP 116:2-8; 127:6-16. Instead, Mr. Maniatis testified he

observed the water from the Singh Property flow from a pond on the property onto the Tosch Property. VRP 141:3-10. Mr. Maniatis testified he observed Singh's construction removed the pond where the water traditionally flowed. VRP 204:23-205:22.

Mr. Maniatis' testimony then established, with reference to admitted pictures and video, water continued to flow onto the Trust Property despite the dry summer months. VRP 173:9-174:12. NOAA rainfall records established an utter absence of rainfall though water continued to pour onto the Trust Property. VRP 173:9-174:12, 187:2-189:1.

The videos recorded by Mr. Maniatis further showed a stream of water flowing from the Singh Property onto the Trust Properties. VRP 189:19-190:7.

E. The Trust prevails at trial, receives the primary injunctive relief, and an award of fees pursuant to RCW 4.24.630, but the trial court purports to modify its findings.

On December 19, 2018, the trial court entered the first Findings of Fact and Conclusions of Law favorable to the Trust. CP 949-65 (the "December FFCL"). Specifically, the trial court's December FFCL found an intentional trespass by the Defendants, or alternatively, a negligent trespass, based on the unabated flow of water. CP 963-64. The December FFCL also found an injunction appropriate and ordered Singh to abate the flow of water. CP 964. Importantly, the December FFCL also found both

the Trust and Tosch prevailed on their claim for statutory trespass RCW 4.24.630. CP 964. The December FFCL awarded the Trust “treble damages, reasonable investigation and litigation costs and attorney’s fees.” CP 964.

Consistent with the December FFCL, the Trust moved for an award of fees and costs within ten days of the December FFCL entry. CP 966-1003.

On January 2 – fourteen (14) days after entry of the December FFCL, the Defendants filed a Motion for Reconsideration. CP 587-610. Following extensive briefing, the trial court reversed its finding of liability for statutory trespass pursuant to RCW 4.24.630. CP 612-43, 1095-96 (trial court’s letter ruling). The trial court’s letter ruling reasoned:

RCW 4.24.630 requires that the Plaintiffs must show that the Defendants ‘wrongfully’ caused waste or injury to land, and that a defendant acts ‘wrongfully’ only if he or she acts intentionally.

CP 1095. The trial court preserved its finding of “Negligent and/or Intentional Trespass.” CP 1095. But, instead, the trial court explained it “did not find... that the Defendants intentionally caused waste or injury to the Plaintiff’s land.” CP 1095.

The Trust prepared the initial form of judgment. CP 1166-74. That initial judgment proposed a June 15, 2019 completion date for Singh to

correct the flow of water. 2/8/19 VRP at 22:9-15. The Defendants opposed a completion date citing complications that theoretically could arise in trying to obtain the City's approval and working on the City's timeline. 2/8/19 VRP at 20:4-22:8, 24:17-26:15, 27:22-28:7. For instance, Defendants' counsel argued:

Further then, there has to be the acknowledgment that the review process of the city is an indefinite time period and will be a process that can take six months or more just to have it run through the review process and obtain a decision by the City of Tacoma on whether a permit will be issued to do the work.

2/8/19 VRP at 21:2-8.

The Defendants instead proposed the trial court set a date for Singh to provide a plan for correction to the Trust and allow the City approval process to unfold at the City's pace. 2/8/19 VRP 25:12-26:15. The trial court ultimately agreed to: (1) a completion date of September 15, 2019 and (2) permit deviation for good cause shown. 2/8/19 VRP 34:4-7; *see also* CP 700. The trial court indicated it wanted completion to occur "before the fall rain should hit" that would exacerbate the flow of water. 2/8/19 VRP 34:6-7. The trial court further advised the parties to make progress on satisfying the City's requirements, if any. 2/8/19 VRP 34:12-20. The trial court also retained jurisdiction of the case to monitor performance of the repairs. 2/8/19 VRP 34:12-20.

Both parties appealed.

V. ARGUMENT

This Brief first addresses and briefs the Trust's assignments of error. Following analysis of the Trust's position, this Brief then addresses both the Brief of Appellants and Brief of Appellants Minckler.

A. The trial court erred in granting the Defendants' untimely Motion for Reconsideration.

Preliminarily, the trial court erred by granting the Defendants' untimely Motion for Reconsideration. An appellate court will "review motions for reconsideration for an abuse of discretion." *Adamson v. Port of Bellingham*, 192 Wn. App. 921, 925, 374 P.3d 170 (2016). However, the appellate "reviews the interpretation of court rules de novo." *State v. Osman*, 168 Wn.2d 632, 637, 229 P.3d 729 (2010).

A party must file his motion for reconsideration "[n]ot later than 10 days after entry of the judgment, order or other decisions." CR 59(b); *see also* PLCR 7(c)(2) ("A Motion for Reconsideration shall be filed within 10 days... after entry of the judgment, decree, or order."). By rule, although a court may enlarge the time in which to file pleadings, under no circumstance may a court "extend the time for taking any action under rules... 59(b)." CR 6(b); *see also Schaeferco, Inc. v. Columbia River Gorge Comm'n*, 121 Wn.2d 366, 367–68, 849 P.2d 1225 (1993) ("A motion for reconsideration is timely only where a party both files and serves the motion within 10 days.

A trial court may not extend the time period for filing a motion for reconsideration.”).

CR 6(a) governs computation of time. Relevant here, CR 6(a) reads:

In computing any period of time prescribed or allowed by these rules, by the local rules of any superior court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday **or a legal holiday, in which event the period runs until the end of the next day which is neither a Saturday, a Sunday nor a legal holiday. Legal holidays are prescribed in RCW 1.16.050.**

RCW 1.16.050 excludes December 31, New Year’s Eve, from the definition of a “legal holiday.”⁴

⁴ For reference, RCW 1.16.050(1) reads, in full:

- (1) The following are state legal holidays:
 - (a) Sunday;
 - (b) The first day of January, commonly called New Year's Day;
 - (c) The third Monday of January, celebrated as the anniversary of the birth of Martin Luther King, Jr.;
 - (d) The third Monday of February, to be known as Presidents' Day and celebrated as the anniversary of the births of Abraham Lincoln and George Washington;
 - (e) The last Monday of May, commonly known as Memorial Day;
 - (f) The fourth day of July, the anniversary of the Declaration of Independence;
 - (g) The first Monday in September, to be known as Labor Day;
 - (h) The eleventh day of November, to be known as Veterans' Day;

The trial court filed its First Findings on December 19, 2018. CP 949-65. By rule, the ten-day period in CR 59(b) ended on December 30, a Sunday. Thus, CR 59(b) required the Defendants file their Motion no later than the following Monday, December 31. RCW 1.16.050, incorporated into CR 6, excludes December 31, or New Year's Eve, from the definition of a "legal holiday." Defendants therefore untimely filed their Reconsideration Motion when they filed on January 2.

B. The trial court erred by concluding the Defendants are not liable under RCW 4.24.630 and denying the resulting award of fees and costs.

Even if this Court sustains the trial court's untimely grant of reconsideration, the record evidences the trial court misapplied the elements of statutory trespass in RCW 4.24.630. Applicable here, appellate courts

apply a two-part review to awards or denials of attorney fees: (1) [first, they] review de novo whether there is a legal basis for awarding attorney fees by statute, under contract, or in equity and (2) [second, they] review a discretionary decision to award or deny attorney fees and the reasonableness of any attorney fee award for an abuse of discretion.

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- (i) The fourth Thursday in November, to be known as Thanksgiving Day;
 - (j) The Friday immediately following the fourth Thursday in November, to be known as Native American Heritage Day; and
 - (k) The twenty-fifth day of December, commonly called Christmas Day.

Gander v. Yeager, 167 Wn. App. 638, 647, 282 P.3d 1100 (2012). Similarly, “Statutory construction is an issue of law that [appellate courts] review de novo.” *Payseno v. Kitsap Cty.*, 186 Wn. App. 465, 469, 346 P.3d 784 (2015). Finally, the appellate court will “review challenged conclusions of law de novo, considering whether the findings of fact support them.” *Dave Johnson Ins., Inc. v. Wright*, 167 Wn. App. 758, 778, 275 P.3d 339 (2012).

The Trust’s appeal, therefore, raises issues for de novo review.

The trial court’s letter ruling⁵ (the “Letter Ruling”) explained it found “RCW 4.24.630 requires that the Plaintiffs must show that the Defendants’ ‘wrongfully’ caused waste or injury to land, and that the Defendants intentionally caused waste or injury to the Plaintiffs’ land.” CP 1095. Though the trial court found an intentional trespass, the court “did not find... Defendants intentionally caused waste or injury to the Plaintiffs’ land.” CP 1095. The trial court then only removed Conclusions 23 and 24 of its First Findings. The trial court never altered any of the Findings of Fact.

⁵ “The appellate court can look at the trial court’s tentative ruling to interpret the trial court’s written findings when the trial court’s tentative ruling is consistent with the written findings and conclusions.” *King v. Bilsland*, 45 Wn. App. 797, 800 n. 3, 727 P.2d 694 (1986).

Explained further below, the trial court erred because: (1) the plain language of RCW 4.24.630 attaches liability upon the intent to cause the act, not the specific harm or damage; (2) the case law cited by the trial court confirms liability attaches upon intent to commit the act, not cause a specific harm; and (3) the trial court’s findings support liability, consistent with case law, that Defendants actually intended to cause the resulting harm.

1. RCW 4.24.630 imposes liability based upon the intent to commit the acts or acts that cause harm, not cause the resulting actual harm itself.

The trial court’s reasoning departs with the plain language of RCW 4.24.630.

“Statutory interpretation is a question of law that [the appellate court] review[s] de novo.” *Birgen v. Dep’t of Labor & Indus. of State*, 186 Wn. App. 851, 857, 347 P.3d 503, 507 (2015), *amended on reconsideration* (May 19, 2015). “The goal of statutory interpretation is to determine and give effect to the legislature’s intent.” *Birgen*, 186 Wn. App. at 857. “To determine legislative intent, we first look to the plain language of the statute.” *Birgen*, 186 Wn. App. at 857.

The plain language of RCW 4.24.630 attaches, as a matter of law, based upon intent to “commit[] the act or acts” not intent to cause the specific, resulting, harm. RCW 4.24.630. The statute, in operative part reads:

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. 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.

RCW 4.24.630(1) (emphasis added). Substituting RCW 4.24.630's internal definition of "wrongful" with the word in the text of the statute reveals:

Every person who goes onto the land of another and...
[intentionally and unreasonably commits the act or acts that]
causes waste or injury to land, or [intentionally and
unreasonably commits the act or acts that] injures personal
property or improvements to real estate on land, is liable to
the injured party...

RCW 4.24.630(1).

The trial court misapplied the plain language of RCW 4.24.630(1). RCW 4.24.630(1)'s plain language only requires proof of intent to "commit[] the act or acts" that caused the harm. RCW 4.24.630(1).⁶ Instead, the trial court departed from the language of RCW 4.24.630(1) by requiring proof that the "Defendants intentionally caused waste" rather than requiring proof to "commit[] the act or acts." *Compare* CP 1095 to RCW

⁶ Importantly, the trial court's letter ruling expressly preserved those findings in which the trial court "describe[d] the intentional acts taken by Defendants Singh." CP 1095; *see also* CP 691.

4.24.630(1). In sum, the trial court erred by interpreting RCW 4.24.630 to require proof of intent to cause the waste rather than the act that caused the waste.

2. Case law, including that of *Borden v. Olympia*, 113 Wn App. 359, 53 P.3d 1020 (2002) comports with the above plain language.

Case law further demonstrates that the trial court erred by modifying elements of RCW 4.24.630. The Letter Ruling construed RCW 4.24.630's elements to require proof that: (1) the "Defendants' 'wrongfully' caused waste or injury to land, and (2) that the defendant acts 'wrongfully' only if he or she acts intentionally." CP 1095 (numerals added).

Conversely, however, this Court already established the component elements for a violation of RCW 4.24.630 in *Clype v. Michels Pipeline Const., Inc.*, 154 Wn. App. 573, 580, 225 P.3d 492 (2010). There, this Court opined: "RCW 4.24.630 requires a showing that [1] the defendant intentionally and unreasonably committed one or more acts *and* [2] knew or had reason to know that he or she lacked authorization." *Clype*, 154 Wn. App. at 580 (italics in original; numerals added).

Accordingly, as a matter of law, comparison of the Letter Ruling elements conflict with the elements of RCW 4.24.630 previously announced by this Court. Noted in *Clype, supra*, liability attaches because the "defendant intentionally and unreasonably committed on or more acts"

not because he intended the specific “waste or injury to land.” *Compare Cclipse*, 154 Wn. App. at 580 to CP 1095.

Further, nothing in *Borden v. Olympia*, cited in the Letter Ruling and decided before *Cclipse, supra*, alters that RCW 4.24.630’s analysis looks to the intent to cause the trespassing act. *Borden v. Olympia*, 113 Wn App. 359, 53 P.3d 1020 (2002). There, “private developers built a new storm water drainage project on privately owned land.” *Borden*, 113 Wn. App. at 363. The plaintiffs never alleged that the drainage project by the city diverted water onto the plaintiffs’ property. *Borden*, 113 Wn. App. at 373. The Court found no trespass occurred, negligent or otherwise, because the defendant never entered the plaintiffs’ property. *Borden*, 113 Wn. App. at 373. Because no trespass occurred, the Borden Court held the “evidence here does not support an inference that the City intentionally, as opposed to negligently, caused waste or injury to the [plaintiffs’] land.” *Borden*, 113 Wn. App. at 373.

Borden, supra, resolved on grounds other than “wrongfulness.” Importantly, unlike in *Borden*, the trial court left undisturbed its findings that the Defendants trespassed, intentionally or alternatively negligently (and also its finding of wrongfulness). CP 692-93. Moreover, unlike Singh here, the city in *Borden* never directed water, or caused an entry, on the *Borden* plaintiffs’ property. Therefore, nothing in *Borden* controls for the

proposition that liability under RCW 4.24.630 requires intent to cause the actual and resulting waste. Instead, the elements from the later decided *Clipse*, 154 Wn. App. at 580 (and statute), control.

The Trust's interpretation of RCW 4.24.630's elements also finds support in the seminal case, *Standing Rock Homeowners Ass'n v. Misich*, 106 Wn. App. 231, 246, 23 P.3d 520 (2001). In *Standing Rock*, this Court held that destruction of gates satisfied RCW 4.24.630's culpability requirement. *Standing Rock Homeowners Ass'n*, 106 Wn. App. at 246. There, the defendant landowner claimed "he did not 'wrongfully' destroy the gates under RCW 4.24.630(1), because he thought he was merely defending his property right or removing a public nuisance on a public road in accordance with a 1993 court order dismissing a related 1993 antiharassment claim." *Standing Rock Homeowners Ass'n*, 106 Wn. App. at 246. The *Standing Rock* Court noted that the trial court dismissed the antiharassment claim on which the defendant relied and never quieted title to the alleged easement. *Standing Rock Homeowners Ass'n*, 106 Wn. App. at 246. Thus, the Court of Appeals sustained the trial court's determination of "wrongfulness" because the defendant "either knew, or had reason to know he lacked authorization to continually take down the gates." *Standing Rock Homeowners Ass'n*, 106 Wn. App. at 247.

Here, the trial court's undisturbed findings support liability under RCW 4.24.630 per the elements this Court already decided. First, the trial court found the Singh intentionally and unreasonably committed one or more acts. *See, e.g.*, CP 691 (concluding Singh intentionally regraded Singh Properties, installed berm "while knowing they did not have authority to do so"); *see also* VRP 464, 481-85 (Kluge Testimony). Those acts, relevant here, included the development of the Singh Properties, installation of the tight-line drainage system that deposited water onto the Trust Property, and regrading and modifying the wetland buffer between the properties. CP 691; VRP 464, 481-85.

Second, Defendants knew or had reason to know that he or she lacked authorization to perform the offending acts. CP 691 (Conclusion 8). The trial court found, supported by evidence including Ms. Kluge's testimony, that the City advised Defendants they could not alter the historic flow of water from the Singh Properties. The trial court further found the Defendants could not regrade or otherwise destroy the wetland buffer. The Court also found that after the water started the Trust notified Singh of the water trespass yet he continued to proceed with construction and did not stop the water.

To conclude, facts here more closely parallel those in *Standing Rock*. Like the offending defendant in *Standing Rock*, the Defendants knew

or had reason to know they lacked authority to: (1) alter the historic flow of water or otherwise change the drainage, (2) violate the wetland buffer, and (3) otherwise redirect the flow of water onto the Trust Property. But the Defendants nevertheless disregarded the admonitions and proceeded to alter the water's flow anyway. Accordingly, the trial court erred by denying application of RCW 4.24.630 on these facts and these findings, by mistaking the intention to cause the harm, with the legal requirement of an intention to cause the act which causes the harm.

3. The Defendants propose an absurd result.

An additional tenant of statutory construction commands that a court should not interpret a statute that creates an absurd result. *State v. Ervin*, 169 Wn.2d 815, 823, 239 P.3d 354 (2010). Courts “presume the legislature does not intend absurd result.” *Ervin*, 169 Wn.2d at 823.

Absurdity ensues if this Court affirms the trial court's and Defendants' proffered interpretation. Any defendant would simply escape liability by denying he intended the resulting harm though intended to commit the offending act. Take for instance, a defendant that bulldozes his neighbor's land and destroys the neighbor's fence. Explained above, liability under RCW 4.24.630 should attach because the defendant intentionally drove the bulldozer and that act resulted in the harm, i.e., destruction of the fence and realty. Under an “intent to cause specific harm”

reading, the defendant could avoid liability by simply arguing he intended to cut a road, not specifically destroy a fence. Accordingly, the “intent to cause specific harm” analysis renders RCW 4.24.630 toothless and patently absurd.

In the instant case Singh intended to regrade the wetland which changed the water flow. After he learned that his regrade and construction work diverted the spring and turned it into a stream onto the Trust property he did nothing to correct it. Therefore, not only is it a sound policy to require liability to affix for waste which is caused by Singh when he intends the conduct which causes the injury, but it is doubly sound to hold Singh liable now. The trespass and waste was ongoing and could have been corrected at any time by simply returning the water to its original course.

4. Even if RCW 4.24.630 considered an intent other than to “commit the act or acts” under common law concepts, this Court can infer intent to cause the resulting harm.

Noted above, as a matter of law, the intent element of RCW 4.24.630 considers the intent to “commit[] the act or acts” not necessarily the resulting harm. However, even under the alternate standard advanced below, the trial court erred by relieving the Defendants of liability.

The Washington Supreme Court extensively addressed the element of intent for purposes of a trespass claim in *Bradley v. American Smelting & Refinery Company*, 104 Wn.2d 677, 709 P.2d 782 (1985). There,

property owners four miles away sued the parent company of the ASARCO smelter located in Ruston. *Bradley*, 104 Wn.2d at 679-80. The property owners alleged the smelter intentionally trespassed upon their property by way of particles placed in the air which eventually fell upon the owners' property. *Bradley*, 104 Wn.2d at 679-80. The Supreme Court quoted approvingly from the Restatement (Second) of Torts, Section 158 (1965):

Intent is not, however, limited to consequences which are desired. If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result.

Bradley, 104 Wn.2d at 682 (quoting Restatement (Second) of Torts, § 158 (comment b)). The Supreme Court went on to hold the smelter, as a matter of law, harbored the requisite intent sufficient to support an intentional trespass claim:

The defendant has known for decades that sulfur dioxide and particulates of arsenic, cadmium and other metals were being emitted from the tall smokestack. **It had to know** that the solids propelled into the air by the warm gases would settle back to earth somewhere. **It had to know** that a purpose of the tall stack was to disperse the gas, smoke and minute solids over as large an area as possible and as far away as possible, but that while any resulting contamination would be diminished as to any one area or landowner, **that nonetheless contamination, though slight, would follow.**

....

It is patent that the defendant acted on its own volition and had to appreciate with substantial certainty that the law of gravity would visit the effluence upon someone, somewhere.

Bradley, 104 Wn.2d at 682-84 (emphasis added).

The “substantial certainty” intent standard remains the law in Washington. *See Grundy v. Brack Family Tr.*, 151 Wn. App. 557, 569, 213 P.3d 619 (2009) (“the defendant need not have intended the trespass; he need only have been substantially certain that the trespass would result from his intentional actions”); *Jackass Mt. Ranch, Inc. v. S. Columbia Basin Irr. Dist.*, 175 Wn. App. 374, 401, 305 P.3d 1108 (2013) (“this requires proof that the actor has knowledge that the consequences are certain, or substantially certain, to result from his conduct and proceeds in spite of this knowledge”).

In this case, even adopting the trial court’s “intentionally caused [the] waste” standard, liability should attach. The Defendants knew they constructed a drainage system. The Defendants knew they diverted water that otherwise flowed into the wetlands to a new outflow point. CP 684-85. The Defendants knew that the diverted water would, based on the law of gravity like in *Bradley* would “visit the effluence upon someone, somewhere.” *Bradley*, 104 Wn.2d at 684. Moreover, despite actual knowledge of the drainage issue, the Defendants never acted to stop the flow. *See* CP 685-86. The trial court therefore erred when it failed to

conclude Defendants acted with culpable intent necessary to sustain liability under RCW 4.24.630.

5. Finally, the trial court never altered any findings that initially supported liability pursuant to RCW 4.24.630 and the finding of wrongfulness.

Finally, notwithstanding the foregoing, the trial court never actually altered its conclusions to remove its determination of wrongfulness.

Importantly, Conclusions 9 and 10 after reconsideration reads:

9. Defendant Singh wrongfully caused the trespass onto Plaintiff Maniatis's Property and onto Plaintiff Tosch's Property.

10. Defendants Minckler have wrongfully caused the trespass onto Plaintiff Maniatis's Property and onto Plaintiff Tosch's Property.

CP 692 (emphasis added). Accordingly, the trial court's amended findings retain the requisite finding of "wrongfulness" to impose liability under RCW 4.24.630. Thus, the trial court erred in denying the relief afforded by the statute.

C. The trial court erred by denying the Trust fees pursuant to RCW 4.24.630.

The Trust also assigns error to the trial court's refusal to award fees and costs. RCW 4.24.630(1) expressly provides a defendant subject to statutory trespass "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.” *See also Standing Rock*, 106 Wn. App. at 247 (“Attorney fees are authorized under RCW 4.24.630(1)”).

As a matter of law, where a more expansive fee and cost statute applies, like RCW 4.24.630, the more limited general standard gives way. *Johnson v. Horizon Fisheries, LLC*, 148 Wn. App. 628, 634, 201 P.3d 346, 350 (2009) (more limited “RCW 4.84.010 does not apply where a specific rule or statute expressly authorizes expanded cost recovery”); *Am. Civil Liberties Union of Washington v. Blaine Sch. Dist. No. 503*, 95 Wn. App. 106, 115, 975 P.2d 536 (1999) (explaining Public Records Act costs statute, RCW 42.17.340(4), more expansive than RCW 4.84.010).

Here, this Court should reverse the trial court’s exculpation of liability under RCW 4.24.630. This reversal, in turn, reinstates the fee provision of RCW 4.24.630 and the award of fees in the trial court’s December 19, 2018 Findings of Fact and Conclusions of Law. Thus, this Court should order the trial court, on remand, to enter a reasonable award of fees in favor of the Trust consistent with RCW 4.24.630(1).

D. The trial court erred by admitting testimony and records of Frank Fiedler while simultaneously excluding evidence and testimony of Edward McCarthy for the same period.

Below, the trial court erred by applying an unequal standard for the admission of evidence among the parties. Specifically, the trial court at

Defendants' request, limited and excluded Mr. McCarthy's testimony. Erstwhile, the trial court simultaneously admitted equally untimely evidence by Defendants' expert, Frank Fiedler.

An appellate court reviews the trial court's decision to admit or exclude evidence under an abuse of discretion standard of review. *State v. Thomas*, 150 Wn.2d 821, 856, 83 P.3d 970 (2004). However, before a court may exclude testimony, a trial court must conduct a *Burnet* inquiry. *Jones v. City of Seattle*, 179 Wn.2d 322, 344, 314 P.3d 380, 391 (2013), as corrected (Feb. 5, 2014) (citing *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997), as amended on denial of reconsideration (June 5, 1997)). "*Burnet* and its progeny require the opposite presumption: that late-disclosed testimony will be admitted absent a willful violation, substantial prejudice to the nonviolating party, and the insufficiency of sanctions less drastic than exclusion." *Jones*, 179 Wn.2d at 344.

Defendant Singh's sale of the Minckler Property on the eve of trial created complications for the underlying trial date. The case scheduling order that set trial originally for February 6, 2018 also set a discovery cutoff date of December 31, 2017. The trial court joined Defendants Minckler to the action on February 2, 2018. In its February 2, 2018 Order, the trial court, at Singh's request closed discovery to everyone but the Mincklers. CP 886

(ordering “that additional discovery shall be limited to the Minckler defendants”).

Then, prior to the August trial date, the Defendants moved to exclude testimony by Mr. McCarthy. CP 6-19. The Defendants sought exclusion alleging the Trust failed to properly disclose Mr. McCarthy and Mr. McCarthy formulated additional opinions after February 2, 2018. CP 6-19. The Trust similarly reciprocated asking to exclude Defendants’ expert, Frank Fiedler on similar grounds that the Defendants raised against Mr. McCarthy. CP 461-466. The Defendants disclosed Mr. Fiedler as a potential witness generally on December 29, 2017 despite discovery cutoff then set for December 31, 2017. More pressing, however, the Defendants only disclosed they intended to call Mr. Fiedler as an expert witness at the time of Mr. Brett Biggerstaff’s⁷ deposition on July 26, 2018 months after any conceivable discovery cutoff. CP 463.

The trial court ultimately excluded Mr. McCarthy’s evidence obtained, disclosed or formulated after February 2, 2018. CP 328-29. Following Defendants’ objection at trial the trial court excluded and significantly limited Mr. McCarthy’s testimony. *See* VRP 313:6-24.

⁷ Until July 26, 2018, the Defendants only disclosed they intended to call Mr. Biggerstaff as their expert witness. The trial court accepted Mr. Biggerstaff’s testimony (and his associate’s, Mr. Fiedler’s) through the preservation deposition. CP 583-86.

However, the trial court later permitted Mr. Fiedler to testify as an expert and admitted Exhibits 141, 142, 143 without regard to the original case schedule and its prior order notwithstanding over the Trust's objections. VRP 1128:1-16; 1129:3-6, 1129:22-24, 1130:10-12. The colloquy by the Court explained, speaking to the Trust's counsel:

In regards to the issue of discovery, you're correct that the Court did say anything, further discovery, that would be the Mincklers from February 2nd on.

The fact that you received this January 29th, that is six-and-a-half months ago. I understand that there wasn't additional discovery being done in regards to it, but it doesn't mean that you didn't have it and have the ability to be prepared and come to the court if you had an issue in regards to it and say this is when we received it. This is the date that you got, and we'd like to address some further specific discovery in regards to this.

So if that's the objection to 141, the Court will admit 141.

VRP 1128:1-16.

Fundamentally, the trial court erred in applying a double standard to discovery at the Trust's detriment. At the Defendants' request, the trial court excluded pertinent testimony by Mr. McCarthy. However, the trial court nevertheless applied a different standard and permitted testimony exhibits by Mr. Fiedler disclosed at a later date than the Trust's disclosures regarding Mr. McCarthy. The Trust contends the trial court either erred: (1)

most likely by denying Mr. McCarthy's testimony⁸ or (2) alternatively, admitting Mr. Fiedler's testimony and records.

VI. RESPONSE TO DEFENDANTS' BRIEF

The Defendants' appeal largely fails in light of the Trust's arguments set forth above. Notwithstanding, the Trust will address the Defendants' assignments of error in detail below.

A. The Defendants primarily challenge the trial court's findings which the appellate court presumes are correct and reviews for substantial evidence.

"On appeal, findings of fact are presumed correct." *Professionals 100 v. Prestige Realty, Inc.*, 80 Wn. App. 833, 842, 911 P.2d 1358 (1996).

"The party claiming error has the burden of showing that a challenged finding is not supported by substantial evidence." *Professionals 100*, 80 Wn. App. at 842. "If substantial evidence supports a finding of fact, an appellate court should not substitute its judgment for that of the trial court." *Recreational Equip., Inc. v. World Wrapps Nw., Inc.*, 165 Wn. App. 553, 558-59, 266 P.3d 924 (2011). Substantial evidence only requires

⁸ Applying a *Burnett* analysis, the same reasoning for admission of Mr. Fiedler's testimony and records applies to Mr. McCarthy's testimony and records. The Defendants equally received Mr. McCarthy's records months in advance of trial (by not later than November 2017) and could prepare for trial even if not conduct additional discovery on the analysis. *See, e.g.*, VRP 1128:1-16. The Defendants cannot demonstrate any prejudice, much less willfulness in light of the trial setting issues.

“sufficient evidence in the record to persuade a reasonable person that a finding of fact is true.” *Recreational Equip., Inc.*, 165 Wn. App. at 558.

“Unchallenged findings of fact are verities on appeal.” *Recreational Equip., Inc.*, 165 Wn. App. at 558.

B. The Brief of Appellants fails to identify the specific findings of fact it challenges, thereby precluding effective review.

Noted above, the Defendants’ appeal generally challenges the trial court’s factual findings. Yet, the Brief of Appellants⁹ fails to identify what findings of fact they appeal thereby precluding any appellate review of the underlying facts.

RAP 10.3(g) clearly sets forth the requirements imposed upon an appellant who brings a fact-based appeal like these Defendants. The rule reads:

A separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number. **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.**

RAP 10.3(g) (emphasis added). “An appellant who fails to identify and set forth challenged findings violates RAP 10.3(g) and 10.4(c).” *M/V La Conte, Inc. v. Leisure*, 55 Wn. App. 396, 401, 777 P.2d 1061, 1064 (1989).

⁹ Conversely the Brief of Appellants Minckler, though it assigns error with citation, nevertheless fails to cite the record for factual support.

“This alone, is justification for refusing to consider an assignment of error.” *M/V La Conte, Inc.*, 55 Wn. App. at 401. Moreover, this Court previously explained failure to assign specific error to findings renders the findings the “established facts of the case on appeal.” *Application of Santore*, 28 Wn. App. 319, 323, 623 P.2d 702 (1981) (emphasis added).

“The purpose of the rule and related rules is to enable the court and opposing counsel efficiently and expeditiously to review the accuracy of the factual statements made in the briefs and efficiently and expeditiously to review the relevant legal authority.” *State v. Cox*, 109 Wn. App. 937, 943, 38 P.3d 371, 374 (2002) (discussing RAP 10.3(a)(5)) (quotes removed). The Appellate court is “not required to construct an argument on behalf of appellants.” *Cox*, 109 Wn. App. at 943.

Absent identification of specific findings the Defendants appeal, the Trust cannot meaningfully respond. Moreover, nothing in the Rules of Appellate Procedure require this Court, or the Trust, to speculate what findings the Defendants’ take issue with or “construct and argument.” *Cox*, 109 Wn. App. at 943; *but see* VRP 38:17-23 (Singh testifying to his lack of knowledge or involvement), 462:21-24 (City issuing correction notices), 463:3-436:6 (Singh regraded wetland and buffer despite lack of permits), 322:9-323:11 (Defendants regrade and failure to act causes discharge on Trust Property and ultimate flooding). Accordingly, the Defendants’

appeal, and in particular, the Brief of Appellants', fails to raise appealable issues with the trial court's findings.¹⁰

C. **Though both Defendants bear the burden to overcome the presumption of correctness afforded to the trial court, the Defendants briefing contains scant citations to the record despite RAP 10.3(a)(5)'s command.**

Separately, the Defendants collective failure to cite to the factual record also precludes, or hinders, effective review now. "On appeal, findings of fact are presumed correct." *Professionals 100*, 80 Wn. App. 842. "The party claiming error has the burden of showing that a challenged finding is not supported by substantial evidence." *Professionals 100*, 80 Wn. App. at 842.

RAP 10.3(a)(5) clearly states: "Reference to the record must be included **for each factual statement**" in a party's statement of the case. (Emphasis added). The Appellate court is "not required to construct an argument on behalf of appellants." *Cox*, 109 Wn. App. at 943 (treating unsupported and uncited argument "as waived"); *see also Milligan v. Thompson*, 110 Wn. App. 628, 634, 42 P.3d 418, 421–22 (2002) (citing RAP 10.3(a)(5) and stating because appellant "cites to neither the record nor any authority to support this proposition and we decline to consider it.");

¹⁰ The Brief of Appellants Minckler largely incorporates the Brief of Appellants and therefore suffers from similar defects. *See Minckler App. Br.* at 3, 8, 12, 19, 25.

Island Cty. v. Mackie, 36 Wn. App. 385, 395, 675 P.2d 607 (1984) (“It is well-settled that assignments of error unsupported by legal argument need not be considered on appeal.”).

Prejudicial here, the both Defendants’ briefs sparsely cite the record below in support of their – apparently bald and unsupported – assertions. The Defendants bear the burden to overcome the presumption afforded to the trial court’s findings of fact and conclusions of law. The Defendants unsupported and uncited arguments fail.

D. Substantial evidence supports the trial court’s conclusions.

An overwhelming volume of evidence supports the trial court’s findings which the Defendants seem to challenge.¹¹

1. The Defendants largely claimed a lack of involvement in the building process and therefore cannot offer testimony to rebut the Trust’s contentions.

Preliminarily, the Defendants failed to offer any testimony to rebut the Trust’s claims. Noted above, Defendant Singh denied any knowledge of his own construction or drainage modification. *See* VRP 38:17-23. Moreover, Defendant Minckler, who purchased the property after Defendant Singh completed construction of the offending drainage

¹¹ Noted above, the Trust contends the trial court erred in refusing to apply RCW 4.24.630. Noteworthy, however, the trial court maintained its finding of “wrongful” conduct by the Defendants. CP at 692.

similarly failed to offer any subject matter knowledge. VRP 71:18-72:14.

The Defendants wholly left the Trust's testimony of these actors un rebutted.

2. The evidence established the Defendants' unpermitted development caused the flooding on the Trust Property.

Substantial evidence supports the trial court's key and central findings that the water flooding the Trust Property comes from the Singh Properties. "Evidence can be either direct or circumstantial, and one type of evidence is not necessarily more or less valuable than the other. *Morawek v. City of Bonney Lake*, 184 Wn. App. 487, 493, 337 P.3d 1097 (2014). Below, the trial court heard evidence (in addition to the volume already set forth above) that:

1. The Singh properties sit downslope or otherwise adjacent to natural streams and water travels through underground channels connected to upland drainage basins (Findings 12 and 13);¹²
2. The spring on the Singh Properties historically flowed into a pond then channeled to an outlet on the Tosch Property (Finding 15);¹³

¹² VRP 535:7-536:14, VRP 349:18-350:19.

¹³ VRP 105:24-106:17, VRP 108:4-9.

3. Singh intentionally demolished the then-existing home and regraded the wetland and buffer areas without City approval (Finding 26);¹⁴
4. Singh's unapproved regrade redirected the flow of water (Finding 26);¹⁵
5. Singh's eventual permit precluded Singh from placing water on neighboring properties (Finding 31);¹⁶
6. Singh "objectively and constructively... knew that water could not be directed onto the [Trust] Property" (Finding 32);¹⁷
7. Singh's "variation of the approved drainage" plan collected and deposited the water immediately upgrade from the Trust Property (Finding 33);¹⁸
8. "Singh became aware of the water" and offered the City to correct the flow of water and had an unknown worker build a small hand

¹⁴ See VRP 463:5-6 (City agent testifying Defendants "never had permits to do gradings in the wetland"); *see also* VRP 465:18-25, 490:17-24; *see also, generally*, trial testimony of Ms. Maniatis, Mr. Maniatis, Ms. Kluge and Mr. Halberg.

¹⁵ See VRP 464:13-19 (testifying City inspection showed "Mr. Manaitis' [the Trust] property was getting soft" due to increase in groundwater); *see also* VRP472:9-473:3.

¹⁶ See VRP 472:10-16; *see also* Exs. 17, 19.

¹⁷ See Ex. 17, 42; *see also* VRP 39:6-12 (testifying to receipt of stop work order).

¹⁸ See VRP 320:4-321:3.

dug, unpermitted, berm to try and abate the flow (Findings 37-38);¹⁹

9. The City issued stop work orders against Singhs' construction due to water flowing onto the Trust Property (Findings 41 and 50);²⁰
10. The City permitted Singh to continue development of the property and advised Singh in writing to stop the flow of water, with which Singh refused (Findings 43-44, 50).²¹
11. Singhs' work altered the historic natural watercourse and otherwise altered groundwater (Finding 49);²²

Moreover, the testimony at trial further established that:

1. Defendants installed a curtain drain system;²³
2. That drainage system collected both rainwater and groundwater on the Singh Properties;²⁴
3. That drainage system flowed downhill with its outlet directly adjacent to the Trust Property, and ultimately onto the Trust Property;²⁵

¹⁹ See VRP 485:11-21.

²⁰ See VRP 466:13-19, 470:16-472:21.

²¹ See VRP 33:5-15; *see also* Exs. 15, 17, 19.

²² VRP 535:7-536:14, 324:13-325:4, 349:18-350:19, 351:12-3.

²³ VRP 310:13-21, 316:21-317:2, 367:15-16.

²⁴ VRP 316:21-2, 320:23-321:3.

²⁵ VRP 322:25-323:11, 187:2-11, 516:4-8 *see also* Ex. 46.

4. The Trust Property stayed historically dry for decades until Singh began his work;²⁶
5. One can physically observe, and a number of videos at trial showed, water running onto the Trust Property from the Singh Properties, even during dry summer months;²⁷ and
6. Defendants Minckler knew of the offending groundwater and drainage issue but never took steps to abate the flow.²⁸

In sum, the trial court received and admitted evidence to establish the facts set forth in the trial court's Findings of Fact and ultimate Conclusions of Law.²⁹ The more than one week of trial testimony – impossible to specifically cite to each and every instance – clearly supports the trial court's findings. That evidence establishes that Defendants installed a drainage system that ultimately collected water from the entirety of the Singh Properties and diverted the water onto the Trust Property. Defendants' diversion of water ultimately lead to flooding of the Trust Property for the first time in history.

²⁶ VRP 512:19-513:17, 116:2-8, 127:6-16; 6:3-5.

²⁷ VRP 187:2-11; *see also* Ex. 46.

²⁸ VRP 69:20-2470:6-14, 71:17-72:11; Ex. 48.

²⁹ The Trust highlights the key findings adduced at trial. Noted herein, Defendants, and in particular Singh, fails to clearly identify which specific Findings of Fact they intend to appeal.

E. The Common Enemy doctrine cannot apply on these facts.

The trial court correctly refused to apply the common enemy doctrine defense. Discussed below, the Defendants cannot prove the three required exceptions necessary to avail themselves of the doctrine.

1. The Common Enemy Doctrine will not apply in three scenarios, all of which occurred below.

“In its strictest form, the common enemy doctrine allows landowners to dispose of unwanted surface water in any way they see fit, without liability for resulting damage to one's neighbor.” *Currens v. Sleek*, 138 Wn.2d 858, 861, 983 P.2d 626 (1999), *amended*, 993 P.2d 900 (Wash. 1999). However, the doctrine will not apply if: (1) a party “inhibit[s] the flow of a watercourse or natural drainway”; (2) a party “collect[s] water and channel[s] it onto their neighbors’ land”; (3) or a party fails to “exercise their rights with due care by acting in good faith and avoiding unnecessary damage to the property of others.” *Currens*, 138 Wn.2d at 862, 865.

Here, the trial court found all of the exceptions noted above preclude the Defendants from availing themselves of the common enemy doctrine. CP 690-91. The record supports these findings and conclusions.

2. Exception 1 – the Trust diverted a watercourse or natural drainway, not surface water.

First, the Defendants never diverted surface water to which the common enemy doctrine applies. Instead, the Defendants diverted a natural

water course (the daylighting spring and its outflow channel) onto the Defendants' property from its historic drainage route onto the Tosch Property.

For purposes of the common enemy doctrine, "surface water" means "vagrant or diffused water produced by rain, melting snow, or springs." *Currens*, 138 Wn.2d at 861 (alterations removed; citations omitted; emphasis added).

The chief characteristic of surface water is its inability to maintain its identity and existence as a body of water. It is thus distinguished from water flowing in its natural course. A natural watercourse, however, has long been defined to include the flood channel of a stream because the flood channel is as much a natural part of the stream as is the ordinary channel.

Fitzpatrick v. Okanogan Cty., 169 Wn.2d 598, 607, 238 P.3d 1129, 1134 (2010) (alterations, quotes and citations removed). Surface water "may be said to form a water course at a point where it begins to form a reasonably well-defined channel, with bed, banks or sides, and current, although the stream itself may be very small, and the water may not flow continuously." *Alexander v. Muenscher*, 7 Wn.2d 557, 559–60, 110 P.2d 625 (1941) (quotes omitted).

The Supreme Court in *Miller v. E. Ry. & Lumber Co.*, 84 Wash. 31, 146 P. 171 (1915) addresses an almost analogous set of facts like those present here. There, a landowner's property contained saturated and

swampy ground before he cleared and ditched the property to benefit his millpond. *Miller*, 84 Wash. at 32-33. In an action brought by the neighbor, the Court found that even water in swampy lands retain its original identity as a watercourse even if the water no longer flowed in a stream bed.³⁰

Miller, 84 Wash. at 34. The *Miller* Court explained:

A swamp or swale is not ordinarily held to be a water course. *Hayward v. Mason*, 54 Wash. 653, 104 Pac. 141; Kinney on Irrigation & Water Rights, § 515. But it would not follow that the waters of a swamp are surface waters. A swamp or swale may be a water course. If the waters which had accumulated upon respondent's land had flowed in natural channels up to or about the east line of his property and then spread out over an area without beds and banks so as to form a swamp, the stream would be a water course. Kinney on Irrigation & Water Rights, 512–515; *Hastie v. Jenkins*, 53 Wash. 21, 101 Pac. 495.

‘Where the stream usually flows in a continuous current, the fact that the water of the stream, on account of the level character of the land, spreads over a large area without apparent banks, does not affect its character as a water course. *Macomber v. Godfrey*, 108 Mass. 219, 11 Am. Rep. 349; *West v. Taylor*, 16 Or. 165, 13 Pac. 665.’ *Miller & Lux v. Madera Canal, etc., Co.*, 155 Cal. 59, 79, 99 Pac. 502, 509 (22 L. R. A. [N. S.] 391).

Where there is a spreading of a stream which still moves by natural gravitation in a certain direction to a common or defined channel, it is a water course. In the case at bar the waters flowing across respondent's land find their way into the water course called China Ditch. There is testimony

³⁰ Said another way: The fact that a water course spreads out and forms a swamp does not deprive it of its character as a “natural water course.” *Snohomish County v. Postema*, 95 Wn. App. 817, 978 P.2d 1101 (1998) (citing *Alexander v. Muenscher*, 7 Wash.2d 557, 110 P.2d 625 (1941)); *Rigney v. Tacoma Light & Water Co.*, 9 Wash. 576, 38 P. 147 (1894).

tending to show in the instant case that the waters complained of flow or move to the westward in all seasons and under all conditions.

Miller, 84 Wash. at 34.

Below, the trial court received extensive evidence that Defendants diverted groundwater, or water other than surface water. *See, e.g.*, VRP 310:13-18; 321:17-22; 350:2-351:8; 464:7-19; 503:172. Among other sources, Singh's curtain drain collected and diverted the spring, a source of groundwater. Defendants offered no evidence, and cite no evidence, to the contrary.

3. Exception 2 – the Defendants channelized the flow of water, surface or otherwise, onto the Trust Property.

Even if Defendants could credibly argue they only altered surface water as the law defines it, they clearly channelized that surface water contrary to the common enemy doctrine.

A party has “a duty not to channel and discharge that water onto the adjoining land in a manner different from the natural flow of the surface water.” *Ripley v. Grays Harbor Cty.*, 107 Wn. App. 575, 581, 27 P.3d 1197 (2001). More succinctly, “the common enemy doctrine in Washington allows landowners to alter the flow of surface water to the detriment of their neighbors, so long as they do not... collect and discharge water onto their

neighbors' land in quantities greater than, or in a manner different from, its natural flow.” *Currens*, 138 Wn.2d at 862-63.

Again, the irrefutable evidence shows the trial court heard evidence that Defendants channelized the flow of water. That evidence included testimony from a variety of witnesses that the water was flowing in a small stream, numerous photographs admitted into evidence and eventually videos showing a small babbling brook running in a small channel onto the Trust Property. *See e.g.*, VRP 189:19-190:5; *see also* Exs. 46 and 47. Moreover, the evidence established Defendants channelized the water by capturing water in the curtain drain and depositing that water directly adjacent and uphill to the Trust Property. Clearly, substantial evidence supports the trial court’s findings and conclusion that the common enemy defense cannot apply.

4. Exception 3 – the Defendants failed to use due care when they diverted the flow of water onto the Trust Property.

Third, and overarching, “landowners who alter the flow of surface water on their property must exercise their rights with due care by acting in good faith and by avoiding unnecessary damage to the property of others.” *Currens*, 138 Wn.2d at 865. The due care exception requires the defendant “limit any harm caused by changes in the flow to that which is reasonably necessary.” *Pruitt v. Douglas Cty.*, 116 Wn. App. 547, 557, 66 P.3d 1111

(2003). “[T]he due care exception requires the court to look only to whether the landowner has exercised due care in improving his or her land, i.e., whether the method employed by the landowner minimized any unnecessary impacts upon adjacent land.” *Currens*, 138 Wn.2d at 866.

Below, the trial court heard evidence of, and correctly found, about the Defendants disregard of due care. In fact, Defendant Singh admitted he exercised no oversight over development of the Singh Properties despite significant violations of the City’s development restrictions. VRP 38:17-23. Defendants Mincklers likewise never investigated or sought to stop the flow of water. VRP 71:18-72:14, 74:14-19. Instead, the Mincklers simply executed an indemnity agreement with Singh to punt the problem without action. *See* Ex. 48.

Moreover, the Defendants’ now on appeal continue to perpetuate the red-herring and cast blame upon the City. But the representatives of the City confirmed Defendants engaged in development contrary to the plans they proposed and which the City approved. For instance, at trial, Ms. Kluge testified to the volume of Singh’s violations, failure to abide by plans submitted to the City and actual knowledge that Singh could not divert water onto neighboring parcels. *See e.g.*, VRP 470:20-471:19, 485:10-21, 464:7-465:7.

Further yet, a reasonable solution existed. Established at trial, Singh could have installed a drainage system that mirrored the flow of water before work began. Mr. McCarthy testified Defendants could run the existing system into the historic drainage location on the Tosch Property which then runs harmlessly to the street. VRP 328:5-15.

In short, whether through conscious neglect or intentional disregard, Singh allowed his agents to divert water onto the Trust Property contrary to permits and approvals. Defendants' avoidable diversion resulted in the flooding of the Trust Property, rendering the same useless.

F. The Trial Court properly denied the Defendants' CR 41 Motion to Dismiss.

The Defendants next claim the trial court erred in denying the Defendants CR 41(b)(3) Motion to Dismiss. This argument fails for two clear reasons.

First, the Defendants fail to offer any substantive briefing for this "error." The Defendants offer a scant one-sentence conclusion that "Plaintiffs failed to meet their burden of proof." App. Br. at 37. The failure to brief the error results in waiver of the argument. *See Specialty Asphalt & Constr., LLC v. Lincoln Cty.*, 191 Wn.2d 182, 196, 421 P.3d 925 (2018) ("When an assignment of error was neither argued nor briefed, we deem it waived.").

Second, even if substantively briefed, the Defendants' arguments fail. CR 41(b)(3), cited by the Defendants, reads in part:

After the plaintiff, in an action tried by the court without a jury, has completed the presentation of evidence, the defendant, without waiving the right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence.

CR 41(b)(3) expressly permits the trial court discretion - discretion to "decline to render any judgment until the close of all evidence."

Nevertheless, a court should only dismiss pursuant to CR 41(b)(3) when "there is no evidence, or reasonable inferences therefrom, that would support a verdict for the plaintiff." *Commonwealth Real Estate Servs. v. Padilla*, 149 Wn. App. 757, 762, 205 P.3d 937 (2009).³¹

Noted throughout the entirety of this brief, the Trust amply proved statutory trespass, if not common law trespass and the theories of liability ultimately found. The evidence established: (1) the Defendants lack any knowledge to rebut the Trust's facts; (2) a spring historically existed on the Defendants Property and the spring drained into a catch basin on the Tosch

³¹ For further reference, the standard of review on appeal differs whether the trial court dismisses as a matter of law or on the facts. *See Commonwealth Real Estate Servs. v. Padilla*, 149 Wn. App. 757, 762, 205 P.3d 937 (2009) (dismissal as a matter of law presents de novo standard of review; dismissal on facts invokes substantial evidence review).

Property; (3) Singh altered the drainage contrary to the plans presented to and approved by the City; (4) the alterations created a “tight line” of the water directly upgradient from the Trust Property; and (5) the historically dry Trust Property remains inundated with water even during the dry summer months. Clearly, the Trust proved its case before the trial court.³²

G. Trial court properly issued the injunction, the primary claim in this litigation.

The Defendants next argue the trial court erred by issuing an injunction. The injunction, for reference, ordered the Defendants to “abate the flow of water from the Singh Properties onto the Plaintiff Maniatis’ Property.” CP 699.

The Defendants seemingly make two arguments. First, they allege they cannot understand “how Defendants could comply with this ruling.” App. Br. at 37. Second, they argue they “cannot comply with the injunction” and related, the cost to comply exceeds the damages the Defendants forced upon the Trust. App. Br. at 37. These arguments fail.³³

³² For clarity, the Trust incorporates its arguments regarding the evidence presented at trial in this CR 41 analysis.

³³ Oddly, the Defendants cite the Covenant and Easement between Defendants and the City in arguing against the injunction. The Defendants argue the Covenant prohibits “altering the surface topography and hydrology... including excavation, removal of any soil, sand gravel, rock or vegetation except as required by activities expressly permitted by the City.” App. Br. at 40. According to the City’s representative, Ms. Kluge, the Defendants altered the flow of water by performing all of these prohibited acts. *See, generally*, VRP 450-509.

1. Injunctions sound in equity and only require proof of three elements, all of which the Trust established.

“Trial courts have broad discretionary power to fashion injunctive relief to fit the particular circumstances of the case before it.” *Hoover v. Warner*, 189 Wn. App. 509, 528, 358 P.3d 1174 (2015). “One who seeks relief by temporary or permanent injunction must show (1) that he has a clear legal or equitable right, (2) that he has a well-grounded fear of immediate invasion of that right, and (3) that the acts complained of are either resulting in or will result in actual and substantial injury to him.” *Hoover*, 189 Wn. App. at 528–29 (citing only the foregoing elements necessary to establish injunctive relief in water trespass claim) (alteration and quotes removed); *see also Kucera v. State, Dep't of Transp.*, 140 Wn.2d 200, 209, 995 P.2d 63 (2000) (same; addressing injunction in context of water caused by boat wake); *Lyft, Inc. v. City of Seattle*, 190 Wn.2d 769, 784, 418 P.3d 102 (2018) (in accord).

The Trust clearly established the requisite elements for injunctive relief. Without unnecessary elaboration, a court may enjoin an ongoing water trespass, of which, a landowner has the right to be free from. *Hedlund v. White*, 67 Wn. App. 409, 418, 836 P.2d 250 (1992). The evidence at trial established an ongoing and active diversion of water that damages and

floods the Trust Property. *See, e.g.*, VRP 189:19-190:7; Exs. 46-47. The Trust established all elements necessary to obtain injunctive relief.

2. The Defendants’ impossibility argument fails, particularly in light of the Defendants failure to provide any evidence that the City would deny requests to return the flow of water to its original configuration.

Separately, the Defendants’ impossibility argument, on the whole, fails in light of the record. Mr. McCarthy clearly testified to a potential repair at trial:

Right here on the property line between the two -- right on the Singh east property line, that's where I think that a curtain drain or an interceptor drain should be installed, which is similar to the foundation drain, it would be a trench filled with gravel and a perf pipe. And then that perf pipe would ideally connect to the Tosch system, which drains out to the street. So that would – that would collect both surface water and drainage water that migrates from the Singh towards Maniatis property.

VRP 328:5-15. Thus, even if the law imposed an obligation on the party seeking an injunction to explain how to enjoin an unlawful act, the Trust complied.

3. Contrary to Defendants’ arguments, the elements to obtain injunctive relief omit any requirement that the Plaintiff provide a plan to accomplish the minutia of the ordered injunctive relief.

The Defendants also argue, though relevant, that the Trust failed to “present any proposed plan to stop the flow of water.” App. Br. at 38. The Defendants fail to offer any authority that the burden to provide a plan to

stop an ongoing trespass of nuisance falls on the aggrieved plaintiff. *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193, 195 (1962) (“Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.”).

Notably, none of the elements for injunctive relief, according to our Supreme Court, require proof of how the offending defendant will comply. Moreover, the Trust’s expert, Mr. McCarthy, proposed a method for repair.

4. The Defendant’s “cannot comply” argument only reiterates the debunked claim that the Defendants never caused the flow of water – a flow that never existed until the Defendants developed the Defendants property.

Worth noting, the Defendants “cannot comply” argument simply parrots the denial already rejected by the facts, evidence, law, and trial court. At the core, the Defendants’ characterize their defense – “Defendants did not cause this [water flow] and cannot resolve it.” App. Br. at 40.

The Defendants offer no evidence of this bold, and oft rejected, contention. To the contrary, the evidence establishes: (1) the Trust Property remained historically dry; (2) the Trust Property only flooded after the Defendants altered the flow of water contrary to the City’s approved plans and (3) that alteration resulted in collecting and channelizing the water directly adjacent to the Trust’s property line.

5. The Defendants cannot argue the trial court must balance the equities where, unlike here, consideration of the equities for injunctive relief only applies to an innocent defendant who acts without knowledge or warning their activity encroaches upon another's rights.

The Defendants also argue the trial court must balance the equities before imposing an injunction. This argument fails for several reasons.

First, the Defendants cite no authority that a trial court must balance the equities before the issuance of an injunction. The argument, accordingly, fails. *See DeHeer*, 60 Wn.2d at 126; *see also Hoover*, 189 Wn. App. at 528–29 (setting forth elements for injunctive relief in trespass claim that excludes balancing equities).

Second, the Defendants' argument, even if asserted, legally fails. This Court previously explained a “balancing the equities or relative hardships” analysis only applies to “innocent defendants who proceed without knowledge or warning that their activity encroaches upon another's rights.” *Bauman v. Turpen*, 139 Wn. App. 78, 96, 160 P.3d 1050 (2007) (citing *Bach v. Sarich*, 74 Wn.2d 575, 582, 445 P.2d 648 (1968)) (emphasis added). In *Bauman*, the Court explained:

In *Holmes and Lenhoff [v. Birch Bay Real Estate, Inc.]*, 22 Wn. App. 70, 587 P.2d 1087 (1978), we held that a trial court should balance the hardships and consider whether an injunction's effect will be disproportionate to the benefit secured by the plaintiff. But these cases do not support the Turpens' argument. In *Holmes*, we upheld the trial court's denial of injunctive relief in part because the defendant

attempted to comply with the height restriction but was confused by its application. In *Lenhoff*, we reversed the trial court's order granting injunctive relief, even though the defendant knowingly violated a restrictive covenant, because injunctive relief was not required to protect the plaintiffs' interests and the covenant provided for damages as a remedy. These cases did not modify the Supreme Court's holding in *Bach [v. Sarich*, 74 Wn.2d 575, 445 P.2d 648 (1968)], *which reserved the doctrine of balancing the equities or relative hardships for innocent defendants who proceed without knowledge or warning that their activity encroaches upon another's rights.*

Bauman, 139 Wn. App. at 96 (discussing propriety of injunctive relief for restrictive covenants) (alterations and emphasis added).

The *Bauman* decision, in turn, followed the Supreme Court which held in black letter:

The benefit of the doctrine of balancing the equities, or relative hardship, is reserved for the innocent defendant who proceeds without knowledge or warning that his structure encroaches upon another's property or property rights.

Bach, 74 Wn.2d at 582.

Even if this Court could reach the issue of balancing, the record defeats any claim that the Defendants fall within the class of an “innocent defendant” that “proceeds without knowledge.” *Bach*, 74 Wn.2d at 582. Again, the evidence shows: (1) the City approved Defendants work on the understanding the work would not alter the historic flow of water; (2) the City intervened and issued multiple citations for Defendants’ failure to abide by the proposed construction; (3) and the Defendants subjectively

knew of the problem, made an impossible weak attempt to mitigate, but nevertheless recklessly continued.

H. The trial court correctly denied the Defendants' untimely request for fees that relied upon RCW 4.84.270.

The Defendants next argue the trial court erred in denying fees to the Defendants. This argument fails on factual, procedural, and legal grounds. The Defendants failed to move for fees until after the ten (10) day window in RCW 54(d) lapsed. Moreover, RCW 4.84.270 cannot apply because Singh – the only party to make an offer – failed to offer to settle all claims, including the Trust's claim for a permanent injunction. Additionally, the Defendants fail to cite any authority for an award of fees against plaintiff that receives substantial injunctive relief like the Trust here. Furthermore, the Mincklers themselves never made an offer and therefore cannot recover their own fees.

1. Singh failed to timely file his Motion for Fees and the trial court properly denied the untimely request.

Preliminarily, Defendants failed to seek fees in the ten (10) day period required by rule and otherwise comply with applicable rules. CR 54(d)(1) requires a party that seeks “costs and disbursements” to “file a cost bill or affidavit detailing disbursements within 10 days after entry of the judgment.” (Emphasis added.) Likewise, CR 54(d)(2) requires any party

that requests “attorneys’ fees and expenses” to file within ten days after entry of judgment, stating:

(2) Attorneys' Fees and Expenses. Claims for attorneys' fees and expenses, other than costs and disbursements, shall be made by motion unless the substantive law governing the action provides for the recovery of such fees and expenses as an element of damages to be proved at trial. Unless otherwise provided by statute or order of the court, **the motion must be filed no later than 10 days after entry of judgment.**

(Emphasis added.) This Court, in turn, repeatedly holds a trial court properly denies fees where the moving party fails to comply with CR 54(d)’s ten (10) day filing requirement. *Corey v. Pierce Cty.*, 154 Wn. App. 752, 773, 225 P.3d 367 (2010); *Clype v. Commercial Driver Servs., Inc.*, 189 Wn. App. 776, 787, 358 P.3d 464 (2015).

Below, the trial court entered judgment on March 29, 2019. By rule, CR 54(d)’s ten (10) day period began to accrue on March 30 ended on Monday, April 8. *See* CR 6(a) (computation of time). The Defendants, however, filed their motion for fees after April 8, and therefore outside the ten (10) day period required by CR 54(d). CP 1194-97. Further yet, contrary to CR 54(d)(1) the Defendants failed to file the requisite “cost bill or... affidavit detailing disbursements.” Accordingly, the trial court properly denied fees to Defendants because Defendants failed to comply with either CR 54(d)(1) or (2).

2. Defendants request contravenes RCW 4.84.250.

Below, the Defendants sought fees pursuant to RCW 4.84.250 *et seq.* CP at 1194-97. As a matter of law, Defendants request for fees below and on appeal fail.³⁴

- a. *Singh's request for fees relies on RCW 4.84.270 and only applies to actions for "damages" not applicable where, like here, the Trust primarily sought injunctive relief, a nonmonetary equitable recovery.*

The Defendants arguments for RCW 4.84.270's application plainly fail.³⁵ RCW 4.84.270 reads, in full:

The defendant, or party resisting relief, shall be deemed the prevailing party within the meaning of RCW 4.84.250, if the plaintiff, or party seeking relief in an action for damages where the amount pleaded, exclusive of costs, is equal to or less than the maximum allowed under RCW 4.84.250, recovers nothing, or if the recovery, exclusive of costs, is the same or less than the amount offered in settlement by the

³⁴ Cursorily, only Defendant Singh extended an offer of settlement under RCW 4.84.250 *et seq.* CP at 1236-37. The Mincklers never requested fees or preserved the issue for appeal. RAP 2.5(a).

³⁵ The Defendants' argument for fees conflicts with the Defendants' assignment of error to the trial court's injunction. The Defendants oppose the injunction hypothetically posing the costs to "stop the water that the City will sign off on costs \$1,000,000.00 to implement." App. Br. at 42. Contrary now, the Defendants claim they prevailed and should recover fees because the damages and monetary implications of the litigation fell below RCW 4.84.270's \$10,000.00 threshold. App. Br. at 43. Any argument that a defendant prevails where, like here, the trial court orders the defendant to perform substantial and costly relief defies logic. Similarly, in no event would this Court award fees pursuant to RCW 4.84.270 if the trial court awarded the Trust \$1,000,000.00 to perform the abatement or injunction work itself.

defendant, or the party resisting relief, as set forth in RCW 4.84.280.

Statutory construction “that results in absurd results must be avoided because it will not be presumed that the legislature intended absurd results.” *Spokane Cty. v. Dep't of Fish & Wildlife*, 192 Wn.2d 453, 458, 430 P.3d 655 (2018).

“RCW 4.84.250 through .290 encourages out-of-court settlements, penalizes parties who unjustifiably bring or resist small claims, and enables parties to pursue meritorious small claims without seeing the award swallowed up by the expense of paying an attorney.” *McKillop v. Pers. Representative of Estate of Carpine*, 192 Wn. App. 541, 545, 369 P.3d 161 (2016). Courts generally avoid injunctive relief where monetary damages provide the plaintiff with complete relief. *See Tyler Pipe Indus., Inc. v. State, Dep't of Revenue*, 96 Wn.2d 785, 791, 638 P.2d 1213 (1982) (“The rule in this state is that injunctive relief will not be granted where there is a plain, complete, speedy and adequate remedy at law.”); *see also Kucera v. State, Dep't of Transp.*, 140 Wn.2d 200, 210-11, 995 P.2d 63 (2000) (denying injunctive relief because property owners in trespass case could receive monetary damages to cure damage caused by trespass). Moreover, “The remedies for a continuing trespass are limited to injunctive relief and damages for injury incurred during the three years prior to filing the action.”

Crystal Lotus Enterprises Ltd. v. City of Shoreline, 167 Wn. App. 501, 506, 274 P.3d 1054 (2012).

Used in RCW Chapter 4.84.250, this Court previously defined “damages” to mean:

the sum of money which the law awards or imposes as pecuniary compensation, recompense, or satisfaction for an injury done or a wrong sustained as a consequence either of a breach of a contractual obligation or a tortious act.

Davy v. Moss, 19 Wn. App. 32, 34, 573 P.2d 826 (1978) (holding RCW Chapter 4.84.250 *et seq.*, “apply to actions for damages on contract as well as in tort”).

Consistent with the above, RCW 4.84.270 only authorizes an award of fees to a defendant “in an action for damages.” In contrast, the Trust primarily sought, and received, equitable relief, namely an injunction – the remedy for trespass. *See also Kucera*, 140 Wn.2d at 209 (“[a]n injunction is distinctly an equitable remedy”).

To adopt the Defendants’ reading of RCW 4.84.270 necessarily results in every defendant recovering his fees in any action that primarily seeks equitable relief. This reading, in turn, only encourages parties, namely defendants, to take cases to trial knowing they will, even if enjoined, recover fees. This application necessary discourages meritorious claims like the Trust’s, which received injunctive relief. Accordingly, the express

language of, and purpose underlying RCW 4.84.270, precludes application here.

- b. *Singh failed to comply with the requirements of RCW 4.84.270 by only offering settlement on some, but not all claims – claims on which the Trust ultimately recovered.*

Separately, even if the Defendants correctly asserted RCW 4.84.270 could apply to actions that sought relief other than damages, the argument still fails in light of Singh’s actions. Below, Singh only offered to settle the Trust’s “claims of trespass, waste, and nuisance.” CP at 1236-37. The offer of settlement made never addressed the most important claim for injunctive relief. CP at 1237; *see also* CP at 806-07 (alleging cause of action for, *inter alia*, “Permanent Injunction”).

As a matter of law, a court must “treat the offer of compromise as a lump sum offer.” *McKillop v. Pers. Representative of Estate of Carpine*, 192 Wn. App. 541, 548, 369 P.3d 161 (2016) (holding party cannot segregate damages among severable claims).

This Division of the Court of Appeals recently decided *Cooke v. Twu*, No. 51294-7-II, 2019 WL 418362 (Wash. Ct. App. Sept. 4, 2019).³⁶ There, the plaintiff alleged violation of a view easement and alleged damages less than \$10,000.00. *Cooke*, 2019 WL 418362 at * 1. The

³⁶ The Trust cites the slip opinion based on the recent nature of the opinion.

defendant counterclaimed for, *inter alia*, timber trespass. *Cooke*, 2019 WL 418362 at * 1. The plaintiffs extended an RCW 4.84.250 offer of settlement that offered to resolve only some of the defendants' counterclaims, which the defendant rejected. *Cooke*, 2019 WL 418362 at * 2. Following a bench trial, the trial court found for the plaintiffs on their easement claim but awarded the defendants damages on their timber trespass claim. *Cooke*, 2019 WL 418362 at * 2. On appeal, this Court denied fees to the defendant ultimately because the defendant refused to compromise the non-monetary easement claim "which she ultimately lost." *Cooke*, 2019 WL 418362 at *

3. This Court reasoned:

[The defendants] argument ignores the fact that parties often put greater value on a nonmonetary form of relief than they do on any accompanying damages claim. Allowing a party to make settlement of a damages claim contingent on forfeiting another nonmonetary claim, yet ignoring that nonmonetary claim when analyzing RCW 4.84.260, runs contrary to the reasoning of *McKillop*[, 192 Wn. App. 541] and *Niccum [v. Enquist*, 175 Wn.2d 441, 286 P.3d 966 (2012)] that the statute does not support segregating the various provisions of a settlement offer.

Cooke, 2019 WL 418362 at * 3.

Applied here, Singh failed to extend an offer that complies with RCW 4.84.270. In fact, Singh freely admitted he never offered to settle the injunction claim. 4/19/19 VRP 10:15-17 ("We're not arguing that our offer

of settlement included injunctive relief. It didn't need to, and it's not required.”).

Case law clearly establishes that an “offer of settlement” must purport to settle all claims, not separate and distinct claims.³⁷ Especially because the Trust’s \$500.00 claim contemplated, the cost to repair after the water stopped. The claim itself was predicated upon injunctive relief, which was not offered. Indeed, like in *Cooke, supra*, the Trust here placed “greater value on a nonmonetary form of relief than [it did] on any accompany damages claim.” *Cooke*, 2019 WL 418362 at * 3. Further, like in *Cooke, supra*, the Trust prevailed on the primary nonmonetary claim and obtained substantial injunctive relief. The rationale set forth in *Cooke, supra*, conclusively applies here and the Court should likewise deny fees here to Singh. Singh’s offer, which settled only a limited number of claims necessarily failed to comport with RCW 4.84.270 and Singh cannot now, therefore, recover fees.

³⁷ Noted throughout, a usual remedy for trespass includes injunctive relief. *Hedlund*, 67 Wn. App. at 418. Predictably, if the Trust settled the trespass claim, the Defendants would allege the Trust settled the claim on which injunctive relief relied.

- c. The cases cited by the Defendants, when faithfully read, contradict the arguments the Defendants now make particularly because these cases never awarded fees against a plaintiff that obtained substantial non-monetary relief like the Trust here.

To save the Defendants' defective analysis, the Defendants cite a series of cases. Those cases, the Defendants' claim, purport to interpret RCW 4.84.270's "damages" to also encompass injunctive or equitable relief. Importantly, the Defendants fail to cite any case in which a court award fees against a plaintiff that prevails in equity and obtains injunctive relief.

In *Hanson v. Estell*, the Court of Appeals denied an award of fees under RCW 4.84.250, and RCW 4.84.280. *Hanson v. Estell*, 100 Wn. App. 281, 290, 997 P.2d 426 (2000). Both the appellate court and trial court denied the defendants' request for a permanent injunction. *Hanson*, 100 Wn. App. at 287. The appellate court then addressed the issue of fees after the defendants received solely monetary damages on their trespass counterclaim. *Hanson*, 100 Wn. App. at 289. In this context, the *Hanson* Court in dicta stated, "Nothing in the statute prohibits parties from seeking other relief besides damages and this court does not so construe its requirements." *Hanson*, 100 Wn. App. at 290. Concluding, the *Hanson* Court then reversed the award of fees initially granted pursuant to RCW 4.84.280. *Hanson*, 100 Wn. App. at 290.

Hanson will not control and support an award of fees here. Contrast to *Hanson*, the Trust obtained substantial equitable relief. Moreover, the *Hanson* Court never imposed fees against the victorious plaintiff that prevailed in equity and received the primary injunction sought.

In the second case cited by Defendants, *Kingston Lumber Supply Co. v. High Tech Dev. Inc.*, 52 Wn. App. 864, 868, 765 P.2d 27 (1988), also fails to offer any support to Defendants. There, court awarded fees to the defendant following dismissal of the plaintiffs' claim where the plaintiff's "claim was dismissed and it recovered nothing." *Kingston Lumber Supply Co.*, 52 Wn. App. at 868. Discussing RCW 4.84.250, the court opined the statute applies to any claim for money "damages" but never addressed the statute's application to injunctive or equitable claims. *Kingston Lumber Supply Co.*, 52 Wn. App. at 867.

Again, contrast to *Kingston Lumber*, *supra*, the plaintiff Trust here recovered a substantial injunction. Indeed, the Defendants now hypothetically fear the costs of repair may exceed \$100,000.00 to comply

with. App. Br. at 42. Further yet, the *Kingston Lumber* Court never imposed fees against a victorious plaintiff.^{38, 39}

3. Even if this Court found merit to Singh’s argument, the Court may only award fees for those claims subject of the offer, and not the primary and central issue of injunctive relief.

Finally, even if this Court awarded fees to Singh, the Court must exclude any award of fees for time spent on the injunction claim. Explained throughout, the Trust prevailed – and the Defendants lost – on the central claim for injunctive relief. In evaluating a request for fees, the Court must determine the reasonableness of any fee request. *Absher Const. Co. v. Kent Sch. Dist. No. 415*, 79 Wn. App. 841, 846, 917 P.2d 1086 (1995) (discussing fee provision of RCW 39.04.240 which “applies the provisions of RCW 4.84.250 through 4.84.280”). “The court may discount hours spent on unsuccessful claims, duplicated effort, or otherwise unproductive time.” *Absher Const. Co.*, 79 Wn. App. at 847

³⁸ The Defendants seemingly concede they rely on dicta from *Hanson* and *Kingston Lumber*. The Defendants nevertheless assert these decisions suggest the statute could apply “*if* the equity action was prevailed upon.” App. Br. at 46 (emphasis added). Importantly, like the Defendants acknowledge, this Court never imposed fees upon a plaintiff that receives substantial equitable relief much less relief that may hypothetically exceed \$100,000.00 according to Defendants.

³⁹ The Defendants argument concerning RCW 4.84.270 also cites *Beckmann v. Spokane Transit Auth.*, 107 Wn.2d 785, 787, 733 P.2d 960 (1987). App. Br. at 45. The Defendants never develop the citation or explain how *Beckmann*, *supra*, applies. Nevertheless, *Beckmann* cannot apply here because *Beckmann* only involved claims of monetary relief following a vehicle accident and never addressed a claim for injunctive relief. *Beckmann*, 107 Wn.2d at 786-87.

Here, the Trust prevailed on the central claim for injunctive relief. Accordingly, any consideration of fees by the trial court (or this Court) must discount, steeply, any award of fees.

I. This Court should award the Trust Fees and Costs on appeal.

This Court should award the Trust fees and costs on appeal pursuant to RCW 4.24.630(1) and RAP 18.1. Noted above, in Section V.C, *supra*, incorporated herein, the statute authorizes a victorious plaintiff to receive “reasonable costs, including but not limited to investigative costs and reasonable attorneys' fees and other litigation-related costs.” RCW 4.24.630(1); *see also Standing Rock*, 106 Wn. App. at 247 (“Attorney fees are authorized under RCW 4.24.630(1)”).

Explained above, the trial court erred by removing its imposition of liability under RCW 4.24.630(1). The trial court’s findings, and the evidence at trial, support the conclusion that the Defendants “wrongfully cause[d] waste or injury to the land... or improvements to real estate on the land.” Accordingly, RCW 4.24.630(1) applies and the Court should likewise order fees on appeal.

VII. CONCLUSION

This Court should reinstate liability upon the Defendants under RCW 4.24.630(1) and direct the trial court to award fees and costs to the Trust for the reasons stated herein.

DATED this 23rd day of September, 2019.

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DECLARATION OF SERVICE

The undersigned hereby declares under penalty of perjury under the laws of the State of Washington, that on the below date she caused to be delivered to the Court and to the persons below, the attached document via the Washington State Appellate Court's Portal:

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