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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.

Brief of Appellant

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I. INTRODUCTION

This appeal involves a dispute among owners in a hillside residential property development, comprised of a number of separate plats, located in Spokane County, Washington. The residential lots owned by the parties involved in this appeal all lie in a generally v-shaped drainage basin, with the lot and home (“Erickson Property”) owned by Appellant Maureen Erickson (“Erickson”) lying at the bottom of the basin. Surface and storm water drainage (“runoff”) coming into and generated from each of the uphill properties owned by the Respondents (collectively “Uphill Owners”) is collected and deposited into manmade structures that artificially channel the runoff downhill into the Erickson Property, where that water would not naturally have run.

The manmade drainage structures that channel runoff from the Uphill Owners’ lots are of two types. They are differentiated based on whether the Owner’s lot lies on the uphill side of Bolan Avenue (a public street running laterally across the drainage basin) (collectively “Drainage System Respondents”), or on the downhill side (the “Bolan Avenue Respondents”).

The Drainage System Respondents consist of Respondents Walker, Jones, Tedesco, Bethmann, Eddy, Miller, Darrah, and O’Callaghan. Each

of them owns a sloped lot that has a manmade drainage ditch (referred to in each of their respective Declarations as a drainage depression) that runs along the downhill side of their property and adjacent to the uphill side of Bolan Avenue to the lowest point above Bolan Avenue in the v-shaped drainage basin (which point lies directly uphill from the Erickson Property). Water runs down these ditches to the low point, through a pipe running under Bolan Avenue and then into a concrete trough that runs downhill into the Erickson Property. This manmade system, has been generally designed and planned to terminate in the Erickson Property since about 2002, and was gradually constructed as homes above Ms. Erickson's Property were constructed. It was completed to the extent that it began discharging water into the Erickson Property in late 2009, and has continued to do so since.

The remaining Respondents, namely Respondents Lee, Johnston, and Sedco Properties, own lots on the downhill side of Bolan Avenue, and are collectively referred to as the "Bolan Avenue Respondents." Runoff coming onto or generated on each of their lots is collected and channeled into black plastic pipes running through or from each of their lots that drain runoff into the Erickson Property. Those pipes running on and/or from each of these lots were apparently installed near the time the home

on the lot was constructed. The three homes at issue were constructed in 2006 with respect to the Lees, and 2009 with respect to Sedco and Johnston. Drainage from all of these pipes also began accumulating on the surface of the Erickson Property in late 2009.

All of the artificial drainage structures were apparently designed and then constructed based on instruments that purported to create easements. The first such easement document was contained in the 1992 plat for Qualchan Hills PUD (“Qualchan PUD”). That plat also established the Erickson Property as a separate lot and, in 1993, the project developer conveyed the Erickson Property to a third party owner, who conveyed it to Erickson’s father in May 2001, who then conveyed it to Erickson in June 2007.

The Qualchan PUD plat also purported to create an easement in favor of a “Qualchan Hills Planned Unit Development Homeowners Association,” when no entity with that name ever existed. Even if that provision could be construed as an easement in favor of the Qualchan Hills Homeowners Association (“HOA”) (which was the non-profit corporation created to act as the homeowners association for Qualchan PUD), it was not an easement for the benefit of the Uphill Owners or their properties.

The HOA never owned any of the property now owned by any of the Uphill Owners. Moreover, none of the Drainage System Respondents own lots in Qualchan PUD, and none are members in the HOA. Instead, they all own lots in a separate plat known as the Overlook PUD (“Overlook PUD”) and are members of the Overlook Homeowners Association.

Subsequent easement instruments and related agreements were executed and recorded by various third parties, but none of those were executed by any owner of the Erickson Property. Those documents did, however, lead to creation of a drainage plan for the subject drainage basin that, since 2002, has provided for runoff for the entire drainage basin to be deposited into the Erickson Property upon completion of the intended manmade drainage system.

The drainage system for the Drainage System Defendants was built and extended as homes along its intended route were completed. By 2008, lots along the lower side of Bolan Avenue where the partially completed drainage system had deposited drainage were unstable due to water issues to the point that one home then under construction was in jeopardy. In 2009 and 2010, the drainage system connected to all of the Drainage System Respondents’ properties was completed, consistent with the

drainage plan that had been in existence since 2001 (prior to the date any of those homes were constructed or any of the Drainage System Defendants purchased their properties). That runoff began accumulating on the surface of the Erickson Property in late 2009.

In addition, the lots for Bolan Avenue Respondents Sedco and Johnston had a retaining wall and the black drainage pipes constructed along the bottom edge of their properties in 2009, and pipes have channeled runoff to the bottom of Respondents Lees' lot since about 2006. The runoff being artificially channeled through the pipes on each of these lots also began accumulating on the surface of the Erickson Property in late 2009. As a result, since late 2009, the owners of the properties owned by each of the Uphill Owners have had the benefit of having runoff from their properties be artificially channeled onto the surface of Erickson Property, which would not have occurred naturally, with no legal right to do so.

In proceedings below, most of the Uphill Owners argued that they had no involvement in completing the drainage system (with respect to the Drainage System Owners) or the black pipes running to the Erickson Property (with respect to the Bolan Avenue Owners). As a result, the Uphill Owners claim they have no responsibility for somebody else having

improperly constructed the various artificial collection and disposal systems and no obligation to stop runoff from each of their properties from being artificially discharged onto the Erickson Property.

Erickson contended that it is not determinative in this case that the various manmade systems were not constructed by the Uphill Owners. Instead, Ms. Erickson contended that it is determinative that the Uphill Owners each have, since late 2009, continually discharged runoff coming upon or generated from each of their respective properties into manmade systems that artificially concentrate and direct that runoff into the Erickson Property, with no easement or other legal right to continue to do so. Ms. Erickson further contended that, since undisputed evidence established that the Uphill Owners individually and collectively could, at a cost that is not unreasonable, stop discharging runoff artificially from their properties onto the Erickson Property through the installation of drywells, swales, and/or detention ponds on their respective properties, the Uphill Owners are each committing a continuing trespass and have the continuing legal obligation to stop doing so.

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II. ASSIGNMENTS OF ERROR

Ms. Erickson makes the following assignments of error:

1. The trial court erred by granting the Uphill Owner's Motion for Summary Judgment.
2. The trial court erred by not granting Ms. Erickson's Motion for Partial Summary Judgment.
3. The trial court erred by entering a final judgment of dismissal with prejudice in favor of the Uphill Owners.

Issues related to assignments of error:

1. The standard of review.
2. Whether Erickson should be granted partial summary judgment determining that Respondents are liable for continuing trespass, given the absence of disputed issues of material fact on that claim.
3. Whether the Uphill Owners have any easements or other legal rights permitting them to discharge runoff onto the Erickson Property.
4. Whether the Uphill Owners are committing continuing trespass, establishing their liability to Ms. Erickson and entitling Ms. Erickson to relief.

III. STATEMENT OF THE CASE

Ms. Erickson submits that the following material facts are undisputed and dispositive:

A. Facts Common to All Defendants.

A Declaration of Covenants for the planned Qualchan PUD was recorded November 19, 1991 (CP 238, para. 3 and CP 232). It referred to the HOA as the project's "Association" (CP 233, Section 1.07). It did not refer to a Qualchan Hills Planned Unit Development Homeowners Association (CP 232-235). None of the Uphill Owners provided provisions from this Declaration of Covenants that purported to create easements or other legal rights entitling them to discharge runoff from their properties into the Erickson Property.

The plat for the Qualchan PUD was recorded in May 1992. The plat map showed the Erickson Property and depicted a drainage easement on it. The dedication language provided that the Drainage easements shown on the plat were "granted as shown hereon to the Qualchan Hills Planned Unit Development Homeowners Association (CP 228-29, para. 4, 237 and 238). For ease of reference, copies of the plat map and dedication with the applicable provisions being depicted are attached at Appendix "A." There never was an entity in Washington named Qualchan Hills

Planned Unit Development Homeowners Association (CP 166, para. 4). A review of all of the plats and the recorded covenants for the properties at issue in this case demonstrates that the HOA was never shown as an owner of any of the properties now owned by any of the Uphill Owners (CP 73-83), and none of the Uphill Owners suggested below that the HOA ever had an ownership interest in any of their properties. In fact, all of the Uphill Owners agreed below that it was irrelevant whether the purported drainage easement on Erickson's Property was void and that none of the Uphill Owners had any "ownership of any easement on or near [Erickson's] property (CP 296, para. 7; CP 115 and 158).

In March 1993, the Erickson Property was conveyed by Statutory Warranty Deed to Gary Blair and Florence Simpson ("Blair and Simpson"), who were predecessor owners prior to Erickson (CP 229, para. 5 and CP 240). In 1999, 2001 and 2002, documents purporting to create drainage easements and drainage facilities construction agreements were executed and recorded. However, Blair and Simpson, as owners of the Erickson Property, did not execute any of those instruments (CP 243-256).

In May 2001, Blair and Simpson conveyed the Erickson Property by Warranty Deed to Bill McKee, who was Ms. Erickson's father (CP

258). In June 2007, Bill McKee conveyed the Erickson Property to Erickson (CP 202, para. 2, and CP 211).

Since late 2009, after the drainage system and pipes discussed below were installed to channel runoff into the Erickson Property, water has accumulated on the surface of the Erickson Property (CP 2-05, para. 16). A pond now exists on the Erickson Property with standing water year around (CP 184, para. 13). The drainage pond located on the Erickson Property is inadequate and overtaxed to handle all of the runoff (CP 182-183, para. 10 and 11). As far as can be determined, the City of Spokane has not approved most of the plans and installed work for most of the drainage system and the drainage pipes discussed below (CP 183, para. 12).

B. Facts Common to Drainage System Respondents.

As early as 1992, a concept drainage plan was developed to create a private drainage system which would terminate on the Erickson Property (CP 177, para. 5). In August 2001, a Joint Drainage Agreement for Qualchan Subdivisions (“Joint Drainage Agreement”) was recorded that created the general design for the drainage system, as well as the drainage basin at issue. The design contemplated that, upon completion of the

intended manmade drainage system, runoff from the entire basin, including properties now owned by the Uphill Respondents, would drain into the Erickson Property (CP 180, para. 8, CP 181, para. 9). The last planned portion of the drainage system serving the Drainage System Defendants, that conveyed the runoff from the downhill side of Bolan Avenue to the Erickson Property through a concrete channel, was designed and initially constructed in 2009 and completed in 2010 (CP 182, para. 11).

No owner of the Erickson Property consented to this revised drainage plan, any subsequent revisions, or any long-term plan to direct storm drainage from uphill areas to the Erickson Property (CP 204, para. 12-14; CP 423, para. 5).

In approximately 2008, land on the downhill side of Bolan Avenue started sloughing to the extent that one home next to Bolan Avenue then under construction was being damaged and was jeopardized (CP 205, para. 15). This problem was also disclosed to Respondent Franklin Johnson who was purchasing a home on Bolan Avenue (CP 119, para. 5).

In July 2009, design plans were completed by a local engineering firm, Adams & Clark, Inc., for construction of the last extension of the Storm Drainage System. That extension was designed to channel water

down through the extensions of the storm drain and into the Erickson Property (CP 182, para. 11; CP 202, para. 3; CP 212-213).

From its inception in about 2002, through completion in 2010, the foreseeable and predictable, if not intended, result upon completion of the drainage system that runs through all of the Drainage System Respondents' Properties was that runoff coming into and generated from all of those lots would be channeled into the Erickson Property (CP 177, para. 6; CP 18-0-182, para. 8-10).

Undisputed testimony from Erickson and her engineer, John DeLeo, established that runoff is artificially channeled from each of the Uphill Owners' properties downhill onto the Erickson Property (see e.g. CP 182, 184, 205-207, 413-414, 422-424). Almost all of the Drainage System Defendants acknowledged that "drainage depressions" or other structures (that are part of the planned and constructed drainage system for this hillside development) run along the lower portion of the sloped lots and drain water from it. No one disputes the testimony regarding runoff being channeled artificially from their property downhill to the Erickson Property (CP 28-30, 35-36, 38-40, 44-45, 50-51, 55-57, 66-67). The end result is that significant runoff is artificially discharged onto the Erickson Property where it ponds on the surface year round, and overburdens a

smaller drainage pond located on the Erickson Property. The City of Spokane and the design engineers for the work have apparently been aware since 2006 that the drainage structure on the Erickson Property is inadequate to handle that flow (CP 413-419).

C. Facts Common to Bolan Avenue Respondents.

As noted above, by approximately 2008, land started sloughing along the downhill side of Bolan Avenue that impacted the ability to construct and maintain homes on that side of Bolan Avenue. The sloughing began to jeopardize and damage one home on the downhill side of Bolan Avenue then under construction (CP 205, para 15).

Some time prior to March 2006, a retaining wall and drainage lines were installed on the property purchased by Respondents Lee (CP 70, para. 4; CP 325, para. 4; CP 326, para. 6). Lees have essentially confirmed that they have never done anything to alter or correct drainage runoff coming from their property. They do not deny they have been aware of the runoff coming from their property toward the Erickson Property (CP 324-326). They were apparently apprised of this situation and directed to make corrections to dispose of the runoff from their property (“such as through the use of drywells”) in September 2006 (CP 432).

In early 2009, a very large retaining wall running along the downhill side of Respondents Johnston's and Sedco Properties' properties was constructed (CP 119-120, para. 5 and 6; CP 62, para. 6). Black pipes were installed at the base of this wall to channel water toward the Erickson Property (CP 206-207, para. 20).

Drainage disposal lines artificially channel runoff from each of the Bolan Avenue Respondents' Properties in to the Erickson Property (CP 422, para. 4). The pipes, running from each of the Bolan Avenue Respondents' properties have, since 2009 with the completion of the retaining wall and pipes at the edge of the Sedco and Johnston Properties, plus the continuing runoff from the Lee Property, the total added volume often overwhelms any drainage facilities in Pender Lane and channeling the unpermitted runoff into the Erickson Property (CP 206-207, para. 21; CP 422-423, para. 4). This runoff is artificially accumulated and channeled onto the Ericson Property in a manner, and in larger concentrated quantities, then would have occurred naturally (CP 415, para. 5).

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IV. LEGAL ARGUMENT

1. Standard for review.

This Court reviews de novo a trial court's order granting or denying summary judgment, engaging in the same inquiry as the trial court. *Triplett v. Dep't. of Soc. & Health Servs.*, 166 Wn. App. 423, 427, 268 P.3d 1027 (2012); *Masunaga v. Gapasin*, 52 Wn. App. 61, 68, 757 P.2d 550 (1988). "When considering a summary judgment motion, the court must construe all facts and reasonable inferences in the light most favorable to the nonmoving party. Summary judgment is proper if no genuine issues of material fact remain and the moving party is entitled to judgment as a matter of law. ... Statutory interpretation is also a question of law reviewed novo." *Triplett*, 166 Wn. App. at 427 (citations omitted); CR 56(c). A court cannot consider inadmissible evidence when ruling on motions for summary judgment. See e.g. *Ebel v. Fairwood Park II Homeowners' Ass'n.*, 136 Wn. App. 787, 790, 150 P.3d 1163 (2007); CR 56(e).

2. No issues of material fact remain.

Erickson contends that no evidence or reasonable inference from evidence creates an issue of fact with respect to any of the facts stated in

Section 3. All of those factual assertions were supported by evidence. As a result, based on the argument below, Erickson contends that applicable law as discussed below, when applied to those facts, warrants granting partial summary judgment in her favor on the issue of Respondents' liability for continuing intentional trespass.

3. Defendants have no easement rights authorizing their actions.

Under Washington law, easements are interests in land. *Berg v. Ting*, 125 Wn.2d 544, 557, 886 P.2d 564 (1995). As a conveyance of an interest in property, an easement must meet the requirements of a deed. *Id.* A deed to a nonexistent entity is void. *John Davis & Co. v. Cedar Glen No. Four*, 75 Wn.2d 214, 220, 450 P.2d 166 (1969); *Loose v. Locke*, 25 Wn.2d 599, 171 P.2d 849 (1946); *Rainier View Court Homeowners Ass'n, Inc. v. Zenker*, 157 Wn. App 710, 238 P.3d 1217 (2010). Further, to constitute a valid conveyance, the easement must in writing and must demonstrate and state a present intent to convey the easement. *Zunino v. Rajewski*, 140 Wn. App 215, 165 P.3d 57 (2007).

As discussed above, the dedication in the Qualchan PUD Plat purported to create an easement in favor of a named entity that has never existed. There was therefore no grantee and no property owned by the

non-existent grantee that could have benefited from the purported easement. As such, the dedication in the plat, while apparently intending to create an easement, did not accomplish that goal.

Even if the plat dedication had created an easement in favor of the HOA, that would not justify the burdens the Uphill Owners have collectively imposed on the Erickson Property. Easements in Washington are of two types. They are either easements in gross which benefit only a designated grantee, or easements appurtenant that must benefit a specific dominant estate. See *M. K. K. I., Inc. v. Krueger*, 135 Wn. App. 647, 655, 145 P.3d 411 (2006) (Rev. denied 161 Wn.2d 1012 (2007)). Easements in gross to a designated named grantee can be used only by that grantee, but cannot be assigned or extended to others for their benefit. Such an easement does not run with or attach to any particular property. It is in part for that reason, that easements, as interests in property, are to be construed as being appurtenant to a dominant estate whenever possible. See, e.g. *M. K. K. I., Inc. v. Krueger*, *supra*. If a situation shows that it is apparent an easement was to benefit a specific dominant estate (a requirement for an appurtenant easement), then the easement will be so construed. *Green v. Lupo*, 32 Wn. App 318, 647 P.2d 51 (1982).

In this case, the only possible property owned by the Defendant Association which could have been the subject of the appurtenant easement when the Qualchan PUD Plat was filed, was the relatively short private road, Pender Lane, also dedicated to the HOA that leads downhill to and provides a means of access for the Erickson Property (CP 416-417, para. 8). An easement appurtenant for the benefit of one property cannot be used for the benefit of other property that is not part of the designated dominant estate within the easement. *Brown v. Voss*, 105 Wn.2d 366, 372, 715 P.2d 514 (1986). No such consent was given by any owner of the Erickson Property. As a result, the easement could not benefit property the HOA did not own which includes all of the uphill property that was then owned by the Developer that has since been developed into building lots owned by the Uphill Owners. At a minimum, the Defendants have all misused and overburdened any easement the Defendant Association has. Trespass includes misuse and overburdening of an easement. *Hughes v. King County*, 42 Wn. App. 776, 780, 714 P.2d 316 (1986).

4. All Uphill Owners are committing continuing trespass as a result of the runoff channeled onto the Erickson Property.

The Uphill Owners' primary argument below was that they had nothing to do with constructing the drainage system or drainage pipes located on each of their respective properties. Specifically, the Drainage System Respondents contend they had nothing to do with constructing the last portion of the long planned drainage system so that it channels runoff onto the Erickson Property. For their part, the Bolan Avenue Respondents contend they did not construct the drainage pipes collecting runoff from their properties and artificially channeling it downhill onto the Erickson Property. Respondent Johnston's assertion in this regard is, at best, misleading. The drainage lines and retaining wall were constructed on his property after he closed his purchase of that property. The construction was paid for with purchase funds he provided at closing and that were held back by the closing agent (CP 118; 120; 137-139). None of the Uphill Owners deny that runoff is artificially channeled from each of their properties onto the Erickson Property; none of them asserts they were unaware that runoff was being artificially channeled from their property downhill onto the property of others, and all of them have certainly known that runoff was being artificially channeled downhill from each of their properties onto the Erickson Property since at least the time they were made parties in this action.

The Uphill Owners misconstrue the law of trespass. A trespass claim does not require that the invasion or trespass itself, or even the actions causing it, be intended to cause harm, only that the acts resulting in the trespass be intentional. The elements to establish trespass are (1) an invasion of the plaintiff's property; (2) an intentional act by the Defendant(s); (3) reasonable foreseeability that the act would disturb the plaintiff's possessory interest in the plaintiff's property; and (4) actual and substantial damage. *Wallace v. Lewis County*, 134 Wn. App 1, 15, 137 P.3d 101 (2006). In this case, each of the elements are met.

Runoff being channeled into another's property constitutes a physical invasion that will support a trespass claim. *Hedlund v. White*, 67 Wn. App 409, 417-18, 836 P.2d 250 (1992). The Erickson Property is being invaded on an ongoing basis by runoff artificially channeling from each of the Uphill Owner's properties.

The second element, an intentional act, is also present. All of the Uphill Owners are aware that their surface water will be collected and channeled from their property into an artificially created drainage system or structure and onto the property of others. Each of the Drainage System Respondents was aware that a "drainage depression" ran across the lower portion of the property." Their actions in continuing to accumulate water

from their roofs and into rain gutters and downspouts, from other impervious surfaces on their lots such as driveways and sidewalks, and from the irrigation runoff when they water their yards, as well as maintaining and operating the structures and equipment to do these things, have all been intentional and knowingly done. (See CP 413-414, para. 3 and 4).

The third element, reasonable foreseeability, is also present. With respect to the Drainage System Respondents, as development has moved down the drainage basin, the drainage system has been extended. In 2010, the drainage system was finally completed in a manner consistent with the original plan and design set out in 2001 with adoption of the Joint Drainage Agreement. The Erickson Property was always intended to be the runoff depository, as the property located at the bottom of the drainage basin. It was entirely foreseeable and intended that storm drainage generated within this drainage district would eventually be channeled and directed onto the Erickson Property. At a minimum, it was always reasonably foreseeable that all of the Defendants' collective actions in collecting and channeling storm water downhill and continuing to extend the capacity of the drainage system would eventually disturb Ms. Erickson's possessory interest.

Similarly, it was entirely foreseeable that the Bolan Avenue Respondents' use and, in the case of Respondent Johnston, installation of, black drainage pipes running downhill from their properties would result in runoff from their properties being channeled down and into the Erickson Property. Respondents Lee were apparently apprised of the problem and instructed to take corrective action in 2006.

Finally, to establish trespass, Ms. Erickson only needs to point out that runoff, in significant amounts, is being channeled onto the Erickson Property. None of the Uphill Owners challenged the undisputed evidence provided by Ms. Erickson and her engineer John DeLeo that runoff runs from each of their properties into the Erickson Property and in a quantity great enough to overburden the drainage pond on the Erickson Property. This is sufficient to establish liability for trespass. See, e.g. *Hedlund*, *supra*.

It is also significant that trespass not only occurs when one wrongfully enters onto another's property through affirmative actions (though that is occurring on an ongoing basis in the manner in which the Uphill Owners use their properties), trespass also occurs when one fails to remove something from the land of another that the person is under a duty to remove. *Brutsche v. City of Kent*, 164 Wn.2d 664, 193 P.3d 110

(2008), see gen. *Woldson v. Woodhead*, 159 Wn.2d 215, 149 P.3d 361 (2006) (property owner was held liable for trespass in connection with a failed retaining wall constructed by a previous owner and without any evidence the defendant property owner engaged in any affirmative or wrongful conduct leading to the wall's failure).

Undisputed evidence established that the Uphill Owners could stop trespassing on the Erickson Property at a cost that is not unreasonable. Since each of the Uphill Owners could construct drainage detention systems on their own properties, such as drainage swales and/or detention ponds that would keep their storm drainage from running onto others' property, the trespass is considered to be abatable. In this situation, each of the Uphill Owners has a continuing duty to remove the intrusive substance or condition and stop their continuing trespass. *Fradkin v. North Shore Utility Dist.*, 96 Wn. App 118, 126, 977 P.2d 1265 (1999) (trespass occurred on an ongoing and periodic basis due to defective construction of a storm drainage system that allowed water to periodically run onto the plaintiff's property, giving rise to a continuing duty to correct the situation so long as the ongoing trespass continued). Even if any of the Uphill owners could claim they were unaware that their storm water was being channeled onto the Erickson Property before this case, they

have certainly become aware of that fact since being joined. Since there is an ability to abate that trespass, they are individually and collectively obligated to make corrections and stop trespassing on the Erickson Property.

Similarly, it would not help any of the Uphill Owners to argue that storm water was not channeled from their properties onto the Erickson Property before 2009. Under Washington law, a cause of action for trespass or other damage to a property is not considered to have accrued with regard to damage resulting from construction of improvements until the construction is completed. *Vern J. Oja and Assoc. v. Washington Park Towers, Inc.*, 89 Wn.2d 72, 76, 569 P.2d 1141 (1997). Here, the storm drainage system connected to the Storm Drainage Respondents' properties was not completed until 2010 and the black plastic pipes running down from at least the Sedco and Johnston properties were not installed as they now exist until the retaining wall was built along the lowest border of their properties in 2009.

Further, claims for trespass due to water intrusion from each of the individual Uphill Owner's properties did not mature until water from their properties began running onto the Erickson Property. *Hedlund*, 67 Wn. App. at 418 n. 12 (citing *Buxel v. King County*, 60 Wn.2d 404, 409, 374

P.2d 250 (1962). This is obviously because no damage had occurred prior to that time and, hence, no cognizable claim.

In proceedings below, the Uphill Owners relied heavily on the contention that they could not be liable because they were parties affirmatively performing any of the subject work. Accordingly, the Uphill Owners claimed they could not be responsible for an intentional trespass because intentional trespass required affirmative wrongful conduct. In fact, as noted above, intentional trespass occurs when one fails to remove something from the land of an owner that the person is under a duty to remove, or to abate a continuing trespass when the trespasser has the ability to do so. See e.g. *Brutsche v. City of Kent*, supra; *Woldson v. Woodhead*, supra.

The Uphill Owners primarily relied on *Bradley Am. Smelting & Refining Co.*, 104 Wn.2d 677, 682, 709 P.2d 782 (1985) for the proposition that one could not be liable for trespass in the absence of having committed an affirmative act causing the trespass. In that case, the Supreme Court recognized that Washington has adopted the Restatement(s) Second of Tort § 8A (1965) (CP 298, lines 11-23). Under that section, trespass occurs “if somebody intentionally (a) enters land in the possession of the other, or causes a thing or third person to do so, or

(b) remains on the land or (c) fails to remove from the land a thing which he is under a duty to remove (emphasis supplied). *Ibid.* at 681-682. A review of those subparts demonstrates that trespass may occur, not only through affirmative conduct, but also through a failure to act affirmatively when one is under a duty to do so. Such is the case with a continuing trespass caused by water intrusion discharged unlawfully from one person's property onto the land of another.

The other primary argument relied upon by the Uphill Owners in proceedings below was that the covenants for their property developments prevented them from being able to modify any of the existing structures that were part of any runoff disposal systems or structures. First, none of the Uphill Owners provided any authority, argument, or analysis that would explain how a set of covenants can entitle a property owner to continue to engage in conduct, such as trespassing onto the land of another, that the law requires them to stop. Further, the assertion proffered by the Uphill Owners, and apparently adopted by the trial court, is incorrect. The claim stemmed from a misrepresentation of the covenants, conditions, and restrictions for Overlook, the property development of which all of the Drainage System Respondents are a part (CP 327-331). A review of the applicable portions of the covenants

demonstrates that, at Section B-4, drainage facilities were shown as having been constructed in easements and owners were only prohibited from placing a structure, planting or other material within such easement that could “damage or interfere with the installation and maintenance of roads or utilities” (CP 330). Nothing in this section prohibited any owner from adding structures or facilities in their own lots to discontinue the discharge of runoff downhill from their lots. Beyond that, the sentence in the middle of the first paragraph of Section B-4 specifies “the easement area of each lot and all improvements in it shall be maintained adequately and continually by the owner of the lot except for those improvements for which a public authority or utility company is responsible.” Thus, not only did lot owners have the ability to install supplementary installations to prevent runoff from discharging from their lots, any work to properly maintain the system “adequately” was placed on them, and not on any third party such as a homeowners association.

Similarly, there is no provision anywhere in the record suggesting that any of Bolan Avenue Respondents were purportedly relieved from retaining drainage on their respective properties by any set of covenants governing the Qualchan PUD of which their properties are a part. At most, the applicable covenants provide in Section 4.13 that owners are not

to interfere with established drainage patterns over lots within the property covered by the covenants “unless an adequate alternative provision is made for proper drainage and is first approved in writing by the ARC.” Established drainage patterns consist of drainage plans would have been approved by the City of Spokane or which are shown on any plans approved thereafter by the ARC (CP 95).

There is no evidence anywhere in the record suggesting that any of the runoff being discharged through the black pipes from any of the Bolan Avenue Respondents’ properties was part of a drainage plan approved by the City of Spokane or by the ARC or, in any other way would qualify as a “established drainage pattern” for purposes of this provision. In fact, as noted above, to the extent evidence exists, owners were directed to retain runoff on their own properties and not discharge it onto the properties of others (CP 432).

In the final analysis, the Uphill Owners all discharge runoff onto the Erickson Property with no easement or comparable legal right to do so. In proceedings below, the Uphill Owners acknowledge they had no easement rights in or to the Erickson Property. The effect of the trial court’s ruling, however, is to effectively give each of the Uphill Owners a legal right to keep discharging runoff onto the Erickson Property that

operates at the functional equivalent of an easement. Since each of the Uphill Owners has the undisputed ability to stop trespassing, this Court should not sanction their continued discharges and should compel them to stop.

V. CONCLUSION

For the reasons stated above, Erickson requests that the trial court's denial of her motion for partial summary judgment, and the granting of the Uphill Owners' motions for summary judgment, all be reversed; and that this matter be remanded to the trial court for further action consistent with that ruling including direction to grant Erickson's motion for partial summary judgment.

RESPECTFULLY SUBMITTED this 5th day of August 2014.

LAYMAN LAW FIRM, PLLP

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Attorney for Appellant

FILED

AUG 13 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.

Appendix "A"

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(509) 455-8883 Telephone
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0 25 50 100
SCALE: 1"=50'

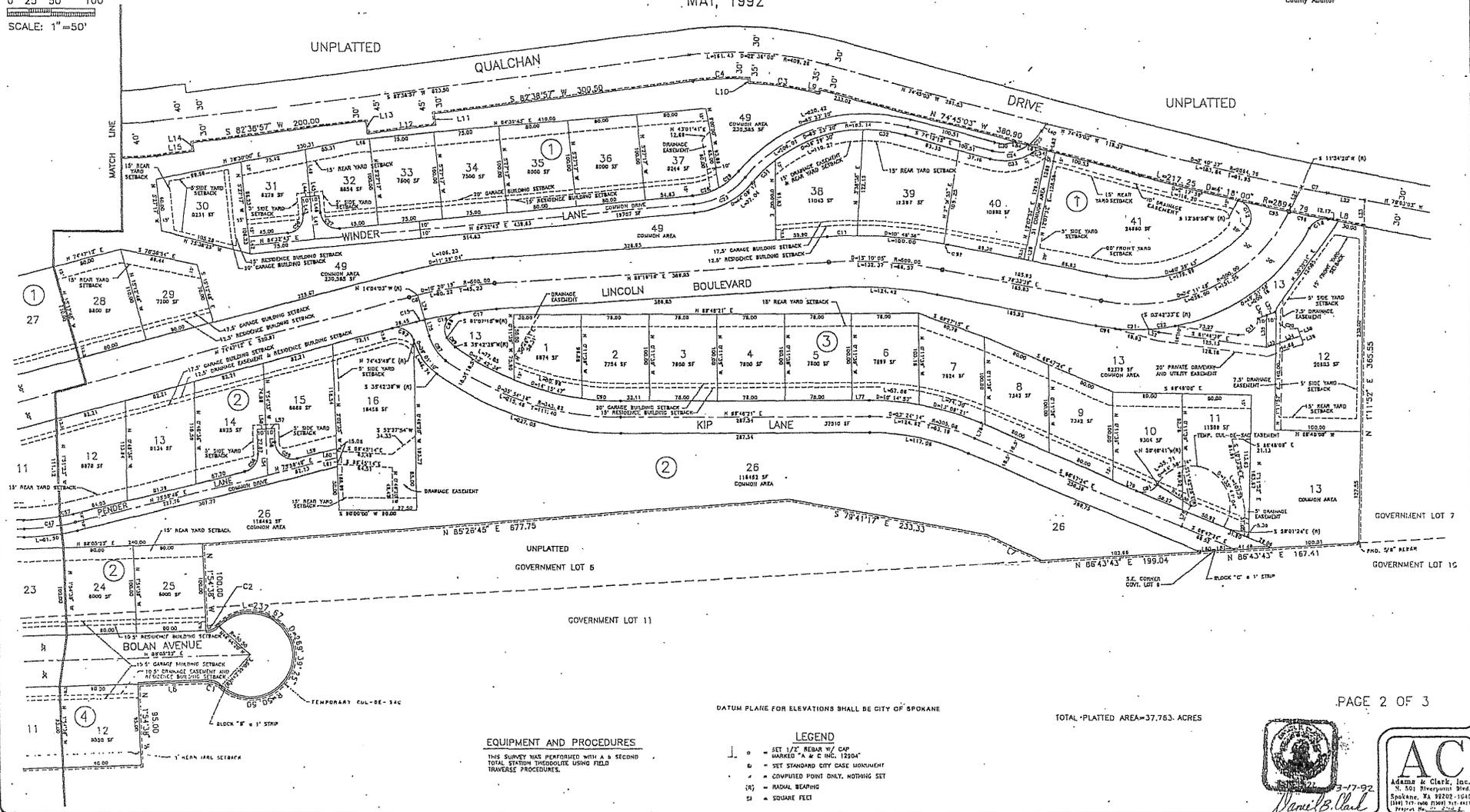
FINAL PLANNED UNIT DEVELOPMENT PLAT QUALCHAN HILLS

BEING A SUBDIVISION OF AN UNPLATTED PORTION OF GOVERNMENT LOTS 5,6,7,11 AND 12 LOCATED
IN THE N 1/2 OF SECTION 6, TOWNSHIP 24 NORTH, RANGE 43 EAST, WILLAMETTE MERIDIAN
CITY OF SPOKANE, SPOKANE COUNTY, WASHINGTON

MAY, 1992

720519056
#3072
BL 20
Pg 53
2/23

AUDITOR'S CERTIFICATE
FILED FOR RECORD THIS _____ DAY
OF _____ 19__ AT _____
BY BOOK _____ OF _____ AT PAGE _____
AT THE REQUEST OF _____
(Signed) _____
County Auditor



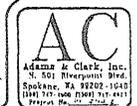
DATUM PLANE FOR ELEVATIONS SHALL BE CITY OF SPOKANE

TOTAL PLATTED AREA=37.763 ACRES

PAGE 2 OF 3

EQUIPMENT AND PROCEDURES
THIS SURVEY WAS PERFORMED WITH A SECOND
TOTAL STATION THEODOLE USING FIELD
TRaverse PROCEDURES.

- LEGEND**
- o = SET 1/2" REBAR W/ CAP
 - hatched "X" = E.M.G. "2124"
 - o = SET STANDARD CITY CASE MONUMENT
 - o = COMPUTED POINT ONLY, NOTHING SET
 - o = RADIAL BEARING
 - (S) = SQUARE FEET



CP 237

3102967 20/53

No building permit shall be issued for any lot in this subdivision until evidence satisfactory to the City Engineer has been provided showing that the recommendations of the Spokane Water Quality "208" Study have been complied with. Trunk and lateral storm and sanitary sewers are required in City platted property as the same is developed. Streets, including sidewalks and sewer improvements, shall be completed in each block for the entire length of a block, or so much of a block length as is within the subdivision, within three years after the date that building permits are issued for not less than sixty percent of the combined frontage on both sides of the street of said block. In the event that said improvements have not been completed within said three years, the subdivider and persons with any interest in the property in said block will not protest a Local Improvement District for said improvements as may be initiated by resolution to the City Council.

Blocks A, B, and C, as shown hereon, are hereby dedicated in fee to the City of Spokane.

No structures may be constructed within the "Special Setback Areas" which adjoin the steeply sloping areas, with the exception of Lots 16, 22, and 23, Block 1. Construction can occur within the "Special Setback Areas" on these aforementioned lots provided that a detailed Grading Plan prepared by a licensed Geotechnical Engineer is submitted with the application for each individual lot. The Grading Plan submitted for Lots 16, 22, and 23, Block 1, shall illustrate that a walk-out basement design is proposed with no portion of the footing located more than 55 feet from street right-of-way of Keyes Court. The Geotechnical Engineer shall verify in the Grading Permit application that the proposed grading and structure improvements will provide a slope similar in stability as exists presently in this plat. All building setbacks shall not be less than minimum front, flanking side, or rear yard requirements as shown hereon. All side yard setbacks are five (5) feet.

A ten (10) foot wide easement adjoining the private streets shown hereon and adjoining the public streets dedicated hereon are hereby granted to the City of Spokane and its permittees, for utilities (including cable television), ~~AND DRAINAGE~~. Utility easements are also granted over all common areas, private streets, common drives, private driveway easements, and elsewhere as shown hereon. Drainage easements are granted as shown hereon to the Qualchan Hills Planned Unit Development Homeowners Association.

No direct access will be allowed from lots within this subdivision to Qualchan Drive, except Lot 14, Block 1.

No portion of Lots 49 through 52, Block 1; Lots 26 through 29, Block 2; or Lots 13 and 14, Block 3; "Common Area" may be used for any residential structure or transferred as a lot to be used for any residential structure, but it must be left in open space for the common use and, together with the private streets and common drives, be held in common ownership by the Qualchan Hills Planned Unit Development Homeowners Association.

The Qualchan Hills Planned Unit Development Homeowners Association and its successors, as owners of the common areas, private streets, and common drives, will be responsible for maintenance of these common areas, private streets, and common drives and the maintenance of the water, sewer, storm sewer, and drainage facilities located therein and located in the drainage easements shown hereon.

This PUD plat shall be served by City water and sanitary service only; the use of on-site sanitary waste disposal systems or private wells is prohibited. As a consideration for the acceptance of this plat by the City of Spokane, the owners of all nonpublic property herein platted into lots, blocks, or tracts agree not to protest under RCW 35.43.180, the construction of, or legal assessment for any sewer ultimately serving their nonpublic property at such time as it is desired by the City of Spokane to construct such sewers. The City of Spokane's responsibility for providing and maintaining sanitary sewer and water delivery system and maintenance of the private streets (including snow removal) ceases at the private property line. Each and every deed transferring ownership of land within this PUD plat shall clearly state that maintenance of streets, water lines, and sewer service within this plat is the sole responsibility of the platfords and all future owners and assignees. The City shall not be a party to any legal action for failure to provide street, water, or sewer service within the boundaries of this PUD plat.

This plat is not in any Irrigation District, drainage channel or flood plain; and it has no ponding areas or bodies of water.

This PUD plat and any portion thereof, except public streets, shall be restricted by the terms of the Declaration of Covenants, Conditions, Restrictions, Reservations, and Easements for Qualchan Hills Planned Unit Development. The