

FILED

OCT 30 2014

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 32209-2-III

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III**

MAUREEN M. ERICKSON,

Appellant,

v.

WILLIAM BETHMANN & ROSSLYN BETHMANN, husband & wife; KAREN S. CARSON (WALKER), an individual; SHAWNA K. MILLER & JEFFREY S. MILLER, wife & husband; THOMAS C. JONES & XANDREA M. JONES, husband & wife; MICHAEL A. TEDESCO & CHERIE E. TEDESCO, husband & wife; CLYDE DARRAH, an individual; SEDCO PROPERTIES, LLC, a Washington limited liability; PATRICK O'CALLAGHAN & MIRANDA O'CALLAGHAN, husband & wife; E. DAWES EDDY & MARY KAY EDDY, husband & wife; FRANKLIN V. JOHNSTON, III, an individual; and KWONG HWA & SEONG JUN LEE, husband & wife,

Respondents.

Reply Brief of Appellant

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I. INTRODUCTION

Most of the Respondents (the “Drainage System Respondents”) own homes on the uphill (South) side of Bolan Avenue, a public road above the Erickson Property, and are part of the Overlook Homeowners Association. The remaining Respondents, Johnston, Lee and Sedco (the “Bolan Avenue Respondents”) own homes on the Downhill (North) side of Bolan Avenue, and are part of the Qualchan Hills Homeowners Association. Respondents’ brief focused on the Drainage System Respondents, devoted two pages to issues related to Lee and Sedco, and only mentioned Johnston on page 9, indicating he would file a brief regarding facts related to his property. Johnston later elected not to file a brief.

II. ARGUMENT

1. **That Respondents did not construct the “System” is no defense.** Respondents’ primary argument, articulated several times and in several ways, is that when Respondents purchased their properties, the portions of the “System” on their properties were in place. Respondents assert that “ ... in every Washington case of intentional water trespass, there has been an intentional and wrongful act of water diversion or channeling by the liable party.” (Resp. Br. p. 9, final para.) Respondents

conclude that, since they did not construct the drainage improvements, they have the right to collect water coming onto or added through their own use (collectively “drainage”), and channel that drainage through artificial structures on each of their properties downhill and into the Erickson Property without facing liability.

a. **Johnston**. The argument stated above does not apply to Respondent Johnston. He acquired his property before the drainage improvements at issue were constructed. The work entailed installing underground drainage fields and black tubing that collected water in a drain field under pea gravel adjacent to the retaining wall constructed at the bottom (North) edge of his property. (CP 119-120). John DeLeo (“DeLeo”) provided undisputed testimony that black pipes then channel drainage from the base of the retaining wall downhill and causing it to run onto the ground, and downhill into the Erickson Property. At times, this drainage, when added to the flow from sources such as the Lee Property, creates enough drainage flow that some of it runs into Erickson’s driveway and garage, with the balance running along the side of her home and into the pool of water created on her property from and after 2009. (CP 179, 180, 206, 207, 415, 422, 423). Johnston presents a very straight forward water trespass case since he had the facilities constructed to

artificially channel water to the Erickson Property, utilizing one or more contractors acting on his behalf. The fact that it was contractors acting on Johnston's behalf that constructed the structures that wrongfully divert water from his property downhill and onto the Erickson Property is irrelevant. See, e.g. *Fradkin v. Northshore Util. Dist.*, 96 Wn. App. 118, 977 P.2d 1265 (1999).

b. Lee and Sedco. A slightly different situation is presented by Lee and Sedco. Lees admit they have had a drainage pipe that runs along the edge of their property and have black pipes that are connected to their rain gutters (CP 70, 71 and 326). In September 2006, Lees and a neighbor were advised by the Qualchan Drainage District that “[y]ou must take action to dispose of this runoff on-site, such as through the use of drywells.” Lees’ neighbors undertook work to retain their runoff on their own property and they are not parties in this litigation. (CP 432 – 441). Lees have done nothing to deal with their runoff and have provided no testimony disputing Erickson’s testimony that their drainage (combined with the additional flow from sources such as the Johnston Property), has run into the Erickson Property since 2009.

Sedco purchased its property in 2009 from Inland Northwest Bank. A retaining wall and drainage pipe were installed on their property by the

Bank before they completed their purchase. (CP 62). They do not dispute that water from the drainage line running from their property has drained water into the Erickson Property since 2009. They cited no authority for the proposition that since they did not construct the artificial structures that collect and artificially discharge drainage from their properties downhill into the Erickson Property, they are shielded from liability. If that were true, then simply transferring ownership of property with structures that lead to water trespass on another's property would operate, for all practical purposes, as an easement in favor of the new owner. The 10 year period of uninterrupted trespass that would otherwise be required to perfect a prescriptive easement would become irrelevant. This would lead to absurdly inconsistent and unfair outcomes.

Under the law, when an ongoing intrusive condition exists that can be corrected, "the law does not presume that such an encroachment will be permanently maintained." The trespasser is under a continuing duty to remove the intrusive substance or condition. "Periodic flooding due to the defective construction of a drainage system is a recognized fact pattern in the category of continuing trespass." *Fradkin*, supra at 126. Liability may be predicated on one of two bases, it can arise from either "an intentional or negligent intrusion onto the property of another, or an unprivileged

remaining on land in another's possession." *Fradkin* at 123 (internal quotes omitted). While the first means for establishing the requisite "act" necessary for a continuing trespass claim might require the actor to have affirmatively created the condition that leads to trespass, the second does not. As noted previously, in *Woldsen v. Woodhead*, 159 Wn.2d 215, 149 P.3d 361 (2006), Woodhead was found liable for trespass resulting from a failed rubble masonry wall against which fill dirt had been added by his predecessors in ownership. Water trespass should not be governed by different rules than continuing trespass by other substances.

c. **Drainage System Respondents.** The Drainage System Respondents' properties are part of a man-made private storm drainage "System." Undisputed evidence from John DeLeo ("DeLeo"), established that the System was designed in 2001 when the drainage basin at issue was created, which includes the Respondents' properties and the Erickson Property. It was always intended that drainage from properties in the drainage basin would be deposited into the Erickson Property upon completion of the System. (CP 180-181). The System was not unexpectedly "altered" in 2009 and 2010, it was completed according to plan as homes were constructed moving down the hill. (CP 177-179, 180, 182, 413-414, 416-417). By 2008, System drainage running under Bolan

Avenue was saturating lots on the downhill side of Bolan Avenue to the point that ground was sloughing and a home then under construction above the Erickson Property was being damaged. (CP 204-205).

These Respondents' situation does not differ in material respects from that pertaining to Sedco and Lee, except that the System that serves all of their properties was not completed according to plan until 2009 and 2010. As with Respondents Lee and Sedco, if these Respondents' position is correct, then people moving into an area where a partially completed drainage system exists, and who did not construct initial improvements, will be given an absolute right to continue discharging water downhill onto the land of another with no easement or other legal right to do so. As with Sedco and Lee, it would have the effect of creating what amounts to a prescriptive easement without meeting any of the requirements for such an easement. The analysis provided above and the decision in *Woldson v. Woodhead*, supra, applies with equal force to these Respondents.

2. The City has not approved the System. Respondents claimed that the System was "preordained [and] municipally required and approved" (CP 4). If that were true, Respondents provided no authority and no reasoning as to why or how the System's approval by the City of Spokane would give them the legal right to discharge drainage into the

System and onto the Erickson Property where there is no easement authorizing that. Regardless, Respondents' assertion is incorrect.

Erickson agrees completely that City approval of the System should have been obtained. Unfortunately, undisputed evidence shows that this is not what did happen. Respondents relied on a May 1994 document in claiming that the System was approved (CP 84). A review of the plat that created Respondents' lots recorded in August 1994 shows the private easements that existed at the time (CP 80-81). The plat did not show a drainage easement along the lower (north) edge of their lot where all parties agree the System depression (ditch) runs. Obviously, the City's 1994 approval did not pertain to the System at issue.

DeLeo also explained in uncontroverted testimony that the System was planned when the drainage basin covering all of the parties' properties was created in 2001 under a Joint Drainage Agreement for Qualchan Subdivisions ("Drainage Agreement"). That Drainage Agreement and the drainage basin at issue always contemplated that upon completion of the System drainage to be disposed of at the lowest point in the basin, the Erickson Property (CP 180-181, 413-414). However, despite inquiry, discussion with City officials and Freedom of Information Act request, DeLeo's undisputed testimony is that the City has been unable to provide

a majority of the design documents or any final approvals for the Qualchan Developments (CP 175, 176, 183). Further, DeLeo established that by 2006, the City and the design engineer for the development, Adams and Clark, recognized that there were deficiencies in the System and that it would overburden the Erickson Property once it was completed (CP 184-185). There is no evidence or inference from evidence that the City approved this System.

3. Respondents do not have easement rights into the Erickson Property, and are not forbidden by subdivision documents from making drainage alterations. Respondents argued they have easement rights that permit them to discharge drainage downhill into the Erickson Property. In fact, Respondents have no easement permitting drainage to be discharged from their properties into the Erickson Property. The initial Qualchan Hills Plat that created the Erickson Property was recorded May 19, 1992. (CP 77). It purported to create and reserve easements in favor of a “Qualchan Hills Planned Unit Development Homeowners Association, when no such entity has ever existed. Respondents claimed that “[t]he ‘Qualchan Planned Unit Development Homeowners Association’ referenced in the plat and the Phase Two Plat was the same entity as the already existing nonprofit corporation

‘Qualchan Hills Homeowners Association.’” (Resp. Br., p. 36). Respondents cited no authority to support this claim.

Even if the Qualchan Hills Homeowners Association received an easement in this plat, there is a strong presumption that easements are appurtenant and run with the land. See e.g. *Kemery v. Mylroie*, 8 Wn. App 344, 506 P.2d 319 (1973). When a particular party is named as the grantee of an easement, the easement will be construed as appurtenant to property owned by the grantee. *Roggow v. Haggerty*, 27 Wn. App 908, 621 P.2d 195 (1980). The Qualchan Hills Homeowners Association never owned Respondents’ properties.

Further, the plat creating Respondents’ lots was recorded in 1994 (CP 81). The Erickson Property had been sold to third parties in 1993 (CP 204). No owner of the Erickson Property consented to easement rights for the benefit of the Respondents’ properties (CP 203-204). An appurtenant easement for the benefit of one property cannot be extended to benefit other property without the consent of the owner of the servient estate. *Snyder v. Haynes*, 152 Wn. App. 774, 217 P.2d 787 (2009) (citing *Brown v. Voss*, 105 Wn. 2d 366, 715 P.2d 514 (1986)).

Respondents also claimed that “through plats, easements, Homeowners Association Covenants and Drainage Plans, homeowners,

like Petitioner and Respondents, were forbidden to interfere [sic] alter or re-direct the drainage system, which other entities including Qualchan Hills HOA had control [sic].” (Resp. Br., p. 4 and 6). Respondents cited CP 76, 82, 84, 94-95, 248, 330, and 331 to support this claim. The record is contrary to Respondents’ assertions.

CP 76 is the original plat of Qualchan Hills, and CP 82 is part of the 1994 plat for Qualchan Hills Phase II. CP 84-85 is the purported approval for construction of improvements, including Bolan Avenue. None of these prohibit homeowners from constructing improvements on their own lots to retain drainage.

CP 94-95 is part of the covenants for the Qualchan Hills Homeowners Association. None of the Drainage System Respondents are part of the Qualchan Hills Homeowners Association. Further, these covenants do not prevent the Bolan Avenue Respondents from retaining drainage on their own properties. Section 4.13 only purports to prohibit interference with an established drainage pattern (being a drainage plan approved by the City of Spokane, or that was shown in plans approved by the ARC). There is nothing suggesting any such drainage pattern was approved for any of the Bolan Avenue Respondents. The record shows

Lees were advised that they needed to retain their drainage on their own lot.

CP 248 is part of the 2001 Joint Drainage Agreement. It provided for an incorporated joint district association that was to be comprised of members representing lot owners in each district. The association that was to manage these districts for the benefit of the owners was the “Qualchan Homeowners District Board Association” (CP 254). That association was dissolved in 2008 (CP 171).

CP 330 is an excerpt from the covenants for the Overlook Homeowners Association. It does not forbid owners from making changes to retain drainage on their lots and, requires that they, not an association, maintain all portions of drainage improvements on their lot “adequately and continually.”

CP 331 deals with two plats identified as “Overlook at Qualchan” and “Overlook Village” that opted to have their own set of covenants. Those provisions have no relevance whatever to the issues in this case.

4. The intrusive substance is the drainage. Respondents repeatedly contend that the only trespass was installation of a concrete chute installed to complete the System. The continuing trespass claims against Respondents deal entirely with the drainage they discharge.

Respondents appear to believe that the concrete trough constructed from Bolan Avenue to the Erickson Property could simply be removed and the water could again be deposited along the lots along the downhill side of Bolan Avenue, where it did her no harm. Unfortunately, the undisputed evidence shows that the water was then causing those lots to slough and was causing damage to at least one home then under construction. At this point, removing that structure is probably unrealistic.

However, as recognized in *Fradkin*, supra, a continuing trespass is abatable regardless of the permanency of a structure when the defendant can take corrective action to stop the continuing damages. As noted above, DeLeo's undisputed evidence establishes that this is the case with all of the Respondents. Again, in 2006, one neighbor uphill from the Erickson Property was told to make changes to retain runoff on their own property and the neighbor did so. Respondents should now be required to do the same.

5. **Erickson does not seek to quiet title in Respondents' properties.** Respondents assert that Erickson is improperly trying to quiet title to easements in their properties. To the contrary, Erickson's position is and has consistently been that the Respondents have no valid easement right or interest allowing them to trespass on her property. Erickson's

Complaint (CP 624-631) alleged that she was the owner of the Erickson Property (para. 8); the purported easement created under the initial plat was dedicated to a nonexistent entity (para. 10); the developer conveyed the Erickson Property to a third party in 1993 (para. 11); the second phase plat (that created Respondents' lots) purported to create additional private easements that were not consented to by the owners of the Erickson Property (para. 12), and that from and after construction of the last portion of the System, water from Respondents' properties constitutes a continuing trespass on hers (para. 18). Erickson pled and has consistently pursued a determination that Respondents do not hold a valid easement entitling them to deposit drainage in the Erickson Property. If anything, it is Respondents who are attempting to establish easement rights in the Erickson Property without having filed answers to properly allege it.

6. **Erickson has proven damages.** Respondents contend that in various ways Erickson has failed to provide sufficient proof of damages.

DeLeo testified supporting this proposition as to each lot, and no Respondent provided any conflicting testimony or evidence (CP 413-418). Respondents did not object to or challenge testimony in his supplemental affidavit. To the extent Respondents now seek to object to some of that

testimony, the objections were not made at trial and may not be raised on appeal. *Rafel Law Grp. PLLC v. Defoor*, 176 Wn. App 210, 225, 308 P.3d 767 (2013). Even if the objections to his testimony were considered, they were based on his observation and his opinions as an expert and are fully admissible and not subject to hearsay exceptions as alleged.

Respondents argued that Erickson had failed to prove that drainage continued to flow onto the Erickson Property from the Respondents' properties from the date her Complaint was filed through the date they were dismissed on summary judgment. That issue was not raised below and should not be considered for first time on appeal. Further, testimony from DeLeo and Erickson, particularly in their supplemental declarations, confirmed that drainage was flowing, and explained that in terms of what was occurring in the present tense, not what had occurred at the time the Complaint was filed. DeLeo's Declaration was dated May 28, 2013 and Erickson's Supplemental Declaration was dated May 29, 2013 (CP 412-419, 420-425).

Respondents contended that "uncertainty as to the fact of damage is grounds for denying liability," citing *Sigman v. Stevens-Norton, Inc.*, 70 Wn.2d 915, 922, 425 P.2d 891 (1967). This case also provides that when the fact of damage is shown, difficulty in quantifying the individual

amounts attributable to defendants with precision will not defeat recovery. *Id.* at 922. See also *Mieske v. Bartell Drug Co.*, 92 Wn.2d 40, 593 P.2d 1308 (1979).

Respondents claimed that Erickson failed to “quantify” the amount of damage flowing to her property as a result of the System as compared to the amount of drainage that would have flowed to her property in an undeveloped condition. Respondents raised no such issue below and it should not be considered. Moreover, the cases upon which Respondents rely for this proposition, *Ripley v. Grays Harbor County*, 107 Wn. App 575, 27 P.3d 1197 (2001), and *Price v. City of Seattle*, 106 Wn. App 647, 657, 24 P.3d 1098 (2001) create no such obligation. The plaintiffs’ claims in those cases were denied because the plaintiffs failed to prove the defendants had artificially channeled water onto the plaintiffs’ properties. That is not the case here.

At most, Respondents contended that it could not be assumed “that water, in excess of natural accumulations, came onto her property from each of these individual defendants” (CP 304). Erickson, through DeLeo, provided undisputed evidence in this regard.

The only other assertion below that touched on this subject was presented by Johnston who contended Erickson had failed to prove that

water from Johnston's property was a proximate cause of damage to her property (CP 362). Again, undisputed evidence from Erickson and DeLeo established that drainage comes from black pipes running under the retaining wall constructed at the downhill edge of Johnston's property and trespasses into Erickson's Property in a manner that did not occur naturally, since there was no flow before this work was completed in 2009. This was uncontroverted evidence that drainage from Johnston's Property is a proximate cause of the damage on Erickson's Property.

7. **The common enemy doctrine does not shield Respondents.** Respondents acknowledged that the "common enemy doctrine" in Washington has an exception that will not permit property owners to collect water and channel it onto their neighbors' land (Resp. Br. 11). The undisputed evidence in this case demonstrates that this is exactly what Respondents have done and continued to do.

8. **Hedlund v. White does not support Respondents.** Respondents appear to rely upon *Hedlund v. White*, 67 Wn. App 409, 836 P.2d 250 (1992). What Respondents ignore is that, at page 416, the court focused on a party's "discharging" of water into a culvert or artificially constructed structure in finding continuing water trespass, not whether the

party opened or closed a gate or other structure or that the owner so discharging water constructed that facility.

9. **Development causes drainage.** Respondents acknowledged at page 13 that Washington courts recognize that development of property increases drainage and leads to the need for creation of appropriate storm drainage facilities. This supports the conclusion that drainage from Respondents' properties is being discharged downhill into the Erickson Property in quantities greater than would have occurred from those properties in their natural condition.

10. **Cases relied upon by Respondents "where the actor is responsible" do not apply.** At pages 16 through 25, Respondents discussed three cases they contend support their position that a passive property owner cannot be liable for continuing trespass. *Buxel v. King County*, 60 Wn.2d 404, 374 P.2d 250 (1962) dealt with a public drainage system owned, operated, and maintained by King County, and there was no suggestion that the drainage at issue was generated from increased flows from individual owners' properties. *Jackass Mt. Ranch, Inc. v. S. Columbia Basin Irr. Dist.*, 175 Wn. App 374, 305 P.2d 1108 (2013), was not a continuing trespass case and the plaintiff sought damages only for one major landslide event that occurred in 2013. Similarly, *Hughes v.*

King County, 42 Wn. App. 776, 714 P.2d 316 (1986) is not a continuing trespass case. At page 783 the court stated “[a]lthough the trial court found that flooding occurred at times when little or no rain had fallen, the storm that caused the only damage for which plaintiffs sought compensation, the storm of October 5 and 6, 1981, was a ‘75-year’ storm.” (emphasis supplied). The continuing duty to remove the intrusive substances in a continuing trespass situation was not relevant in those cases.

11. The Joint Drainage Agreement does not alter the result.

At page 32, Respondents claim that the Joint Drainage Agreement created an incorporated drainage district board and stated that easements were created for the benefit of all owners and that that board was to be “responsible for all decisions concerning the Drainage Districts established” (citing CP 248) somehow forbade Respondents from retaining drainage on their individual properties. The Joint Drainage Agreement contains no such restriction and the incorporated association was dissolved in 2008.

On page 38, Respondents acknowledge that the drainage districts were created to make the drainage facilities available to all lots in each drainage district. Respondents then claim the facilities in the district were

thereby “entirely owned, maintained, and controlled by entities other than the Respondents.” An easement does not confer ownership, the incorporated drainage board was dissolved in 2008, and nothing suggests that when another has an easement on property, the owner of the property is prohibited from taking steps to abate a continuing trespass.

12. Respondents’ motion to strike shall be denied. At pages 41-45, Respondents assert that testimony provided by DeLeo and Erickson should be stricken. A comparison of Respondents’ objections to Erickson’s summary judgment declarations (CP 312-320) as compared to the objections asserted on appeal, demonstrates that the objections raised below are entirely different than those being asserted on appeal and were never raised below. Additionally, in response to Respondents’ objections below, Erickson and DeLeo provided supplemental declarations (CP 412-419, 420-450) to which no Respondent objected. Again, issues not raised in the trial court should not be considered for the first time on appeal.

Beyond the absence of an objection below, Respondents’ objections in their brief are not well taken.

At page 42, Respondents contend that when an expert opinion is not sufficiently based on appropriate foundational testimony, the opinion will be disregarded. DeLeo testified at length regarding his qualifications,

his inspections of the property, his review of records from the county, his discussions with the design engineer, and discussions with City officials. His opinions were explained and supported and not simply offered as conclusory opinions without foundation. No Respondent claimed below that DeLeo should have included additional source documents in his Declaration. In fact, DeLeo attached certain source documents (CP 190-200) to which no objection was raised.

At the bottom of page 42 carrying over to page 43, Respondents argue that Freedom of Information Act documents provided by Erickson and attached to her Declaration are hearsay and should not be considered. At the trial court, Respondents contended Erickson's comments about those documents should not be considered and argued that the public records speak for themselves (CP 315).

As noted above, the objections asserted through Erickson's affidavit on page 43 were clarified and explained in her supplemental affidavit, and Respondents raised no objection to that testimony below.

Respondents also objected to testimony in DeLeo's initial affidavit suggesting that the drainage plans to which he referenced were not identified and that references were therefore hearsay and should be excluded. The specific objections raised below regarding DeLeo's review

and opinions regarding drainage plans was stated in the middle block at CP 317 as follows

ER 401 -- not relevant. The moving defendants in this summary judgment were not design engineers, nor were they builders of these homes. They are mere lot owners who had nothing to do with a pre-established drainage plan and are not responsible for the actions of the Qualchan Hills Homeowners Association. Further, there is not the requisite specific allegation against identifiable defendants. Generalized assertions are not confident-proof and should be excluded.

That is not in any way similar to the objection now being advanced by Respondents. In any event, DeLeo's opinions and testimony was based on his inspection of the property, discussions with the design engineers and City officials, and review of plans that were available. Again, it is inappropriate for Respondents to suggest that DeLeo should have specifically identified or attached all such source documents to his opinions when they provided no notice or demand that this be done below.

The objections interposed by Respondents on page 44 of their brief are also improper because no objection to DeLeo's supplemental declaration was made below. Further, the objection is not well taken as DeLeo testified regarding conditions that occurred naturally on property as compared to what happens as a result of development, all parties have

acknowledged that the hillside slopes downhill, it does not take an expert to know that water flows downhill, it does not take an expert to know that water flowing into a ditch along the edge of property will flow downhill in that ditch, and DeLeo did testify that water runs onto each of these properties and then is channeled and discharged downhill in a way that would not occur naturally and but for the manmade System.

III. CONCLUSION

Respondents characterize the entire System and development of the drainage basin as though this were typical, with governmental approval, an incorporated entity to manage the System and valid easements to dispose of the drainage at the bottom of the basin. In fact, the situation applicable to the System and other drainage facilities constructed by the Bolan Avenue Respondents or their predecessors is anything but typical. There is no governmental approval, no easement, and the entity created to manage the System was dissolved about 6 years ago.

The picture painted by the Respondents is entirely inaccurate and, based on the undisputed facts in this case, Erickson respectfully requests that the summary judgment granted in favor of Respondents be reversed

and this Court order that the partial summary judgment motion brought by Erickson be granted.

RESPECTFULLY SUBMITTED this 29th day of October 2014.

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