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No. 65316-4

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

I. DAVID HONG, KIM HONG, and DEL RAY MOBILE
HOME PARK, L.L.C.,

Appellants,

v.

RICHARD J. and AVA M. SCHNEIDER, LLOYD R. and TINA C.
MUSSELMNA, MARTIN and JEANETTE GROGAN,
R/B HOLMAN TRUST, HYUNGIN P. MOON and JANE DOE MOON,
his wife, T. HEUNISCH and JANE DOE HEUNISCH, his wife,
ARMAN GOLCKH LLC, ALLEN G. STORAASLI and JANE DOE
STORAASLI, his wife, MICKAEL J. and KAREN L. BERG, DAVID C.
and SANDRA J. RIPPENTROP, NOTRE DAME PROPERTIES THREE,
MICHAEL A. BRICE and JANE DOE BRICE, his wife, REDONDO
BAY TRANQUILITY HOMEOWNERS ASSOCIATION, and
JOHN DOES 1-13,

Respondents,

APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

RBT's motion for summary judgment requires construing facts in favor of RBT and assumption of unproven facts: that its drainage complies with its King County submittal, that it was not required to give any attention to maintenance of its system, that the increase in water flow over the years was just an increase in surface water, that erosion was not a result of negligence or bad faith, that Del Ray would have recognized the erosion and increased water flow were a trespass by RBT though RBT did not know it, that the trespass was open, avowed, notorious, continuous for 10 years under a claim of right and was not abandoned.

II. DUTY

RBT's motion does not eliminate fact questions regarding its duties.

RBT misconstrues Price v. Seattle, 106 Wn. App. 647, 224 P.3d 1098 (2001). The court held that ownership of land alone does not establish a duty to prevent harm to others resulting from acts of nature affecting the land. The plaintiff there could not establish that any acts of the City contributed to the cause of landslides. The plaintiff had asserted that replacement of brush with grass increased the flow of water, but the plaintiff's expert admitted that the City's acts had reduced the flow. Price is neither a common enemy or surface water case, nor did it involve exceptions to the common enemy doctrine. No case cited by RBT puts the burden of proof on the downhill owner to show by "quantifiable" evidence that the natural flow has been exceeded to negate the common enemy doctrine where the defense does not present evidence as it did in Price that

there was no increase. The decision in Price was not based on the fact that the flow was not quantifiable. It was based on the fact that the flow was reduced. That Mr. Chang has not yet calculated the flow does not mean it cannot be calculated. RBT has not proven the flow is not quantifiable. The area of the 12” pipe which Mr. Restad saw running full is 113.09733 sq. inches. All that remains is to determine its rate. In Price there was expert testimony that the water flow had not been increased by any human activity. This testimony was uncontradicted. Del Ray presents evidence of a human activity causing an increase and RBT eliminates no fact issue. RBT speculates the cause could be water from the south of RBT but presents no proof. Likewise, RBT makes no effort to prove that the increase was surface water and not precipitation falling on hard surfaces: street, driveways, roofs. RBT acknowledges at CP 68 the need to maintain its drainage system and that the increase testified to by RBT witnesses would be reduced.

In Price the negligence and bad faith issues did not arise and Price did not purport to overrule Snohomish County v. Postema, 95 Wn. App. 817, 978 P.2d 1101 (1998)¹.

RBT claims that the city and county ordinances were cited for the first time on appeal and therefore should not be considered.. County Ordinance 2281 was cited at CP 280. In its opening brief Del Ray asserted not that violation of the ordinances was a separate ground of liability, but

¹. Postema cited in greater detail at p. 14.

that they were evidence of negligence. This is not a new issue. Gardner v. Seymour, 27 Wn.2d 802, 180 P.2d 564 (1947).

Del Ray did not assert that RBT negligently allowed silt and debris to encroach on Del Ray property for the first time on appeal. CP 277. RBT's motion for summary judgment was based, not on a claim that RBT had no duty, but that it was reasonable to rely on King County to perform RBT's duty and therefore it wasn't negligent. RBT argued at CP 20 "the defendants have never been informed by King County that the County's duty to maintain the RBT drainage system was transferred to the defendants." And "absent notice of the duty to maintain or manage the RBT drainage system, it was reasonable for the defendants not to do so." The argument expressed on appeal that RBT had no duty to maintain its system comes as a new issue. Communication between the County, the City, and RBT could have been discovered had the current contention been raised by the motion for summary judgment. RBT cannot now claim as a basis for summary judgment it had no duty to maintain its system. Almy v. Kvamme, 63 Wn.2d 326, 387 P.2d 372 (1963).

RBT argues that King County accepted a duty to provide maintenance but RBT cannot argue that King County had a duty not only to maintain, but also to regularly inspect without any request or notice by RBT. There is nothing of record that suggests that RBT ever requested maintenance, or that RBT had any right to expect that maintenance would be done by King County without a request. There is nothing of record giving any reason that RBT could assume any maintenance had ever been

done by King County after 1991. When RBT was informed that King County was not doing maintenance there is no evidence of any complaint to King County and RBT has made no complaint herein against King County. Instead RBT cleaned the retention tank, assured Del Ray it would reduce the flow to a trickle and allowed Del Ray to install the drain pipe on RBT property. This is not behavior consistent with an assumption that King County owed a duty to perform RBT's duties.

Where an owner of property, as here, has a non-delegable duty to maintain its drainage he can look to one with whom he contracts to indemnify him. Carlos v. 3915 East 151st Street, LLC, 837 NYS. 2d 150, 41 A.D. 3d 193 (2007). RBT did not argue at the superior court level that it had no duty to exercise reasonable care. The argument was that it had discharged the duty by relying on King County. The Restatement (SECOND) of Torts §427B imposes non-delegable duties on a land owner whose activities create a risk of trespass to others or a public nuisance. It is immaterial whether the land owner was reasonable in relying on the party to whom the work was assigned. Budagher v. Amrep Corp., 97 NM 116, 637 P.2d 547 (1981). The court said "The possessor of land is enforceable for the negligent failure of an independent contractor to put or maintain buildings and structures thereon in reasonably safe condition" Here the county was arguably in the position of an independent contractor, but if so, didn't relieve RBT of its duty if the county did not reasonably performed its work in ensuring that the water flow was reduced to a trickle. If the result is flooding waters the property owner is liable. The drainage system was built

for all the RBT owners and their association. The RBT owners are the successors-in-interest subject to the same responsibilities as owners that the original owners had. It would be absurd that the owners would be insulated from liability for the continuing damage they cause as owners simply as a result of transfer of title. No case holds that subsequent owners are relieved of the duty not to damage neighbors.

Assuming there was a period of time when King County was bound to maintain the RBT retention tank and system, the question remains whether RBT had a right to assume that the county would maintain the system without receiving a request or notice from RBT and whether RBT retained a duty to inspect the system and whether RBT acted reasonably in failing to verify that the county was providing any maintenance for approximately a 16-year period. There remains the question whether RBT was reasonable in its conduct after becoming aware that King County was not providing maintenance by taking many months to obtain the cleaning of the retention tank, in not providing rip rap and in not providing the tight line system, or even allowing Del Ray to provide a tight line system.

RBT admits at P. 19 of its brief that the plat restrictions run with the land. The plat provides that it is subject to the covenants, conditions and restrictions of record. CP 183-186. These provisions at CP 296 give complete control of all drainage facilities to RBT. RBT has the authority to direct drainage control and prevent erosion. Any nuisance to the neighborhood is prohibited. RBT at p. 19 admits the plat restrictions run with the land. RBT argues it has no duty because it does not own the

drainage system. This argument fails because there is no evidence RBT ever transferred ownership to anyone else. The most it can argue is that King County had an easement. Since RBT owned the land it owned the system on the land. RBT cites no authority to the contrary. Baker Boyer Nat. Bank v. Garver, 43 Wn. App. 673, 719 P.2d 583 (1986). RBT misconstrues Pettit v. Dwoskin, 116 Wn. App. 466, 68 P.3d 1088 (2003). It is not a case of duty imposed by a building code, the case simply held at p. 474 that “violation of a legal requirement is evidence of negligence.” RBT asserts “there is nothing in the record that establishes a duty on RBT to maintain the RBT drainage system.” This is a different position from that asserted in the trial court. RBT asserted at CP 20 “absent notice of a duty to maintain or manage the RBT drainage system, it was reasonable for the Defendants’ not to do so.” RBT seemed to acknowledge its responsibility but its’ brief at CP 20 falsely asserted that the city of Federal Way was claiming ownership of the system was transferred to RBT. At CP 50 the city simply had pointed out what always had been true: RBT owned the system. At p. 21, RBT describes its innocence of negligence. It claims it had no prior notice of a duty, though it had to be aware its property was within the city of Federal Way as of February 28, 1990, CP 14, and that King County had no more involvement, at least, as of December 22, 1992, CP 14. Whether RBT was negligent in not being aware of its duty, in failing to assure that the county carried out RBT’s duty, in failing to inquire of the city whether it would assume the duty, the result is the same. RBT failed in its duty.

RBT claims it is immune from suit because the contractor was MJ Treftz & Assoc. RBT does not disprove current ownership of the system and does not establish when its current ownership began. CP 142 and 183 do not remedy the lack of evidence, and RBT owners do not disclaim participation in the development. The court can infer their participation. British Columbia Breweries, (1918) Ltd. v. King County, 17 Wn.2d 437, 135 P.2d 870 (1943); Bengston v. Shain, 42 Wn.2d 404, 255 P.2d 892 (1953); Wright v. Safeway Stores, Inc., 7 Wn.2d 341, 346, 109 P.2d 542 (1941); Bank of Chewelah v. Carter, 165 Wn. 663, 5 P.2d 1029 (1931). Even if RBT acquired its interest after construction of the system it is liable for its failure to remedy the defects. No case distinguishes between the liability of developers and owners.

III. NEGLIGENCE AND BAD FAITH

RBT's motion does not eliminate fact questions regarding negligence and bad faith. RBT claims that it assumed King County would maintain the RBT drainage system. The basis for their assumption is unstated and unclear. CP 31, 65, 84. RBT owners do not claim any knowledge of an assumption of maintenance by King County, transfer of ownership to King County, or any notice or request to King County to maintain the drainage system. They made no inspections or inquiries to verify that King County performed maintenance until 2007. They claim some awareness that King County had, at some time, cleaned part of the system. No reason is given why RBT did not request maintenance based on its assumption King County would provide maintenance or inspect routinely

to know when that maintenance was needed or inquire whether there had been maintenance. The trier of fact could conclude these failures are negligent. RBT does not explain why the representation that it would discharge into a stream has not been complied with.

At P. 15 RBT argues that Del Ray's case authority does not establish a relevant duty to prevent dirt from flowing onto a neighbor's property because the cases do not involve surface water. This is in error. In Peterson v. King County, 41 Wn.2d 907, 908, 252 P.2d 797 (1953) the allegation was, "the County had actual notice that the drainage system was inadequate and that surface water was overflowing and soaking the roadway and hillside." In Kuhr v. City of Seattle, 15 Wn.2d 501, 131 P.2d 168 (1942) the court held the City liable for allowing its fill to encroach on its neighbor's property. The court said, "when Eastlake Avenue was improved the City made a fill extending into Shelby Street for about 20 feet. A drain was laid through this fill to carry off surface water that accumulated in the depression in the pavement on Eastlake." In both cases surface water was involved and provided no defense.

No case holds that a right to discharge surface water includes a right to discharge mud, silt or debris.

RBT seeks to distinguish Solastic Products Co. v. City of Seattle, 144 Wash. 691, 258 P.2d 830 (1927) and Curtis v. Puget Sound Bridge and Dredging Co., 133 Wash. 323, 233 P. 936 (1925) by calling them "sluicing cases." They involve a variety of reasons for the flow of mud, silt and water. They are not surface water cases involving the common enemy

doctrine or its exceptions. A property owner is simply liable for his negligent acts causing damage to his neighbor whether or not surface water is involved. Here RBT's system was an unintended sluicing operation eroding its own property.

RBT argues that Del Ray's cases cited at pp. 9-11 of Del Ray's opening brief are unrelated to the facts of this case. Summarizing the thrust of Del Ray's argument:

1. RBT failed to connect to a stream as it said it would;
2. RBT negligently discharged water, mud, debris and silt onto Del Ray;
3. Del Ray was deprived of the full use of its land;
4. The negligent discharge entails liability;
5. The negligence included gathering water from a wide area, collecting it in a catch basin, transferring it to a retention tank, and casting it in a body onto Del Ray property, and increasing the quantity of the flow failing to clean the tank;
6. There is no evidence of any source for the increase except RBT's failure of maintenance;
7. Failing to control erosion; and
8. RBT is liable as the property owner, whether or not it designed or built the system.

The cases cited clearly relate to the facts set forth in the Statement of Facts.

In Currens v. Sleek, 138 Wn.2d 858, 862, 983 P.2d 626 (1999) the court said that the trier of fact could consider failure to comply with an environmental checklist was bad faith. Here Del Ray proves numerous acts which may evidence bad faith:

RBT cannot eliminate material fact questions. Here the trier of fact could find that the flow of water to Del Ray from RBT has increased over the years, and the flow of mud, silt and debris now accompanies that increase, that the design of the RBT system is founded on an erroneous assumption that the flow will be disposed of harmlessly into a stream, that RBT unreasonably and negligently failed to take reasonable actions to prevent harm that was caused to Del Ray, that RBT should have either cleaned the retention tank or requested King County to do it. RBT should have provided an extended outfall pipe to reduce erosion. RBT should have provided additional rip rap rock to protect the unstable banks of RBT's property.

RBT excuses the failure to protect the slope from erosion because one of its property owners refused the recommended rip rap. That property owner is one of the Respondents. The covenants, conditions and restrictions give the RBT Association plenary authority over construction and especially drainage. CP 293-297. The history of slide danger to the RBT system justified RBT in demanding permission to tight line of any property owner in the plat. There is no evidence that the covenants, conditions and restrictions were invoked by RBT. The trier of fact could question the good

faith of RBT in delaying from December 2006 to September 2007 cleaning the retention tank. CP 33 and CP 70-76.

RBT's criticism at p. 24 of Mr. Chang's declaration is not supported by the cited authority: Davies v. Holy Family Hospital, 144 Wn. App. 483, 496, 183 P.3d 283 (2008). The failure of the expert declaration in Davies was not in the use of the word "likely,"² it is that the expert did not state that what was "likely" was the harm claimed by the plaintiff. The word "likely" is as strong a statement as "more likely than not."³ Anything which is purely and simply "likely" is also "more likely than not." Here Mr. Chang recited several acts of negligence and that they caused damage, but the trier of fact without expert opinion can easily understand the testimony of Restad, CP 266-CP 269, contrasting the condition before remedial measures with the results after remediation, and find that RBT was negligent in not adopting these measures and not either cleaning the system itself or requiring that the county clean it and in not providing anti-erosion measures.

The trier of fact could find from the testimony of Hong, CP 270-273 that RBT was not in good faith, and that over the years the flow of water had increased and caused the flow of debris, and that if RBT had any excuse for causing this harm it should provide the evidence.

² "1. Apparently true to the facts; credible; probable..." Websters New World College Dictionary, Fourth Edition, Wiley Publishing, Inc., Cleveland, Ohio 2005.

³. See Appendix.

The observations of Restad and Hong and their opinions based on their observations are admissible. In State v. King, 135 Wn. App. 662, 1145 P.3d 1224 (2006) the court said, “the testimony of eyewitnesses based on their own personal observations is admissible under ER 701. A lay witness can testify to opinions or inferences that are ‘rationally based on the perception of the witness, (b) helpful to clear understanding of the witnesses testimony or the determination of a fact in issue, and (c) not based on scientific, technical or other specialized knowledge.’” Eyewitnesses have been allowed to testify to speed of vehicles. Clevenger v. Fonseca, 55 Wn.2d 25, 345 P.2d 1089 (1959). Mr. Restad’s testimony that 90% of the water flow emanated from the pipe is no more objectionable than eyewitness testimony of speed. Dr. Hong’s testimony that the water flow increased over the years or that it came down in a body was observable by Dr. Hong with his own eyes. That the water and debris were coming down slope from RBT was observable and, in any event, they could not have come from any other place.

IV. PROXIMATE CAUSE

RBT’s motion does not eliminate fact questions regarding proximate cause. The trier of fact can find an increase of flow in Chang, Hong, and Restad’s testimony. It is precisely Del Ray’s position that the tank cleaning, installation of pipe, rip rap rock that should have been provided many years previously, and the resulting reduction of flow of mud, silt, debris and water are proof of proximate cause.

The reasonable inference from the RBT letter of May 21, 2007, CP 68, is that RBT admits that cleaning the retention tank would allow the out flow to “trickle out slowly” and that Del Ray would not be harmed by the “pronounced surges” that previously had occurred. The trier of facts could find that the failure to clean was the proximate cause of the pronounced surges and the failures to rip rap and tight line produced the erosion.

V. COMMON ENEMY DOCTRINE

Del Ray is not required to go forward with any proof of its case until RBT’s evidence demonstrates there is no material issue of fact. Byrd v. System Transport, Inc., 124 Wn. App. 196, 99 P.3d 394 (2004), McMann v. Benton County, Angeles Park Communities, Ltd., 88 Wn. App. 737, 946 P.2d 1183 (1997).

RBT has not eliminated fact questions regarding the common enemy doctrine. At p. 8 RBT asserts erroneously “this case is all about surface water.” Del Ray’s evidence establishes that mud, silt and debris are also deposited on its property. CP 266-273.

There is a question of fact whether the drainage constitutes surface water. Surface water is defined as “...those vagrant or diffused waters produced by rain and melting snow or springs.” King County v. Boeing, 62 Wn.2d 545, 550, 384 P.2d 122 (1983). Here the plat map shows that the hard surface drainage is diverted into a catch basin then into a retention tank. Street, driveway, and roof drainage is not surface water. Until RBT establishes that the water flowing from the retention tank is surface water,

and that it does not exceed the natural flow RBT has not proved its defense of common enemy doctrine.

RBT asserts that no authority is cited by Del Ray for the proposition that the common enemy doctrine only applies to surface water and therefore the argument should not be considered. At P.8 RBT acknowledges that the common enemy doctrine applies to surface water.

Del Ray cited Snohomish County v. Postema, 95 Wn. App. 817, 978 P.2d 1101 (1998) where the court said at P. 821 “only if the waters are determined to be ‘surface water’ are the Postemas entitled to seek the shield of the common enemy doctrine. The determination of what classification of water is involved is a question for the trier of fact and should not be taken from ‘the jury’. There are disputed issues of material fact, and summary judgment should not have been granted.” The court held that water flowing in a natural drainway is not surface water and is not covered by the common enemy doctrine. At P. 822 the court also said “although a question for the trier of fact there appears to be an abundance of evidence that the Postemas trespassed on the Smiths’ property by discharging a quantity of water from their property which was filled with sediment and silt.” The court held that if the quantity was increased or the manner of discharge was changed there could be liability even if the water was surface water.

RBT relies on an out of context citation of Currens v. Sleek, 138 Wn.2d 858, 862, 983 P.2d 626 (1999). The court said the flow of surface water may be hastened or increased so long as the water is not diverted from its natural flow. But the court made it clear it was referring to “diffuse

surface water” and said an owner may not create an “unnatural conduit.” The trier of fact could find the RBT system as a whole to be an unnatural conduit. CP 183, CP 250, CP 272, 273. Currens was decided for the plaintiff based on evidence of bad faith and lack of due care comparable to the case at bar

RBT claims that the summary judgment here is supported by Laurelon Terrace v. City of Seattle, 40 Wn.2d 883, 246 P.2d 113 (1952) where a jury verdict was appealed from. Evidence at trial established that the City was not negligent. There was no question that all the water was surface water in Laurelon. The Laurelon opinion was issued before the existence of the exceptions in Washington law to the common enemy doctrine and is no longer dispositive on its facts.

Here Dr. Hong and Mr. Restad testified to an increase (CP 266-273), and Mr. Chang testified that the water was gathered from a broad area, CP 258 and 158, that the representation to King County was that the water would flow harmlessly into a stream, which it clearly does not. RBT introduced into evidence the following conclusion of Mr. Chang. “The system as designed and installed also effectively conveying an increased amount of runoff to the subject property via the eastern storm drain outfall, relative to the condition that existed before the RBT plat was developed.” CP 158

RBT seeks to put the burden on Del Ray to explain why the water flow from RBT property increased over the years. Since the water emanated from RBT property it would be natural for RBT to explain if there

were some non-negligent reasons why the water flow increased over the years. The failure to provide an explanation allows an inference that there is none. British Columbia Breweries, (1918) Ltd. v. King County, 17 Wn.2d 437, 135 P.2d 870 (1943); Bengston v. Shain, 42 Wn.2d 404, 255 P.2d 892 (1953); Wright v. Safeway Stores, Inc., 7 Wn.2d 341, 346, 109 P.2d 542 (1941); Bank of Chewelah v. Carter, 165 Wn. 663, 5 P.2d 1029 (1931). The only explanation in the record is RBT's explanation that after cleaning the retention tanks the surging flow would be reduced to a harmless trickle. CP 68.

RBT misconstrues Harbison v. City of Hillsboro, 103 O. 257, 204 P. 613 (1922). The case was not decided as RBT asserts on the addition of flushing water to the natural flow. It was decided on the breach by allowing sewer flow mingled with surface water to clog drainage channels. The court recognized the common enemy rule, but held that did not allow the City to discharge sewer or refuse clogging the downhill owner's drains without liability.

RBT argues that it is Del Ray's burden under the common enemy rule to prove quantifiable increase in water flow. In Currens v. Sleek, 138 Wn.2d 858, 983 P.2d 626 (1999); Borden v. City of Olympia, 113 Wn. App. 359, 53 P.3d 1020 (2002); and Colwell v. Etzell, 119 Wn. App. 432, 81 P.3d 895 (2003) the court ignored Laurelon Terrace v. City of Seattle, 40 Wn.2d 883, 246 P.2d 1113 (1992) and they did not require quantification. The exceptions to the common enemy doctrine do not require it. Laurelon is inapplicable. In any event, the case was based on a conclusion that there

was no evidence of negligence. The “quantifiable” comment was dicta. State ex rel. Lemon v. Langlie, 45 Wn.2d 82, 89, 273 P.2d 464 (1954).

At p. 11 RBT erroneously categorizes the right to hasten water flow as an exception to an exception to the common enemy doctrine. It is not an exception; it is part of the common enemy doctrine.

VI. PRESCRIPTIVE EASEMENT

RBT’s motion does not eliminate fact questions on its prescriptive easement claim. RBT argues that previously existing landslide risk and hazardous condition of the slope commenced the running of the period for a prescriptive easement. However, there is no evidence that the risk actually contributed to a landslide for which Del Ray makes a claim. The risk of a landslide does not commence the running of a period for a continuing trespass resulting from negligent deposit of water, mud, silt and debris. Del Ray’s knowledge of the existence of the RBT drainage system is not knowledge of a continuing trespass. Del Ray’s complaint is unrelated to pre-existing natural conditions set forth by Mr. Chang. CP 158, 159. Mr. Chang pointed out the previous landslide history involves an area to the west. CP 258.

No one testified or opined that the trespass was continuous. RBT at p. 35 sets forth facts which it argues support an inference of repeated trespass or concern. However, the permissible inferences are to be construed in favor of the non-moving party, not the moving party.

At p. 36 RBT argues that arguments not made at the superior court level cannot be raised on appeal. Almy v. Kvamme, 63 Wn.2d 326, 387

P.2d 372 (1963) refers to a claim not raised below, not argument. The argument at p. 36 of Del Ray's brief which RBT claims was not raised below was set forth at CP 324. The argument is inherent in the definition of a prescriptive easement. Del Ray argued below as it does here the facts do not satisfy the definition of a prescriptive easement set forth in Pederson v. Washington State Department of Transportation, 43 Wn. App. 413, 17 P.2d 773 (1986).

RBT witnesses claim they assumed the county should maintain the drainage system. CP 31, 65, 84. RBT claims in its brief that the mud flow could have come from uphill of RBT. P. 31. These assertions by RBT supply justification to deny that RBT's trespasses were open, avowed, notorious and under a claim of right. Del Ray had no more reason to conclude that RBT was committing a trespass than RBT did. RBT is asking the court to impose on a property owner a duty to determine the inner workings of its neighbor's drainage system at his peril. He must hire an engineer and bring suit and still face a claim of a frivolous lawsuit. CP 134-168.

At p. 40, RBT argues that any flow of water exceeding the amount permitted by the common enemy doctrine commences the running of the 10 year period required for a prescriptive easement. However, a prescriptive easement require more than simply a proof of a trespass. Pederson v. Washington State Department of Transportation, 43 Wn. App. 413, 17 P.2d 773 (1986) set forth at p. 33 of RBT's brief.

RBT equates the long existence of its system with an open, avowed and notorious trespass under a claim of right. It buttresses the claim with references to previous landslide events. Such events are not continuous, and the existence of a system is not a trespass without more. Negligence is not a claim of right. RBT claims it was not aware that it had a duty to clean its system, and, if true, this is inconsistent with a claim of right. Construction of a structure on another's property or routine crossing or use of another's property where physical presence on property is observable provide the kind of notice that RBT's breaches do not. The trier of fact can decline to find the facts necessary for a prescriptive easement.

It is too much to demand of Del Ray, the property owner, that it know that a flow of water exceeds the natural flow. Del Ray had limited opportunity to observe the flow entering RBT property from the south, no opportunity at all to observe the property south of RBT, or the condition of RBT's retention tank. Furthermore Del Ray could not know if RBT or King County intentionally chose not to clean the retention tank. The trespass is not like that of people walking across property or structures built across property lines. There must be clear notice of a trespass.

In Kunkel v. Fisher, 106 Wn. App. 509, 23 P.3d 1128 (2001), the court said, "if the use is initially permissive, it may ripen into a prescriptive easement only if the user makes a distinct, positive assertion of a right adverse to the property owner." Here the initial use, though not under a specific grant of permission, was not apparently a trespass, and so permission was not necessary. Yet the character of the use was not overtly

adverse, and there was no claim of a right until the suit was filed. The court also held that prescriptive easements are disfavored. In Rognrust v. Seto, 2 Wn. App. 215, 416 P.2d 204 (1970) the court said, “the statute of limitations, although not an unconscionable defense is not such a meritorious defense that either the law or the facts should be strained in aid of it.” The court should similarly not strain the law or the facts in aid of a prescriptive easement which is disfavored for the good reasons cited in Kunkel.

RBT’s flow of mud, silt and debris is a public nuisance in that it affects the entire community. RCW 7.48.130. Womack v. VonRardon, 133 Wn. App. 254, 260, 135 P.3d 542 (2006). The ordinances are evidence that the flow of mud, silt and debris is not merely a private nuisance but violates public policy against erosion, water pollution and landslides. Puget Sound’s location in proximity downhill is shown at CP 254. RBT’s silt, mud and debris will enter Puget Sound if the downstream property owners do not remedy RBT’s fault.

At p. 37 RBT misconstrues Del Ray’s argument. RBT asserts that Del Ray claims RBT assumed a duty by its letter of May 21, 2007. CP 68. Actually Del Ray’s argument was that the letter was an admission that RBT could reduce the flow to a trickle, an admission that a flow exceeding a trickle would be a violation of its duty, and an acknowledgement that it was abandoning any claim of a prescriptive right to discharge more than a trickle. Appellants’ Brief p. 20, CP 68. At p. 34 of its brief, RBT confuses an open, avowed and notorious existence of its drainage system with a

continuing trespass resulting from a mismanagement of its system. There is no evidence that Del Ray began suffering from a continuing trespass from any date more than 10 years before commencement of this action. Though there may have been some incidents there is no evidence of a continuing trespass for 10 years.

VII. ABANDONMENT

At p. 41 RBT denies that the permission to install the pipe in the ravine, the cleaning of the retention tank and the promise to reduce the flow to a trickle constitutes an abandonment of the prescriptive easement. However, interpreting the facts in the light most favorable to Del Ray, the trier of fact could find that these acts are sufficient as in Barnhart v. Gold Run Inc., 68 Wn. App. 417, 843 P.2d 545 (1993) or Heg v. Aldredge, 157 Wn.2d 154, 137 P.3d (2006).

VIII. INJUNCTION

A trial court's decision to grant injunctive relief is a matter of discretion and will be upheld unless it is manifestly unreasonable. Lenhoff v. Birch Bay Real Estate, Inc., 22 Wn. App. 70, 587 P.2d 1087 (1978). Here the existing pipe is a part of the tight line system sought by Del Ray, and RBT threatens to remove it. CP 5-8. RBT has promised to reduce the flow during storms to just a trickle. CP 68.

At p. 10 RBT cites Hedlund v. White, 67 Wn. App. 409, 36 P.2d 250 (1992) where the court found that a trespass had occurred, but occasioned no damage and that an injunction therefore was not warranted.

Hedlund is not on point because here there is substantial evidence of damage set forth by Dr. Hong and Mr. Restad.

At p. 44 RBT defines the injunctive relief which it claims is inappropriate. Del Ray has sought tight lining of the retention tank outfall to Del Ray's drainage system. There is no reason why RBT cannot be ordered to apply to the city of Federal Way for a permit. The Court also might order RBT to continue maintenance of the existing pipe and/or continue annual inspections of the system and/or cleaning. It is unlikely that the trial court or the city of Federal Way would find any public benefit in removing Del Ray's pipe thereby increasing the erosion and deposit of silt, dirt and debris into Del Ray's system, and ultimately depositing it into the nearby Puget Sound. CP 254.

IX. ATTORNEY FEES

Please refer to the introduction. Del Ray has responded on the issues though RBT's motion failed to make a prima facie case showing that eliminates the material issues of fact as is necessary for RBT to prevail.

RBT is correct in asserting that the basis for the summary judgment motion below was the claim that the increased water flow was not quantifiable. This was pure dicta in Price v. City of Seattle, 106 Wn. App., 647 at 657. One could conclude that the motion for summary judgment was unsupported and frivolous, not the response.

X. CONCLUSION

Every issue relied on by RBT raises fact questions RBT does not resolve. Del Ray is not required to respond where RBT has not reached the

threshold of proof required by Schaaf v. Highfield, 127 Wn.2d 17, 21 846 P.2d 665 (1995) cited by RBT at p.7. The summary judgment should be vacated and the cases remanded for trial.

DATED this 21 day of October, 2010.

THE FUNK LAW FIRM, P.S.



J. Stephen Funk, WSBA #1850
Attorney for Plaintiffs

Appendix

APPENDIX

RCW 7.48.130

Public nuisance defined.

A public nuisance is one which affects equally the rights of an entire community or neighborhood, although the extent of the damage may be unequal.

[Code 1881 § 1236; 1875 p 79 § 2; RRS § 9912.]

APPENDIX

Restatement (SECOND) of Torts

§ 427 B. Work Likely to Involve Trespass or Nuisance

One who employs an independent contractor to do work which the employer knows or has reason to know to be likely to involve a trespass upon the land of another or the creation of a public or private nuisance, is subject to liability for harm resulting to others from such trespass or nuisance.

No. 65316-4

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

I. DAVID HONG, KIM HONG, and DEL RAY MOBILE
HOME PARK, L.L.C.,

Appellants,

v.

RICHARD J. and AVA M. SCHNEIDER, LLOYD R. and TINA C.
MUSSELMNA, MARTIN and JEANETTE GROGAN,
R/B HOLMAN TRUST, HYUNGIN P. MOON and JANE DOE MOON,
his wife, T. HEUNISCH and JANE DOE HEUNISCH, his wife,
ARMAN GOLCKH LLC, ALLEN G. STORAASLI and JANE DOE
STORAASLI, his wife, MICKAEL J. and KAREN L. BERG, DAVID C.
and SANDRA J. RIPPENTROP, NOTRE DAME PROPERTIES THREE,
MICHAEL A. BRICE and JANE DOE BRICE, his wife, REDONDO
BAY TRANQUILITY HOMEOWNERS ASSOCIATION, and
JOHN DOES 1-13,

Respondents,

CERTIFICATE OF SERVICE

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I certify under penalty of perjury under the laws of the State of Washington that I, Leslie A. Listy, Legal Assistant to J. Stephen Funk, caused to be delivered via hand delivery the *Appellants' Reply Brief* and *Certificate of Service* to the following addressees:

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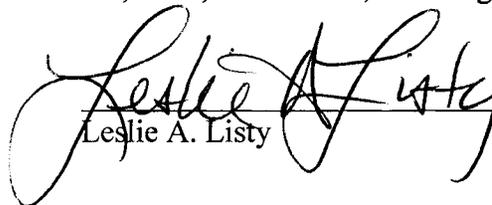
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STATE OF WASHINGTON
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DATED this 21st day of October, 2010, at Bellevue, Washington.


Leslie A. Listy