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No. 64478-5

**STATE OF WASHINGTON
COURT OF APPEALS, DIVISION I**

REBECCA FENSKE,

Appellant,

vs.

STEVE TEGMAN and DEYONNE TEGMAN, husband and wife, and the
marital community thereof,

Respondents.

BRIEF OF APPELLANT

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I. INTRODUCTION

Appellant Rebecca Fenske's home began flooding in December 2005 and continued to flood periodically through the time of trial, which commenced on August 25, 2009. Respondents Tegman caused this flooding by their unreasonable failure to provide adequate drainage across their property in the natural drainway. Stormwater backed up from a blockage at the Tegman property and flooded the Fenske property with every significant rainstorm for over four winters.

The Tegman's liability for obstructing a natural drainway and causing flooding of the Fenske property was established via summary adjudication on May 22, 2009. Although the Tegmans knew about the flooding of the Fenske property and its cause since January 2006, and were found liable for the flooding in May 2009, they did nothing to correct their blocked drainway. At the time of trial, the drainage across the Tegman property had not been restored and the Fenske property had not yet been relieved of flooding. The Tegmans did not act to restore the blocked drainway until the trial court ordered injunctive relief at the conclusion of the trial in October 2009, requiring the Tegmans to design and install a City approved and permitted stormwater drainage system across their property.

As to damages, the trial court, trying the case without a jury, declined to award Ms. Fenske damages for her loss of use of her home due to the periodic flooding from December 2005 to the start of trial in August 2009. The trial court also declined to award Ms. Fenske any damages for the diminution in value of her real property, although Ms. Fenske's expert appraiser testified that the property had declined in value because of the recurring flooding, and the defense introduced no contradictory evidence.

This appeal presents several questions concerning damages. The Court is asked to find that a homeowner should recover loss of use damages where the basement of her home floods with every significant rainstorm for over four years. Additionally, the Court is asked to find that a homeowner should recover the diminished value of her residential property from recurring flooding caused by her neighbors who refused, before trial, to restore the blocked natural drainway that was entirely on their property and in their control. Such damages are not a double recovery. Finally, the Court is asked to find that it is appropriate for an appraiser to calculate diminution in value damages on the facts as they exist at the time of trial. If the Defendants have refused to remediate their property, they cannot then argue that the Plaintiff's appraiser must assume some unknowable remediation, assume that remediation has been

completely successful, and then calculate diminution in value based on those assumptions.

Ms. Fenske requests that the Court reverse the findings of the trial court and remand her case with instructions to enter judgment for her loss of use damages in the amount of \$35,200. Ms. Fenske further requests that the Court reverse the findings of the trial court and remand her case with instructions to award her diminution in fair market value damages in the range established at trial through uncontradicted expert testimony of \$74,800 to \$110,000.

II. ASSIGNMENTS OF ERROR

A. Failure to Award Loss of Use Damages.

At the damages trial, the trial court erred by not awarding Ms. Fenske her loss of use damages when the evidence established that the basement of her home flooded with every significant rainstorm for over four years because her neighbors unreasonably refused to unblock their natural drainway and provide adequate drainage across their property. The defense did not introduce any contradicting evidence regarding these damages.

B. Failure to Award Diminution in Value Damages.

At the damages trial, the trial court erred by not awarding Ms. Fenske the diminished value of her residential property caused by recurring

flooding, measured as of the time of trial, where the inadequate drainage on the neighbor's property had not been restored and Ms. Fenske's expert appraiser had no way to know the design, cost or efficacy of the drainage remediation that the neighbors might install some time in the future.

III. STATEMENT OF THE CASE

In 1985, Rebecca Fenske, a landscape architect, moved an old farmhouse onto a vacant lot near the intersection of 116th Avenue NE and NE 91st Street in Kirkland. CP 3-4; RP II, 47:7-49:21. The natural drainway across the narrow (60-feet wide by 142.2 feet long) lot extended from the higher east side to the lower west side. RP II, 53:1-11; CP 14. Ms. Fenske designed a drainage system to flow across her property and discharge onto the vacant lot to the west. RP II, 45:1-46:18. The drainage system was placed on grade and four to five feet of fill were placed over the system on the Fenske property. RP II, 53:17-54:10.

The small size of the old house, approximately 940 square feet on the main floor and 400 square feet on the second, prompted Ms. Fenske to construct a full-size basement, effectively adding about 940 square feet of living space. CP 119; RP II, 49:22-51:2. The property lacked any other storage buildings, and the basement served as the utility room, storage area, and work shop. The Fenske family intended to someday finish the basement with a room and bath as the children grew older. The drainage

system for the property, including the below-grade basement, functioned without problem until 1988. RP II, 51:3-52:3; III, 17:7-18:6; II, 56: 9-16.

In 1988, the Markland Group developed the property immediately west of the Fenske property with what is now the Tegmans' residence. During construction, Markland crushed the pipes draining from the Fenske property, causing the basement to flood until the drainage across the western (now Tegman) property was restored. RP II, 56:20-57:13, 58:4-59:7. From 1988 to 2005, with the exception of one incident of moisture in one corner of the concrete floor, the Fenske basement remained dry. RP II, 65:5-14, III, 1:20-6:25.

However, this changed in December 2005 when water began penetrating the concrete floor of the basement. RP II, 63:23-64:15. By January 5, 2006, water stood 1-1/2 inches deep across the basement. RP II, 64:15-18. Flooding continued throughout the wet winter weather. RP II, 67:4-70:11. The items set aside in the basement for charity donations were destroyed. The flooding destroyed other items stored in the basement, including tools and construction supplies, as well as irreplaceable personal memorabilia and artwork. RP II, 71:23-80:12.

Ms. Fenske and the Tegmans investigated the cause of the flooding and determined that the drainage problem existed on the Tegman property. RP II, 68:13-69:16. The problem could not be fixed on the Fenske

property. CP 174-175; RP I 75:15-76:16. Even after learning that the flooding was caused by a blockage on their property, the Tegmans took no action to restore the drainage across their property in 2006.

The following wet season, the flooding recurred, with water reaching a depth of five to six inches in the basement. RP II, 86:8-88:6. The flooding snuffed out the water heater pilot light and caused the furnace to blow air smelling of wet concrete and mold throughout the house. RP II, 87:3-23; III, 16:9-14. The Tegmans again declined to fix the drainage problem on their property in 2007.

Again, the flooding in the Fenske basement recurred with the wet season in late 2007 and into 2008. RP III, 11:1-12:2. White, fuzzy mold grew in the perpetually wet space despite repeated cleaning. RP II, 72:19-73:12, 84:19-86:4. Ms. Fenske took to keeping a pair of knee-high rubber boots on the stairs so that she could wade to the laundry. RP III, 15:10-16:2. The toilet in the basement, one of only two in the house, remained non-functional, as the toilet had to be removed to allow the flood water to drain into the sewer. RP II, 65: 1-25. The Tegmans did not fix the drainage problem on their property in 2008.

In late 2008, Ms. Fenske had a co-worker of hers, Scott Carlson, cut a concrete square in the basement floor in order to install a sump pump to drain the flood water down the toilet and into the City sewer system.

matter, as of May 2009, the Tegmans had not submitted a plan for the remediation of the drainage on their property, nor had they obtained a cost estimate for that work. RP III, 25:3-15, 40:20-41:10, 57:11-20, 63:4-64:22. Hagar's evaluation, of necessity, was of the Fenske property in its then current state—with the unremediated and inadequate drainage next door on the Tegman property causing recurring flooding.

On May 22, 2009, the trial court ruled on Ms. Fenske's Motion for Summary Adjudication of Issues and established the following for purposes of trial under Civil Rule 56(d):

1. The natural drainway extends from the northeast corner of the Fenske property, across the Fenske property to the southwest, and onto the adjacent Tegman property;
2. Defendants Tegman owed a duty to Fenske to provide adequate drainage through the natural drainway to accommodate the flow in times of recurrent flooding conditions;
3. Beginning in December 2005 and continuing to the present, Defendants Tegman failed to provide adequate drainage through the natural drainway to accommodate the flow in times of recurrent flooding conditions;
4. Defendants Tegman failure to provide adequate drainage through the natural drainway is an unreasonable use of their property; and
5. This failure of Defendants Tegman to provide adequate drainage across their property in the natural drainway resulted in recurring flooding of the Fenske property from December 2005 to the present.

The scope and amount of damages for which the Defendants are liable are reserved for trial.

CP 13-15.

Between the date of the court's ruling and the start of trial on August 25, 2009, the Tegmans did not submit a plan or cost estimate to restore the drainage on their property. Nor did the Tegmans restore the drainage on their property prior to the start of trial.

The bench trial before the Honorable Charles W. Mertel was conducted on August 25, 26, and 27, and September 9, 2009. The court conducted a site visit on August 26, 2009. CP 177. At trial, Plaintiff called Rebecca Fenske and expert witness, Richard Hagar, to testify. The Tegmans did not call any witnesses. CP 179.

Ms. Fenske testified about the loss of use of 940 square feet of her 2280 square foot house through four consecutive rainy seasons. She told the court about using rubber boots to access the laundry through several inches of flood water. RP III, 15:10-16:2. With no other storage buildings on the property and the basement flooding and full of mold, she had no choice but to rent a storage unit for her mother's furniture and belongings after her mother's death in July 2006. RP II, 51:10-14, 63:19-20, 72:19-73:12, 84:19-86:4; III, 19:5-20:7. Ms. Fenske testified about missing a vacation and being unable to host Thanksgiving dinner because the flood water in the basement was so deep that it snuffed out the pilot light of her hot water heater. RP II, 87:3-88:5. She told the court about remarrying in June 2009, which added another teenage daughter to the household. With

the growing family, the home still had only one bathroom because the basement toilet was the discharge point for the sump pump. Although it was Ms. Fenske's intent to finish the basement for her teenager daughters, the flooding and mold prevented that from happening. RP II, 65:1-25, 51:21-25; III, 18:1-5. At the time of trial, Ms. Fenske's new husband's furniture remained on the covered porch, again, because of the lack of any storage area. RP III, 18:6-19:5. Ms. Fenske valued her loss of use of the basement of her home at \$800 per month. For the 44 months from the time that the flooding began to the time of trial, she placed her loss of use at \$35,200. RP III, 20:8-16. The defense introduced no evidence contradicting Ms. Fenske's testimony.

Richard Hagar testified at trial to the appraised value of the Fenske property. Based on the hypothetical assumption that the property had no problems, he set the fair market value at \$440,000. RP III, 16:9-21. In his impact value analysis, he addressed the question of whether ongoing and unresolved drainage problems have an impact on the marketplace for residences. RP III, 17:1-4. He concluded that the Fenske property, with its four-year history of flooding and lack of corrective plan on the Tegman property, was negatively impacted in the range of 17 to 25 percent, for a loss of fair market value of \$74,800 to \$110,000. RP IV, 35:19-41:25.

Again, the defense introduced no evidence contradicting Hagar's testimony.

At the conclusion of trial on October 2, 2009, the court entered its findings of fact and conclusions of law. CP 174-184. The court ordered that the Tegmans restore the drainage on their property as follows:

The Court hereby orders Injunctive Relief in favor of Plaintiff Rebecca Fenske and against Defendants Steve and DeYonne Tegman as follows:

1. Defendants shall provide on their property adequate drainage through the natural stormwater drainway to accommodate the flow of storm and surface water from the Fenske property both in normal conditions and in times of periodic flooding conditions;
2. Defendants shall incur all costs for the design and installation of the drainage system on Defendants' property;
3. Defendants shall pay Plaintiff the value of any trees on the boundary between Plaintiff's and Defendants' properties damaged or destroyed as a result of the installation of the stormwater drainage system. The issue of damage to trees and value of such damage is reserved;
4. The stormwater drainage system shall be designed consistent with good engineering practices;
5. The stormwater drainage system design shall be approved and permitted by the City of Kirkland prior to its installation; and
6. Installation of the stormwater drainage system shall be complete by October 31, 2009, absent good cause shown.

CP 180-181; RP V, 32:1-33:18.

As to loss of use damages, the court awarded no damages to Ms.

Fenske, finding the following:

Six, loss of use of basement as a residential property – it was valued at none. . . . Historically, this was never used as a residence. Historically, according to the testimony, it was never going to be used as a residence. It just – there’s no basis for any award in that area. The basement was used historically for storage and it has continued to be used as a storage facility albeit now with a better wrapping system. Things are just not on the ground.

RP V, 30:15-24.

The Court also declined to find any loss of value of the Fenske residence. It had hinted at its position with these initial remarks:

Okay, because I do have a concern about that [Hagar’s testimony], and I guess you’ll need to brief it and look at, that is in essence collecting twice. I may be wrong, and certainly acknowledge that is possible, but that is – would be my concern with that type of testimony. If the situation is repaired, I guess, why would there be diminution of fair market value?

RP III, 89:20-90:9. In its ruling the Court reasoned as follows:

That gets us to the tough issue, and you may have already figured out where I’m going on this based on my initial remarks. This property began with a storm, a natural drainage way running through it. And it is today – has that drainage system albeit one that’s diverted and channeled. With the correction of the system, it’s the conclusion of this Court that, in fact, the property has the same value today that it had before the storms of 2005.

It would have been appropriate, I believe, to disclose this drainage way before the storms of 2005, and it’s appropriate to disclose it now. I suppose today it’s probably legally mandated.

But the reality is that Ms. Fenske’s property is burdened with this drainage system, drainage way. It was before these incidents and is now a burden (inaudible) as is the Defendants’ property. There is no basis for this Court to

award a diminution of value based on these facts, and I declined to do so.

RP V, 31:1-18.

The Court did award Ms. Fenske \$10,096.00, representing loss of personal property, clean up expenses, labor costs, and restoration of the Fenske property. CP 177-181. In summary, the trial court granted injunctive relief requiring the Tegmans to remediate the blocked drainway on their property, awarded Ms. Fenske a minimal amount of damages, and refused to award Ms. Fenske damages for the loss of use and for the diminution in her property value due to four years of flooding.

IV. ARGUMENT

A. Substantial Evidence Supported Ms. Fenske's Loss of Use Damages and the Trial Court Erred in Failing to Compensate Her for this Undisputed Loss.

1. The Court of Appeals Should Reverse the Trial Court's Erroneous Finding of Fact that Ms. Fenske Sustained No Loss of Use Damages.

Trying the case without a jury, the trial court awarded Ms. Fenske no loss of use damages despite her testimony regarding her loss of use and the lack of any contradictory evidence. The Court should determine that the trial court's finding lacks any support in the record and should be reversed.

Findings of fact entered in a bench trial are reviewed to determine whether they are supported by substantial evidence. “Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth of the declared premise.” *Bingham v. Lechner*, 111 Wn.App. 118, 127, 45 P.3d 562 (2002) (quoting *American Nursery Prod., Inc. v. Indian Wells Orchards*, 115 Wn.2d 217, 222, 797 P.2d 477 (1990)).

In granting Ms. Fenske’s Motion for Summary Adjudication, the trial court established that the Fenske property flooded because of the unreasonable and inadequate drainage on the Tegmans’ property. At trial, Ms. Fenske testified about her loss of use of her property due to flooding. No evidence contradicted her testimony. The trial court’s conclusion that Ms. Fenske did not sustain loss of use damages finds no support in the evidence and should be reversed.

2. **Substantial Evidence Supports that Ms. Fenske Suffered a Loss of Use of Her Property Due to Recurring Flooding from December 2005 through the Time of Trial in the Amount of \$35,200.**

The trial court’s position that Ms. Fenske suffered no loss of use of her basement due to four years of recurring flooding finds no support in the evidence. Ms. Fenske testified at trial about the many uses of the full-size basement, and the limitations of its use when it was repeatedly full of water and mold. Ms. Fenske also testified about her family’s needs for the

basement, and how those needs could not be met because of the four years of recurring flooding. None of this evidence was disputed. Finally, Ms. Fenske provided the Court with a rental value for the basement that provides, under case law, the correct measure of her damages for loss of use.

The facts of *Colella v. King County*, 72 Wn.2d 386, 433 P.2d 154 (1967), are similar to this case. In *Colella*, the plaintiffs' property flooded because of drainage problems on adjacent property owned by King County. Like Ms. Fenske, the plaintiffs could not go onto the neighboring property and correct the drainage problem—they were at the mercy of King County taking some remedial action. *Colella*, 72 Wn.2d at 392. The Court took guidance from *Harkoff v. Whatcom Cy.*, 40 Wn.2d 147, 241 P.2d 932 (1952):

If, however, the property may be restored to its original condition the measure of damages is the reasonable expense of such restoration, and in a proper case the loss of use or of income therefrom for a reasonable time pending such restoration. *Kincaid v. Seattle*, 74 Wash. 617, 134 Pac. 504; *Messenger v. Frye*, 176 Wash. 291, 28 P.2d 1023; *Armstrong v. Seattle*, 180 Wash. 39, 38 P.2d 377, 97 A.L.R. 826; *Ghione v. State*, 26 Wn.2d 635, 175 P.2d 955; 3 Sedgwick on Damages (9th ed.) 1916, § 932.

Colella, 72 Wn.2d at 393.

The *Colella* Court went on to award plaintiffs, provided that their property could be restored, “the value of the loss of use of plaintiff's property since

the damage first occurred.” *Colella*, 72 Wn.2d at 395. Similarly, in this case the trial court should have awarded Ms. Fenske loss of use damages.

How to “value” loss of use was before the court in *Holmes v. Raffo*, 60 Wn.2d 421, 374 P.2d 536 (1962). Mrs. Holmes testified that her family was deprived of the use of their automobile during the time it was being repaired following an accident with defendant. She also testified that they did not rent a substitute vehicle during that time. The court followed the general rule stated in *Pittari v. Madison Ave. Coach Co.*, 188 Misc. 614, 68 N. Y. S. (2d) 741 (1947):

We now hold that, where, as here, a plaintiff has not rented a substitute automobile, he is nevertheless entitled to receive, as general damages in the event liability is established, such sum as will compensate him for his inconvenience. Proof of what it reasonably would have cost to hire a substitute automobile is sufficient evidence to carry this item of damages to the jury, but is not the measure of such damages. It is relevant evidence in determining the general damages for inconvenience resulting from loss of use of an automobile.

Holmes v. Raffo, 60 Wn.2d 421, 431-32, 374 P.2d 536 (1962). *Accord Meakin v. Dreier*, 209 So.2d 252, 254 (Fl. App. 1968); *Burgess Construction Co. v. Hancock*, 514 P.2d 236, 238 (Alaska 1973); *Lomond, Inc. v. Campbell*, 691 P.2d 1042, 1045 (Alaska 1984); *Airborne, Inc. v. Denver Air Center, Inc.*, 832 P.2d 1086, 1090 (Colo. App. 1992).

The *Holmes* court felt that to hold otherwise would be to deprive a plaintiff of loss of use damages because of his inability to hire a substitute. In effect, damages would be available only to those with the financial ability to rent a car. *Holmes*, 60 Wn.2d at 431. The view of the *Holmes* court, and the courts also cited above, finds support in the Restatement 2d of Torts, Section 931.

If one is entitled to a judgment for the detention of, or for preventing the use of, land or chattels, the damages include compensation for

(a) the value of the use during the period of detention or prevention or the value of the use of or the amount paid for a substitute, and

(b) harm to the subject matter or other harm of which the detention is the legal cause.

Comment on Clause (a):

b. The owner of the subject matter is entitled to recover as damages for the loss of the value of the use, at least the rental value of the chattel or land during the period of deprivation. This is true even though the owner in fact has suffered no harm through the deprivation, as when he was not using the subject matter at the time or had a substitute that he used without additional expense to him. The use to which the chattel or land is commonly put and the time of year in which the detention or deprivation occurs are, however, to be taken into consideration as far as these factors bear upon the value of the use to the owner or the rental value.

Illustrations:

1. A takes possession of and detains for six months B's land, which has a rental value for the period of \$ 1000. B is entitled to receive this amount as damages although he

never had used and would not have used the land during the period.

See also Krivant v. 12-22 Woodland Avenue Corp., 138 N.J. Super. 1, 35 A.2d 102, 115 (1975) (*quoting* Comment to § 931: “The owner of the subject matter is entitled to recover as damages for the loss of the value of the use, at the rental value of the . . . land during the period of deprivation. This is true even though the owner in fact has suffered no harm through the deprivation, as where he was not using the subject matter at the time . . .”).

In this case, Ms. Fenske did suffer harm from the deprivation of the use of her basement. As she testified, the basement was below the finished grade of the lot, yet had no sump pump until the flooding. She stored items directly on the concrete floor from 1988 to 2005. With a single minor exception, there were no problems with wetness in the basement. RP II, 65:5-14, III, 1:20-6:25. The basement was used because the Fenske property lacked any other buildings. RP II, 51:10-14.

Additionally, the basement served as the utility room, storage area, and workshop. She told the court about using rubber boots to access the laundry through inches of flood water. RP III, 15:10-16:2. Ms. Fenske testified about missing a vacation and being unable to host Thanksgiving dinner because the flood water in the basement was so deep that it snuffed

out the pilot light of her hot water heater. RP II, 87:3-88:5. She also testified about her furnace, also located in the basement, blowing the smell of wet concrete and mold throughout the house. RP II, 87:3-23; III, 16:9-14. Finally, following the death of her mother in July 2006, and with the basement of her home full of water and mold, Ms. Fenske had no choice but to rent a storage unit for her mother's furniture and belongings. RP II, 51:10-14, 63:19-20, 72:19-73:12, 84:19-86:4; III, 19:5-20:7.

Ms. Fenske testified about how she always intended to someday finish the basement with a room and bath for her children. RP II, 51:3-52:3; III, 17:7-18:6; II, 56: 9-16. When she remarried in June 2009, and added a second teenage daughter to her household, Ms. Fenske was still unable to finish the basement because of the ongoing wetness and mold problems caused by the failure of the Tegmans to correct the drainage on their property. RP II, 65:1-25, 51:21-25; III, 18:1-5. At trial, her new husband's furniture remained on the covered porch, again, because of the lack of any storage area. RP III, 18:6-19:5.

Ms. Fenske testified that she valued the loss of her 940-square-foot basement at \$800 per month. For the 44 months from the time that the flooding began to the time of trial, she placed her loss of use at \$35,200. RP III, 20:8-16. Her testimony on this point provided the court with competent evidence of the value of her loss of use. *See e.g., Lyle v.*

Ginnold, 174 Wn. 104, 107-08, 24 P.2d 449 (1933) (“The rule that the owner of premises may testify as to the market value thereof if he is familiar therewith is stated in 22 C.J. 586, § 685.”); *Hoff v. Lester*, 31 Wn.2d 937, 945, 200 P.2d 515 (1948) (“[T]estimony as to rental value is competent evidence of the value of the use of the property to the owner.”). The defense introduced no evidence contradicting Ms. Fenske’s opinion.

The trial court reasoned that Ms. Fenske had set the value of her loss of use as the rental value of the basement. Since it had never been rented, the trial court found that she was entitled to no award for her loss of use. RP V, 30:15-24. The trial court’s analysis is in direct contradiction of *Holmes v. Raffo*, 60 Wn.2d 421 (1962), and the Restatement 2d of Torts, Section 931. Under these authorities, Ms. Fenske is entitled to recover the rental value of her basement because she was deprived of its use, whether or not she actually incurred a monetary loss.

Substantial evidence supports a finding that Ms. Fenske was deprived of the use of her basement for over four years as a result of recurring flooding. Under case law, whether she actually incurred loss of rent for this deprivation, she is entitled to recover her loss of use damages. Ms. Fenske provided the court with a rental value for the basement that provides the correct measure of her damages. Ms. Fenske requests that the

finding of the trial court as to her loss of use damages be reversed and that the Court remand her case with instructions to enter judgment for her loss of use damages in the amount of \$35,200.

B. The Trial Court Erred in Not Awarding Ms. Fenske Her Diminution in Value Damages.

1. The Trial Court's Decision that Diminution in Value Damages are Unavailable to Ms. Fenske is a Question of Law that should be Reviewed by the Court of Appeals De Novo.

The trial court determined that Ms. Fenske could not recover the diminution in value of her residential property due to recurring flooding lasting more than four years. The court ordered injunctive relief that required the Tegmans to correct the drainage problem on their property following trial. The court heard testimony from Ms. Fenske's expert appraiser about the loss of value of her property due to the years of flooding. However, the trial court believed that recovery of diminution in value damages up to the time of trial would constitute double recovery, and awarded Ms. Fenske nothing on this claim.

Generally, the appropriate measure of damages is a question of law reviewed *de novo*. See *Womack v. Von Rardon*, 133 Wn. App. 254, 263, 135 P.3d 542 (2006) (citing *Fisher Properties, Inc. v. Arden-Mayfair, Inc.*, 106 Wn.2d 826, 843, 726 P.2d 8 (1986)). The appellate court reviews the record on appeal without any deference to the trial court's findings.

Ms. Fenske requests that the Court determine the measure of damages available to her under the facts of this case to include diminution in value of her residential property. She suffered almost four years of flooding of her home due to inadequate drainage on adjacent property that she could not repair. The adjacent property owners refused to repair their drainage system up to and at the time of trial. The question of whether Ms. Fenske can recover her diminution of value damages measured as of the time of trial presents an issue of law for the Court's *de novo* review.

2. **Ms. Fenske Should Recover from the Tegmans the Lost Value of Her Residential Property Due to Recurring Flooding Measured as of the Time of Trial.**

The trial of Ms. Fenske's case commenced on August 25, 2009. Her property had flooded periodically since December 2005. The blocked drainway existed on the Tegmans' adjacent property, and Ms. Fenske had no ability to correct it and solve the flooding problem on her property. Exasperated, she finally resorted to filing a lawsuit in December 2007. In preparation for trial, Ms. Fenske retained expert real estate appraiser, Richard Hagar, to evaluate the diminution in value of her property. RP IV, 4:13-16. Mr. Hagar viewed the Fenske property and conducted his analysis in May 2009—prior to any remediation or court-ordered injunctive relief. RP IV, 5:4-14. The drainage was not corrected prior to trial so it was impossible for Mr. Hagar to consider the Fenske property in

a remediated condition, or examine the yet-to-be proposed fix for cost and effectiveness. RP IV, 62:23-11. His conclusion focused on what he was able to determine, that is, the diminution in value to the Fenske property based on the events of December 2005 to the time of trial. RP IV, 41:2-5. The defense presented no contradictory evidence. The trial court disregarded Hagar's testimony and found no basis for Ms. Fenske to recover diminution in value damages. RP V, 31:14-18. The trial court's finding is an error of law.

The guiding principle in assessing damages to real property was set forth in *Thompson v. King Feed & Nutrition Service, Inc.*, 153 Wn.2d 447, 459, 105 P.3d 378 (2005): "The purpose of awarding damages in cases involving injury to real property is to return the injured party as nearly as possible to the position he would have been in had the wrongful act not occurred." *Thompson* at 459 (citing 16 DAVID K. DEWOLF & KELLER W. ALLEN, WASHINGTON PRACTICE: TORT LAW AND PRACTICE § 5.2, at 126 (2d ed. 2000)). The time at which such damages should be measured is the date of trial. See *Woldson v. Woodhead*, 159 Wn.2d 215, 149 P.3d 361 (2006).

Woldson, involved two neighbors who shared a crumbling rock wall. The neighbor whose soil was pressing against the wall causing it to fail did not abate the problem before trial. The court viewed the case as

one of continuing tort, in effect, “the ‘event’ happens every day the trespass continues. Every moment, arguably, is a new tort.” *Woldson*, 159 Wn.2d at 219. In such cases, “because the continuing offending intrusion upon the property may be removed or abated at any time, future damages are inherently speculative and may not be awarded.” *Id.* Damages that are recoverable include those “from three years before filing until the trespass is abated or, if not abated, until the time of trial.” *Id.* at 223 (*emphasis added*). *Accord Hawley v. Mowatt*, 160 P.3d 421 (Colo. App. 2007).

As in *Woldson*, the court in *Colella v. King County*, 72 Wn.2d 386 (1967), considered recurring damages to plaintiff’s property that plaintiff could not fix. King County’s drainage system repeatedly flooded plaintiff’s property over a period of years. The court attempted to determine whether the damage was permanent or temporary in order to assess damages. It found that awarding plaintiff restoration damages would be worthless:

The damage done by the county may be repairable, but the plaintiff cannot go upon county property and do that which the county has been ordered to do by the court. Plaintiff cannot trespass upon county property or property of others to correct the damage that the county has caused. An allowance of damages to the plaintiff in an amount necessary to correct the county’s wrong does not give a practical remedy to plaintiff. He is still left with unusable property of doubtful value.

Colella, 72 Wn.2d at 392.

The court found probative on the issue of permanency the County's long-term failure to correct the known problem:

The findings and judgment indicate that the damage is repairable and temporary; yet the refusal of the county to even attempt to correct the cause of the damage, for at least 4 years prior to trial (and now, perhaps, for a longer period), is some indication that the damage *may* be permanent.

Colella, 72 Wn.2d at 393-94.

The determination that the property can be restored does not absolutely dictate what damages can be recovered. In *Brickler v. Myers Construction*, 92 Wn. App. 269, 966 P.2d 335 (1998), the court considered the plaintiff's claim that the septic system for the new home they purchased was defective. Plaintiffs lived with the defective system for 26 months before spending the money for a temporary repair of the system. The appellate court reasoned that the plaintiffs had lost the use of their property, had incurred expenses to repair the septic system, and were left with a home worth 90 percent of its value. The court awarded the damages required to make plaintiffs whole: "They would not be made whole unless they received *all three* of these damage items, and thus damages for loss of use did not duplicate other items." *Id.* at 273. *See also, Pugel v. Monheimer*, 83 Wn. App. 688, 691-93, 922 P.2d 1377

(1996) (“The trial court's award of damages, in limiting Pugel to this remaining loss of value while omitting his out-of-pocket repair expenses altogether, did not make him whole. He is entitled to an award that combines the two.”); *Olson v. King County*, 71 Wn.2d 279, 293, 428 P.2d 562 (1967) (“There is not ordinarily a depreciation in the value of real property over and above the cost of restoration, however, it does sometimes occur.”); *Grant v. Leith*, 67 Wn.2d 234, 237, 407 P.2d 157 (1965) (Although all of the testimony established that the itemized expenditures would accomplish full restoration of lateral support to Parcel A, nevertheless, Parcel A was shown to have a permanently depreciated value occasioned by the invasion.”); *Mayer v. Sto Industries, Inc.*, 156 Wn.2d 677, 695, 132 P.3d 115 (2006) (affirming the award of stigma damages where there was expert testimony that because in addition to the repairs, there was a permanent loss of value to the property due to the need to disclose that the home is sided with a known defective product).

Ms. Fenske, like the property owners in *Woldson*, *Brickler*, and *Colella*, could not permanently fix the problem on her own property. She had to rely upon her neighbors, the Tegmans, to provide adequate drainage across their property. She could not trespass onto their property to remediate it. If their system malfunctions again, she will have to rely on the Tegmans again to fix their drainage so her property will not flood.

The evidence of this case establishes that the Tegmans knew of the drainage problem in January 2006. Ms. Fenske filed her lawsuit in December 2007. In May 2009, the court found the Tegmans at fault for causing the flooding on the Fenske property. In August 2009, the matter was tried and the Court granted injunctive relief, in effect, forcing the Tegmans to correct the drainage problem that they had ignored for nearly four years. Under these facts, the court only awarded one level of damages for destroyed personal property and expenses for clean up and restoration costs. Loss of use and the diminished value damages are necessary to make Ms. Fenske "whole."

The property is diminished in value because it flooded for nearly four years. The trial court assumed there would be a correction of the system in the future by the Tegmans and then stated: "it's the conclusion of this Court that, in fact, the property has the same value today that it had before the storms of 2005." RP III, 89:20-90:9. There were no facts or expert opinions before the court to support its conclusion. It is irrefutable that there was no correction of the system by the Tegmans at the time of trial. Mr. Hagar testified as to the value of the Fenske home as of the date of trial. The defense offered no expert opinion whatsoever. The trial court ignored the years of flooding, the mold that developed and more importantly, that the Tegmans and their successors in interest have control

over whether the Fenske property will flood. The Tegmans have been recalcitrant and awaited a court's order before fixing their drainage. At the time of trial, there was no remediation.

Moreover, the flooding and mold must be disclosed to any potential buyer or lender. RP IV, 20:6-21:2. The trial court did acknowledge that disclosure of the problems at the property would be "legally mandated." RP III, 89:20-90:9. However, he focused on the need to disclose the "natural drainage way" rather than the flooding, mold and the control that the Tegmans can exercise over the Fenske property.¹

Mr. Hagar focused on conditions at the Fenske property as they existed at the time of trial. The Tegmans were in control of those conditions. They refused to implement remedial measures on their property. Despite this, they took the position, which the court appeared to adopt, that Mr. Hagar should have evaluated the Fenske diminution in fair market value by assuming some sort of future remediation was implemented by the Tegmans that was perfectly successful. The Tegmans argued that if any diminution damages were available, they should be the "residual" diminution damages—those remaining after the Tegmans were assumed to have restored the drainage on their property. This type of

¹ Ms. Fenske testified that she does not currently intend to sell her house which does not foreclose the availability of diminution in fair market value damages. RP III, 25:24-26:3. There is a decrease in value because of nearly four years of flooding.

testimony is speculative and pure conjecture of no probative value. *See e.g., State v. Tobin*, 161 Wn.2d 517, 526, 166 P.3d 1167 (2007).

Again, Ms. Fenske could not force the Tegmans to remediate their property. She had to take the extraordinary measure of filing a lawsuit against them. She should not be required to provide her appraiser with a hypothetical remedial plan for the Tegman property. If the Tegmans wanted the residual diminution of fair market value to be assessed post-remediation, they could have remediated their property anytime during the four years prior to trial.

In support of their argument, the Tegmans proffered cases in which Defendants² fix the problem before trial and Plaintiff's appraiser has the opportunity to evaluate the residual diminution in value of the property after restoration. CP 83-88. In effect, the Tegmans sought to benefit from their four-year delay in fixing the inadequate drainage across their property. That is, if Plaintiff's expert appraiser could not testify as to the post-remedial loss of value of the Fenske property, because the Tegman property was not remediated at the time of trial, the Defendants avoid paying loss of value damages all together. In this way, Defendants who steadfastly refuse to restore the drainage on their properties until sued and taken through trial, pay less in damages than those who go ahead and fix

² The Tegmans' position would be somewhat more understandable if Ms. Fenske was able to fix all the problems on her own land and she refused to do so before trial.

the property without being ordered to do so by a court after lengthy litigation and the completion of the trial. Such a result should not be allowed. The Tegmans here, by refusing to acknowledge a problem and refusing to restore adequate drainage, should not be able to avoid the inevitable decrease in value that resulted to Ms. Fenske's property occasioned by their inaction.

Ms. Fenske requests that the Court determine that the measure of damages available to her under the facts of this case include diminution in value of her residential property. She suffered almost four years of flooding of her home due to inadequate drainage on the adjacent Tegman property that she could not repair. The Tegmans did not repair the drainage until after the trial and only then because the court ordered them to do so and gave them an October deadline by which to comply. Ms. Fenske should be allowed to recover her diminution of value damages measured as of the time of trial in order to return her as nearly as possible to the position she would have been in had the unreasonable acts of the Tegmans not occurred. *See Thompson v. King Feed & Nutrition Service, Inc.*, 153 Wn.2d 447, 459, 105 P.3d 378 (2005), *Woldson v. Woodhead*, 159 Wn.2d 215, 149 P.3d 361 (2006).

V. CONCLUSION

Appellant Rebecca Fenske respectfully requests that the Court reverse the findings of the trial court with respect to loss of use damages, and remand her case with instructions to enter judgment for her loss of use damages in the amount of \$35,200. Ms. Fenske further requests that the Court reverse the findings of the trial court with respect to diminution in fair market value damages, and remand her case with instructions to award her diminution in value damages in the range of \$74,800 to \$110,000.

DATED this 1st day of April, 2010.

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FILED
COURT OF APPEALS DIV #1
STATE OF WASHINGTON
2010 APR 11 PM 3:13

No. 64478-5

STATE OF WASHINGTON
COURT OF APPEALS, DIVISION I

REBECCA FENSKE,

Appellant,

vs.

STEVE TEGMAN and DEYONNE TEGMAN, husband and wife, and the
marital community thereof,

Respondents.

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