

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' BRIEF

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I. ASSIGNMENT OF ERROR

1. The trial court erred by entering the order for summary judgment dated April 2, 2010.
2. The trial court erred by entering the order denying reconsideration dated April 20, 2010.

II. ISSUES PRESENTED

- A. Was there a material issue of fact that Respondents were negligent?
- B. Was there a material issue of fact that the Respondents discharged mud, silt, debris and excess water onto Appellants' property?
- C. Was there a material issue of fact that the excess water, silt, mud and debris discharged onto Appellants' property was proximately caused by negligence of Respondents?
- D. Was there a material issue of fact that the water, silt, mud and debris discharged onto Appellants' property was permitted under the common enemy doctrine?
- E. Was there a material issue of fact that the discharge of water, silt, mud and debris was open, avowed, notorious, under a claim of right, adverse and continuous for a period of ten years?
- F. Was there a material issue of fact that Respondents engaged in conduct consistent with an intent to abandon a prescriptive easement?

G. Was there a material issue of fact whether Appellants were entitled to equitable relief?

H. Where there are unresolved material issues of fact, must a summary judgment be reversed?

III. STATEMENT OF FACTS

The Appellants David Hong, Kim Hong and Del Ray Mobile Homes Park LLC (collectively “Del Ray”) own a mobile home park adjacent to and north of the Redondo Beach Tranquility Plat owned by the Respondents (collectively “RBT”). CP 139-140. When Del Ray purchased their property in 1986 there was no apparent silt, debris or drainage problem. CP 271. The eastern part of the RBT property is drained through a retention tank and a 12 inch pipe into a ravine uphill and south of Del Ray. CP 142. The purpose of the retention tank is to retain water temporarily during downpours so as not to overwhelm the drainage systems of adjoining properties in accordance with King County ordinance 2381 adopted January 1, 1975. CP 305-306. Water entering the RBT drainage system was gathered from a wide area and channeled to the retention tank. CP 250. RBT deposited the water from the tank by a 12” pipe into a ravine casting it in a body onto the Del Ray property. CP 272. The RBT drainage system plan had been designed to discharge into a stream. There is no stream on the Del Ray property and no stream into which the RBT system could have fed. CP 258. Engineer William Chang attested that the design, based on a stream that did not exist, is negligence.

CP 258. He testified that retention tanks cannot fulfill their function if they are not cleaned and that they should be cleaned yearly, and that the failure to clean them is negligence. CP 159. RBT property is in the city of Federal Way. The Federal Way Revised Code 19.165.040 requires that culverts be kept free of silt and debris. CP 236. A problem with the silt, dirt and debris flowing from RBT has developed since Del Ray has been owned by the Hongs requiring cleanup of the Del Ray property. CP 272, 267. The RBT system effectively increased the runoff onto Del Ray property. CP 158.

Both parties rely on the opinion of engineer William Chang. CP 134-168. There has been a slide history at the RBT property. CP 140, 143. However, that history is related to RBT property west of the area at issue in this case. CP 258. In 1987, the "Golder Report" (CP 108) established that there was no evidence of erosion north of the retention tank. A slide in the area west of the subject problem area led to a lawsuit in 1988. CP 215-221. In 1990 and 1991, in accordance with its 1984 agreement, CP 188, King County inspected and cleaned the retention tank and the road catch basin, CP 192-196. In 1991, Golder investigated and reported the slide conditions to the west, but the retention tank was not mentioned as a contributing factor. CP 54. On April 27, 1994, Dr. Hong in a letter to King County referred to downspout drainage and silt from the westerly area and requested that street drainage be tight lined, CP 119. There is no record of any problem thereafter until years later.

Beginning in December 2005, Del Ray began investigating the responsibility for drainage issues relating to the retention tank. CP 247. On December 15, 2006, Del Ray requested of RBT tight lining from the retention tank to the Del Ray drainage. CP 33. In December 2006, RBT began to investigate cleaning its drainage facilities. CP 96. On February 1, 2007, RBT was still investigating. CP 98. On February 9, 2007, RBT met with the city of Federal Way and was advised of the necessity to rip-rap the slope north of the retention tank, and was also advised that the retention tank needed cleaning. CP 100. On May 21, 2007, RBT wrote to Del Ray rejecting the request to tight line, and indicating that rip-rap would not be provided. RBT claimed it could not obtain access for this maintenance. CP 68. RBT's letter was followed by Del Ray building a pipe and funnel it installed with permission from an RBT owner, Mr. Golckh, at a cost of \$13,164. CP 272-273. RBT had claimed Golckh wouldn't permit tight lining and that RBT had no easement. That is belied by the owners' agreement. CP 295-296. RBT stated that the cleaning of the retention tank would prevent "pronounced surges," and would allow the water to "trickle out slowly." CP 68. This was an admission that RBT could eliminate any harmful flow and a promise that it would. From August 14 to September 18, 2007, RBT had the retention tank cleaned and inspected. CP 70-76.

Following the cleaning by RBT and provision of out fall pipe and funnel by Del Ray, the flow of mud, debris, silt and water, which previously had been observed, was found to be reduced. CP 268-269.

There is no evidence in the record of any increase in water flow to RBT property over any period of time from the uphill and south of RBT. There is no denial of Dr. Hong's assertion at CP 272 that water, mud, debris and silt flow increased over the years. There is no evidence of mud or silt flow coming onto RBT's property from the uphill property to the south. There is no denial that RBT had cast the water in a body onto Del Ray as stated by Dr. Hong. CP 272. Three RBT owners claim that prior to December 15, 2006, they were unaware of the city of Federal Way telling RBT of its duty to maintain its drain facilities. CP 31, 65, 84. They do not deny they had the duty and were aware of the duty. They claimed they had knowledge that King County had done some cleaning and these three individuals claim they assumed it was continuing. CP 31, 65, 84. They do not claim to have paid for continuous maintenance.

In fact, RBT did have the duty to maintain the system so that it would function properly and not transmit mud. CP 295, 296. King County Ordinance 2281, dated January 13, 1975, requires adequate energy dissipaters and retention facilities. CP 303, 304.

At CP 183 is the plat dedication establishing that RBT owned the drainage system.

There is no evidence in the record of any request for access to the RBT drainage facilities by King County or the city of Federal Way. On March 28, 1984 (CP 188) King County wrote to Gary J. and Terrie L. Silvers saying that King County accepted the maintenance of RBT facilities and acknowledged payment for two years. There is no evidence

RBT paid for more than two years or that maintenance was ever requested by RBT, or that access was ever given for maintenance except the two years of 1990 and 1991, or that any of the RBT parties were ever aware of the acceptance letter. In 1992, King County conveyed to Federal Way the facilities within the city it had been required to maintain. CP 198-209. The RBT facilities were not among the facilities transferred, raising an inference that King County had not deemed itself responsible for maintaining them at that time. RBT does not contend that it was not responsible for maintaining the facilities. That question is not an issue on the motion for summary judgment, and was not investigated or briefed by Del Ray.

Del Ray brought suit alleging that RBT was discharging water onto Del Ray property unnaturally and excessively along with silt and debris by a concealed pipe. Del Ray alleged negligence and interference with Del Ray's use of its property, property damage and injury to the sensibilities of Del Ray's tenants. Del Ray requested damages and an injunction barring continuance of the nuisance. CP 250-252.

RBT moved for summary judgment asserting as defenses the common enemy doctrine, good faith and due care, lack of proximate cause, prescriptive easement and that an injunction would be inequitable, violating the public interest, and would be impractical to enforce. CP 11-29. The motion was granted on April 2, 2010. CP 317-318. Del Ray moved for reconsideration. CP 319-326. The motion was denied April 20, 2010. CP 334-335.

IV. STANDARD OF REVIEW

On an Appeal from Summary Judgment the Appellate Court engages in the same inquiry as the Trial Court, construing the facts and reasonable inferences therefrom in the manner most favorable to the non-moving party to ascertain whether there is a genuine issue of material fact. Sellsted v. Wa. Mu Sav. Bank, 69 Wn. App. 852, 857, 851 P.2d 716 (1993). Review is *de novo*. Korslund v. Dyacorp, Tri-Cities Serves, Inc., 156 Wa.2d 168, 177, 125 P.3d 49 (2005), Summary Judgment is only proper if reasonable persons could reach but one conclusion. Korslund, 156 Wn.2d at 177, 125 P.3d. The conclusion must be based on the pleadings, "...depositions, answers to interrogatories and admissions on file, together with the affidavits if any." Bainbridge Citizens United v. Washington State Department of Natural Resources, 147 Wn. App. 365, 198 P.3d 1033 (2008).

A moving defendant must show at least that a non-moving plaintiff cannot prove an element of his case to force the plaintiff to go forward to establish a material issue of fact. Masunaga v. Gapasin, 52 Wn. App., 61, 757 P.2d 550 (1988).

V. ARGUMENT

A. EVIDENCE

The testimony of Dr. Hong, and Mr. Restad was not objected to and was all admissible either as factual observations or opinion based on observation. ER 701. The opinions of Engineer William Chang are useful

to the trier of fact, were not objected to and are admissible. ER 702. The opinions presumably were based on adequate support. ER 703. That Mr. Chang may have testified to the ultimate issue of negligence does not affect admissibility. ER 704. Both Del Ray and RBT rely on Chang's opinions.

In order to object to a declaration on a motion for summary judgment there must be an objection registered specifying the deficiency, or a motion to strike. Smith v. Showalter, 47 Wn. App. 245, 248, 734 P.2d 928 (1987).

The court gives no deference to the trial court in reviewing mixed questions of law and fact on summary judgment. Yousoufian v. Office of Sims, 165 Wn.2d 439, 463, 200 P.2d 232 (2009). Proximate cause is a mixed question of law and fact to be resolved by the trier of fact. Rasmussen v. Bendotti, 107 Wn. App. 947, 955 29 P.3d (2001).

An inference may be drawn against a party when the party fails to produce evidence under his control that would be natural for him to produce. His failure to present it without satisfactory explanation gives rise to an inference that the evidence would be unfavorable to him. 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); and Bank of Chewelah v. Carter, 165 Wn. 663, 5 P.2d 1029 (1931).

Therefore the Court in this case must conclude based on RBT's failure to provide documents or testimony to the contrary, that the RBT

parties participated in the design and construction of the drainage facilities. Their counsel's argument to the contrary is unsupported. The Court must also find that because of lack of evidence to the contrary that over the years while the flow of water was increasing to Del Ray (CP 271, 272) that there was no increase in water flow from property to the south of RBT, so any increase was generated by RBT (CP 158) and that any silt flow and debris received by Del Ray (CP 267, 272) did not come from south of RBT and so was caused by RBT, and that the RBT parties were unaware of the County letter accepting maintenance and were not affected by it, that the RBT parties never asked the County to maintain the drainage facilities, and that the only maintenance of the drainage facilities until 2007 was that conducted by King County in 1990 and 1991. CP 192-196.

B. NEGLIGENCE

Del Ray alleged that RBT negligently discharged water, debris, and silt onto Del Ray property. A property owner is liable to his neighbor if his use of land causes his dirt to flow onto the neighbor's land as a consequence of negligence. Any use of land depriving the adjoining property owner of the use of his land results in liability, whether by negligence, trespass, nuisance, or constitutional violation. If the acts result from a failure of maintenance, the owner is liable. Peterson v. King County, 41 Wn.2d 907, 252 P.2d 797 (1953) and 45 Wn.2d 860, 298 P.2d 74 (1954). CP 24.

The adjoining property owner is liable for negligently allowing its property to slide onto the neighbor's property. Kuhr v. Seattle, 15 Wn.2d 501, 131 P.2d 168 (1942). To the same effect is Peterson v. King County, 41 Wn.2d 907, 252 P.2d 797 (1953). In Kuhr, the court held that it does not matter whether the legal theory supporting the claim is called trespass, nuisance or negligence if the facts are adapted to either theory.

A property owner may not cast surface water in a body on his neighbor's land or in a different matter. Peters v. Lewis, 28 Wn. 366, 68 P. 869 (1902); Snohomish County v. Postema, 95 Wn. App. 817, 978 P.2d 1101 (1998). Here the water is gathered from a wide area into a catch basin, then channeled to the retention tank (CP 176, CP 250), cast in a body onto Del Ray property and increasing over the years. CP 272. The system was designed to discharge into a non-existent stream. CP 258. There is no evidence that the increasing flow originated above RBT. RBT accepts a responsibility to transfer no more than a trickle to Del Ray. CP 158, CP 68.

No Washington case has been found holding that where a lack of due care was initiated by a prior owner, it becomes permanent and free of liability by the subsequent owner who continues to maintain the same circumstance.

In Solastic Products Co. v. City of Seattle, 144 Wash. 691, 258 P.2d 830 (1927), the court held that a sluicing operation which resulted in the flow of water and mud onto the plaintiff's property was a ground for liability. To the same effect is Curtis v. Puget Sound Bridge and Dredging

Co., 133 Wash. 323, 233 P. 936 (1925) and Wolten Grocery Co. v. Puget Sound Bridge and Dredging Co., 165 Wash. 27, 4 P.2d 863 (1931).

In Borden v. City of Olympia, 113 Wn. App. 359, 53 P.3d 1020 (2002) the court found the City liable, though it was neither the contractor nor the owner of the project. The City provided material assistance to the developer. The court pointed out that an uphill land owner cannot lawfully collect water in an artificial channel and then discharge it upon adjoining lands in quantities greater than or in a manner different from the natural flow thereof.

In Riblet v. The Spokane-Portland Cement Company, 45 Wn.2d 346, 274 P.2d 574 (1954) the court awarded damages for nuisance. The nuisance had been long existing, and the award in Riblet was not for the creation of the nuisance, but for the continued maintenance of the nuisance.

C. DUTIES

Violation of a statute may be negligence. If injury results from the negligence there is liability. Gardner v. Seymour, 27 Wn.2d 802, 180 P.2d 564 (1947) at 813.

The King County Code § 9.12.025 which prohibits any connection allowing silt, sediment and gravel to be discharged is for the purpose of the King County surface water management program to promote public health, safety and welfare to “reduce flooding, erosion and sedimentation.”

King County Code § 9.08.040.

King County Ordinance 2281 at CP 226-229 and the Federal Way Revised Code 19.165.040 at CP 236 and 244 require careful drainage management and prohibit the deposit of silt in culverts.

The plat itself provided constructive notice to any property owner in RBT of the duty to maintain the drainage system. RCW 65.04.050. Hollis v. Garwall, 137 Wn.2d, 683 P.2d 836 (1999).

RBT had a non-delegable duty to maintain their drainage facility so that silt did not deposit on Del Ray property.. The duty arises both from the duty to comply with county ordinance, plat requirements, city ordinances, and because the type of harm was a peculiar risk arising from operating the Respondents' drainage facility. SEA Farms, Inc. v. Foster and Marshall Realty, 42 Wn. App. 308, 711 P.2d, 1049 (1985). SEA Farms, Inc. was modified eliminating negligence per se for violation of a statutory safeguard. The imposition of negligence per se is a matter of statutory interpretation. Whether violation is negligence per se in the case at bar or merely evidence of negligence is immaterial. Either interpretation bars summary judgment for RBT. Petit v. Dwoskin, 116 Wn. App. 466, 68 P.3d 1088 (2003) at 472.

D. PROXIMATE CAUSE

Where it is shown that a drainage facility is not adequately maintained and there is actual or constructive notice to the one having the duty it is for the trier of fact to determine if the harm would have been suffered without the negligence. It cannot be determined on a motion for

summary judgment. Pruitt v. Douglas County, 116 Wn. App. 547, 66 P.3d 1111 (2003).

The Declaration of Restad established that the flow of mud was greatly reduced by Del Ray's funnel and pipe system. CP 268-269. RBT also provided evidence in 2007 that they had not cleaned the retention tank since 1991. CP 68, 31, 65, 84. The installation of Del Ray's funnel and pipe system could not logically have reduced the flow of water. The inference is that RBT's failure to prevent erosion and control water was the cause of the excessive flow of mud prior to provision of Del Ray's system and RBT's cleaning of its tank. If there is some other explanation RBT has not provided it.

RBT sought to shift the burden of proof to Del Ray to prove negligence and proximate cause. To do so it was required to show that even when resolving all reasonable inferences in favor of Del Ray there was no material issue of fact. Nicholson v. Deal, 52 Wn. App. 814, 764 P.2d 1007 (1988). RBT's showing is insufficient. RBT established that from 1991 to 2007 no one had cleaned the retention tank. CP 182-196, CP 96, 98. It shows a recommendation by the city of Federal Way that rip-rap rock be installed to stabilize the bank (CP 100) and it shows a history of an unstable bank which showed no erosion in the critical area before 1987. CP 108. Del Ray shows that there was an increase in mud and water flow over the period the retention tank was not being cleaned. CP 68. RBT shows a request by Del Ray for tight lining (CP33), and that Del Ray installed a funnel and pipe system to protect against erosion. CP

272-273. RBT does not contest that cleaning the tank and installing the funnel and pipe reduced the flow of mud and water. CP 268-269. A trier of fact can reasonably infer that due care required no less. That there is still a mud flow allows the inference that rip-rap is also required.

The Court can take an inference of causation from the onset of harm after the occurrence of the negligent acts, and the reduction of harm after mitigating it. Borden v. City of Olympia, 113 Wn. App. 359 at 372, 53 P.3d 1020 (2002). Here the evidence shows no drainage problem before King County ceased maintenance of the retention tank in 1991. No erosion of the ravine was observed as late as 1987. Thereafter we have massive erosion and plugging of the Del Ray drainage. After installation of the Del Ray funnel and pipe system, and RBT having the retention tank cleaned, the water flow and silt deposits declined. The letter of Michael J. Berg, RBT president, acknowledged the expectation that a properly maintained retention system would prevent storm water surges and allow drainage to “trickle” out slowly. CP 68.

E. COMMON ENEMY DOCTRINE AND EXCEPTIONS

RBT relies on the common enemy doctrine defense which allows a property owner to protect itself from surface water any way it sees fit with certain exceptions, citing Currens v. Sleek, 138 Wn.2d 859, 983, P.2d 626 (1999) (CP 17).

The common enemy doctrine only applies to surface water. There is a fact question whether the water entering Del Ray property from RBT

is surface water. Summary judgment may not be granted in reliance on the common enemy doctrine where there is a substantial quantity of mud, silt and sedimentary material discharged along with water. The problem is not just water but silt, mud, and debris clogging Del Ray drainage.

CP 272, 267. RBT failed to clean the tank from 1991 to 2007 and failed to rip-rap as recommended by the city of Federal Way. CP 100.

The court provided a very instructive and relevant analysis of the issue in Long v. IVC Indus. Coatings, Inc., 908 N.E.2.d 697 (Ind.App. 2009). The court said, "...we cannot say that a jury could not determine that the discharge here with its large content of mud, silt, and sedimentary material, ceased to be mere surface water." The court said also, "In our view, whether mud, silt, or sediment contained in rainwater runoff is discharged in such quantities that the water ceases to be characterized as surface water is a question of fact." Discharge of water filled with silt raises the question of fact even if the water flows in a natural drain.

Snohomish County v. Postema, 95 Wn. App. 817, 918 P.2d 1101 (1998).

In Postema the court held that the common enemy doctrine does not apply to natural drains or water courses, and the law imposes liability for the artificial collection and discharge of diffuse surface waters on adjoining land in quantities greater than, or in a manner different from, the natural flow. The court said "Although a question for the trier of fact, there appears to be an abundance of evidence that the Postemas trespassed on Smith's property by discharging a quantity of water from their property which was filled with sediment and silt."

It appears from the RBT Plat that the Storm Drainage Layout provides that the retention tank receives its water in-flow from a street drainage catch basin on 292nd Place. (CP 176.)

It is a clear fact that the water entering the retention tank cannot be considered surface water and subject to the common enemy doctrine.

Del Ray complained of deposits of water exceeding the amount of surface water received by RBT and deposits of silt, debris and mud.

In Currens v. Sleek, 138 Wn.2d 858, 983 P.2d 626, 630 (1999), the court pointed out the due care exception: The common enemy doctrine would prevent liability only if the upland land owner's use is reasonable and they must exercise their rights in good faith and with such care as to avoid unnecessary damage to the property of adjacent owners." The court did not differentiate between the constructor of the facility and any subsequent user.

The court held that failure to follow an environmental check list on the Defendant's project could be considered in determining if due care was exercised and was sufficient to require reversal of a summary judgment in favor of the upland owner.

Where, under the common enemy rule, the property owner connects its sewer with a private drain overtaxing its capacity allowing material to accumulate causing an obstruction, and water then flows back on private property the upland owner is liable. Harbison v. City of Hillsboro, 103 Or. 257, 204 P. 613 (1922).

F. NO DUTY TO QUANTIFY WATER FLOW

The Court in announcing its decision on April 2, 2010, relied on Price v. Seattle, 106 Wn. App. 647, 224 P.3d 1098 (2001). The case is not on point because it was not decided on summary judgment and because at trial the Court found there was no negligence. The city met its burden to prove it came within the common enemy doctrine because there was no increased quantity, and no breach of duty. Price's basis for argument was that Seattle had a duty to prevent erosion resulting from natural causes. That theory was rejected. Del Ray's argument is different in the case at bar because the evidence establishes an increase of water flow and erosion resulting from RBT's failure to properly design and manage their drainage facility. The evidence established that at least up until 1987 there were no signs of erosion. CP 108. The Golder Report supports Dr. Hong's statement that when he acquired the property there was no such problem. RBT has offered no evidence that the erosion coming after 1991 could have come from any source other than their negligent design and maintenance of the retention tank and its outfall.

That the water flow was erosive is proven by Restad's testimony that the water flow and erosion and damage was greatly reduced by the Del Ray funnel and pipe and cleaning up the tank. (CP 267-269.) Two city inspectors told RBT in 2007 that the retention tank had "quite a buildup" (silt) and recommended rip-rap to control erosion. (CP 100.) This suggestion was made in February 2007, and as of September 2007

Ray's rights. There is no evidence as to commencement, frequency, continuity or intent.

Dr. Hong did not know why the water flow was increasing over the years until he became aware of RBT's failure to clean the tanks, and the importance of frequent cleanings. CP 271, CP 259. RBT claims it did not intend to allow the retention tanks to fill with silt and that RBT did not intend to cause excessive flow onto Del Ray property. There is no evidence of entry onto Del Ray property by RBT. The negligent inaction cannot be construed to be adverse, notorious and under a claim of right when RBT assumed that King County was doing the cleaning. CP 31, 65, 84. King County did assume responsibility up to, at least, 1991. CP 192, 196.

There was not a ten-year period when Del Ray could have brought suit. Water and silt flow alone was not evidence of a breach of duty. CP 68. The proximate cause element could not be met until after RBT cleaned its tank and Del Ray installed the funnel and pipe in 2008. CP 267-268. Price v. Seattle, 106 Wn. App. 647, 24 P.3d 1098 (2001) and Laurelon Terrace v. City of Seattle, 40 Wn.2d 883, 246 P.2d 1113 (1952). Prescriptive easements, unlike adverse possession claims, are disfavored in the law. Kunkel v. Fisher, 106 Wn. App. 599, 23 P.3d 1128 (2001).

The adverse use required to establish a prescriptive easement is such use as the owner would exercise, disregarding the claims of others, asking permission from no one, and using the property under claim of right. Id. If the essential factual findings are not in dispute, whether use is

adverse or permissive is purely a question of law. Lingvall v. Price, 97 Wn. App. 245, 982 P.2d 690 (1999). Here there is a dispute.

For the use to be adverse it must exceed the user's rights. In this case, to be adverse it must exceed the quantity of water allowed under the common enemy doctrine. RBT makes no attempt to show when their flow exceeded the quantity that would be permissible under the common enemy doctrine.

Inaction, as in the case at bar, cannot establish the notice necessary for a claim of a prescriptive easement. Failure to clean a retention tank, and failure to rip-rap are not acts of which a neighbor must be aware. Negligence which can entail a liability does not necessarily give sufficient notice to trigger a prescriptive easement. Dunbar v. Heinrich, 95 Wn.2d 20, 622 P.2d 812 (1980). Simply because water and silt flowed from RBT property to Del Ray without more is an insufficient basis to trigger a prescriptive easement. There was no readily apparent evidence of any breach of duty until May 21, 2007. CP 68. There was no sufficient evidence of proximate cause until after RBT cleaned its tank and Del Ray installed the funnel and pipe system in 2008, and a reduction in water and silt flow became apparent. CP 267-268. Price v. Seattle, 106, Wn. App. 647, 24 P.3d 1098 (2001) and Laurelon Terrace v. City of Seattle, 40 Wn.2d 883, 246 P.2d 1113 (1952).

Where use is justified by a legal right it is not adverse. No use can ripen into an easement by prescription unless it constitutes some actual invasion or infringement of the rights of the owner. Simmons v. Perkins,

63 Id. 136, 144, 118 P.2d 740 (1941). Whether a use is trespassory depends on whether it consists of a wrong which the fee holder can prevent or for which he can obtain damages in court. Whether a use is adverse is a question of fact. Bonards v. Kazmirchuk, 146 N.H. 640, 776 A.2d 1282 (2001). To establish adverse intent requires unexplained or unrefuted acts of disseisin. Adverse intent must be established by overt acts. Gray v. McDonald, 46 Wn.2d 574, 578, 283 P.2d 135 (1955).

In the case at bar there were no overt acts manifesting the required adverse intent. Milk Pond Condominium Ass'n v. Manailo, 910 A.2d 392 (ME 2006) Supreme Judicial Court of Maine. Sapp v. General Development Corp. 472 So.2d 544 (Fla. App. 2 Dist. 1985). RBT chooses not to show the outcome of the suit they rely on to show adversity. CP 24. Allegations are not proof.

The inference that Del Ray was unaware of the violation of their rights until 2007 is further supported by the inaccessibility of the drain outfall over 100 feet from the Plaintiffs' property, the mixture of the flow from the drain with the natural surface water in the ravine, and the fact that RBT's property received water from other properties further South. Without any investigation, without knowledge of RBT's negligence and without the report of Mr. Chang, Del Ray would have no basis for a suit enforcing Plaintiffs' rights. In 1994 Del Ray did not know who had responsibility for the drainage. CP 119.

The required proof in the case at bar falls short of that relied on in Pedersen, 43 Wn. App. at 413. For the use to be "open, notorious,

continuous and uninterrupted for the entire prescriptive period” and for the servient property owner to be held to knowledge requires, at least, that he know who the trespasser is and, in fact, that there is a trespass.

Knowledge that water and silt enters his property is not knowledge of a trespass. RBT’s brief in support of its motion for summary judgment at CP 13, l. 8 to CP 14, l. 19, is a recitation of facts which raise inferences negating a claim of trespass and a claim of knowledge of a trespass by Del Ray. RBT’s argument from CP 16, l. 21 to CP 20, l. 8, establish why it was that only the information supplied by RBT disclosed the trespass. It was unclear to Del Ray and even to RBT itself for the required period of the prescriptive easement, that it was RBT’s duty to maintain the drainage system. CP 31, 65, 84.

All easements are limited to the purpose for which they are created and their enjoyment cannot be extended by implication. United States v. Johnson, 4 F.Supp. 77 (WD. Wash. 1933). Rupert v. Gunter, 31 Wn. App. 27, 640 P.2d 36 (1982), Green v. Lupo, 32 Wn. App. 318, 647 P.2d 51 (1982), Castanza v. Wagner, 43 Wn. App. 770, 719 P.2d 949 (1986), Granite Beach Holdings v. State ex. rel. Dept. of Natural Resources, 103 Wn. App. 186, 11 P.3d 847 (2000). Making the burden more severe is impermissible. Thus RBT’s use claimed under common enemy rights does not support the use expansion exceeding that right. CP 271.

H. ABANDONMENT OF PRESCRIPTIVE EASEMENT

Abandonment of a prescriptive easement is a question of intent to abandon. If the Defendants ever had a prescriptive easement, it was intentionally abandoned. In Barnhart v. Gold Run Inc., 68 Wn. App. 417, 843 P.2d 545 (1993) it was held that the deliberate voluntary choice of the property owner not to use an easement was sufficient evidence to support a finding of abandonment. In Heg v. Alldredge, 157 Wn.2d 154, 137 P.3d (2006), the Court held that whether an easement had been abandoned was a question of fact. See also, Green v. Normandy Park, 137 Wn. App. 665, 151 P.3d 1038 (2007) and Wendler v. Woodland, 93 Wn. 684, 161 P. 1043 (1916).

RBT's letter of May 21, 2007 (CP 68) abandons any claim of right to allow any more than a slow trickle of water to escape RBT's drainage facilities. It consents to any outfall arrangement Del Ray can negotiate with the owner of lots 7 and 8, including the provision of rip-rap recommended by the city of Federal Way inspectors. (CP 100.)

I. EQUITIES

Equity follows public policy. Longview School Dist. No. 112 of Cowlitz County v. Stubbs Elec. Co., 160 Wn. 465, 295 P. 186 (1931) at 470. Therefore, it would be inequitable to deny relief to Del Ray from the silting of the Del Ray drainage facilities. The enactments of King County and the city of Federal Way and RBT's plat established that a duty recognized by RBT exists, and public policy requires it be enforced.

Federal Way Revised 19.165.040; King County Code 9.08.040 and 9.12.025.

In Holmes Harbor Water Company Inc. v. Page, 8 Wn. App. 600, 630, 631, 508 P.2d 628 (1973) the court held that to decide whether an injunction to remove an encumbrance should be granted, the court should consider:

- a. The character of the interest to be protected.
- b. The relative adequacy to the plaintiff of injunction in comparison to other remedies.
- c. The delay, if any, in bringing suit.
- d. The misconduct, if any, of the plaintiff.
- e. The relative hardship to the defendant if the injunction is granted, or to the plaintiff if it is not.
- f. The interest of third persons or the public.
- g. The practicality of framing the injunction and enforcing it.

The same rule should be in effect as to the continuing duty to maintain and control the flow of water and restrict the flow of silt, mud, and debris in the case at bar. Peters v. Lewis, 28 Wash. 366, 369, 68 Pac. 862 (1902); and Desimone v. Mutual Materials Co., 23 Wn.2d 876, 885, 162 P.2d 808 (1945).

There is no evidence of any facts establishing any equitable rights of RBT than can be determined on summary judgment.

VI. CONCLUSION

RBT has not responded to Del Ray's negligence claims and has not addressed the due care exception to the common enemy doctrine, has distorted the Price case and must acknowledge that their negligence was the most likely cause of Del Ray's damages. The contention that the construction of RBT's system established a prescriptive easement is contrary to the statute and public interest and the requirement of adverse use. The lack of due care is not rebutted by proof of a prior use which was legal. It would be error not to void the Orders entered on April 2, 2010 and April 20, 2010.

Respectfully submitted this 27th day of August 2010.

The Funk Law Firm, P.S., Inc.

By 
J. Stephen Funk, WSBA #1850
Attorney for Appellant

RCW 65.04.050

Index of instruments, how made and kept — Recording of plat names.

Every auditor or recording officer must keep a general index, direct and inverted. The index may be either printed on paper or produced on microfilm or microfiche, or it can be created from a computerized database and displayed on a video display terminal. Any reference to a prior *record location number may be entered in the remarks column. Any property legal description contained in the instrument must be entered in the description of property column of the general index. The direct index shall be divided into eight columns, and with heads to the respective columns, as follows: Date of reception, grantor, grantee, nature of instrument, volume and page where recorded and/or the auditor's file number, remarks, description of property, assessor's property tax parcel or account number. The auditor or recording officer shall correctly enter in such index every instrument concerning or affecting real estate which by law is required to be recorded, the names of grantors being in alphabetical order. The inverted index shall also be divided into eight columns, precisely similar, except that "grantee" shall occupy the second column and "grantor" the third, the names of grantees being in alphabetical order. The auditor or recording officer may combine the direct and indirect indexes into a single index if it contains all the information required to be contained in the separate direct and indirect indexes and the names of all grantors and grantees can be found by a person searching the combined index. For the purposes of this chapter, the term "grantor" means any person conveying or encumbering the title to any property, or any person against whom any lis pendens, judgment, notice of lien, order of sale, execution, writ of attachment, claims of separate or community property, or notice for request of transfer or encumbrance under RCW 43.20B.750 shall be placed on record. The auditor or recording officer shall also enter in the general index, the name of the party or parties platting a town, village, or addition in the column prescribed for "grantors," describing the grantee in such case as "the public." However, the auditor or recording officer shall not receive or record any such plat or map until it has been approved by the mayor and common council of the municipality in which the property so platted is situated, or if the property be not situated within any municipal corporation, then the plat must be first approved by the county legislative authority. The auditor or recording officer shall not receive for record any plat, map, or subdivision of land bearing a name the same or similar to the name of any map or plat already on record in the office. The auditor or recording officer may establish a name reservation system to preclude the possibility of duplication of names.

Federal Way Revised Code 19.165.040

19.165.040 Culverts.

- (1) Culverts are permitted in streams only if approved under this section.
- (2) The city will review and decide upon applications under this title using process III in Chapter 19.65 FWRC.
- (3) The city will allow a stream to be put in a culvert only if:
 - (a) No significant habitat area will be destroyed; and
 - (b) It is necessary for some reasonable use of the subject property. Convenience to the applicant in order to facilitate general site design will not be considered. The applicant must demonstrate, by submitting alternative site plans showing the stream in an open condition, that no other reasonable site design exists.
- (4) The culvert must be designed and installed to allow passage of fish inhabiting or using the stream. The culvert must be large enough to accommodate a 100-year storm.
- (5) The applicant shall, at all times, keep all culverts on the subject property free of debris and sediment so as to allow free passage of water and, if applicable, fish. The city shall require a bond under Chapter 19.25 FWRC to ensure maintenance of the culvert approved under this section.
(Ord. No. 07-554, § 5(Exh. A(10)), 5-15-07; Ord. No. 04-468, § 3, 11-16-04; Ord. No. 97-291, § 3, 4-1-97; Ord. No. 91-123, § 3(80.90), 12-17-91; Ord. No. 91-105, § 4(80.90), 8-20-91; Ord. No. 90-43, § 2(80.90), 2-27-90. Code 2001 § 22-1309.)

King County Code 9.08.040

9.08.040 Purpose. It is the finding of the county that the Surface Water Management Program is necessary in order to promote public health, safety and welfare by establishing and operating a comprehensive approach to surface and storm water problems which would reduce flooding, erosion and sedimentation, prevent and mitigate habitat loss, enhance groundwater recharge and prevent water quality degradation. This comprehensive approach includes the following elements: basin planning, land use regulation, construction of facilities, maintenance, public education, and provision of surface and storm water management services. It is the finding of the county that the most cost effective and beneficial approach to surface and storm water management is through preventative actions and protection of the natural drainage system. In approaching surface and storm water problems the Surface Water Management Program shall give priority to methods which provide protection or enhancement of the natural surface water drainage system over means which primarily involve construction of new drainage facilities or systems. The purpose of the rates and charges established herein is to provide a method for payment of all or any part of the cost and expense of surface and storm water management services or to pay or secure the payment of all or any portion of any issue of general obligation or revenue bonds issued for such services. These rates and charges are necessary in order to promote the public health, safety and welfare by minimizing uncontrolled surface and storm water, erosion, and water pollution; to preserve and utilize the many values of the county's natural drainage system including water quality, open space, fish and wildlife habitat, recreation, education, urban separation and drainage facilities; and to provide for the comprehensive management and administration of surface and storm water. (Ord. 11615 § 6, 1994: Ord. 10187 § 4, 1991: Ord. 7817 § 2, 1986: Ord. 7590 § 5, 1986).

King County Code 9.12.025

9.12.025 Discharges into King County waters.

A.1. It is unlawful for any person to discharge any contaminants into surface and storm water, ground water or Puget Sound. Contaminants include, but are not limited, to the following:

- a. trash or debris;
- b. construction materials;
- c. petroleum products including but not limited to oil, gasoline, grease, fuel oil, heating oil;
- d. antifreeze and other automotive products;
- e. metals in either particulate or dissolved form;
- f. flammable or explosive materials;
- g. radioactive material;
- h. batteries;
- i. acids, alkalis, or bases;
- j. paints, stains, resins, lacquers or varnishes;
- k. degreasers and solvents;
- l. drain cleaners;
- m. pesticides, herbicides or fertilizers;
- n. steam cleaning wastes;
- o. soaps, detergents or ammonia;
- p. swimming pool backwash;
- q. chlorine, bromine and other disinfectants;
- r. heated water;
- s. domestic animal wastes;
- t. sewage;
- u. recreational vehicle waste;
- v. animal carcasses;
- w. food wastes;
- x. bark and other fibrous materials;
- y. collected lawn clippings, leaves or branches;
- z. silt, sediment or gravel;
- aa. dyes, except as stated in subsection C.1. of this section;
- bb. chemicals not normally found in uncontaminated water;
- cc. any hazardous material or waste not listed above.

A.2. Illicit connections. Any connection identified by the director that could convey anything not composed entirely of surface and storm water directly to surface and storm water or ground water is considered an illicit connection and is prohibited with the following exceptions:

- a. connections conveying allowable discharges;
- b. connections conveying discharges pursuant to an NPDES permit, other than an NPDES storm water permit, or a State Waste Discharge Permit; and
- c. connections conveying effluent from onsite sewage disposal systems to subsurface soils.

B. BMPs shall be applied to any business or residential activity that might result in prohibited discharges as specified in the Stormwater Pollution Prevention Manual or as determined necessary by the director. Activities that might result in prohibited discharges include but are not limited to following:

1. Potable water line flushing;
2. Lawn watering with potable water;
3. Dust control with potable water;
3. Automobile and boat washing;
4. Pavement and building washing;
5. Swimming pool and hot tub maintenance;
6. Auto repair and maintenance;
7. Building repair and maintenance;
8. Landscape maintenance;
9. Hazardous waste handling;
10. Solid and food waste handling; and
11. Application of pesticides.

C. The following types of discharges shall not be considered prohibited discharges for the purpose of this chapter unless the director determines that the type of discharge, whether singly or in combination with other discharges, is causing significant contamination of surface and storm water or ground water:

1. Spring water;
2. Diverted stream flows;
3. Uncontaminated water from crawl space pumps, foundation drains or footing drains;
4. Lawn watering with potable water or collected rainwater;
5. Pumped groundwater flows that are uncontaminated;
6. Materials placed as part of an approved habitat restoration or bank stabilization project;
7. Natural uncontaminated surface water or ground water;
8. Flows from riparian habitats and wetlands;
9. The following discharges from boats: engine exhaust; cooling waters; effluent from sinks; showers and laundry facilities; and treated sewage from Type I and Type II marine sanitation devices;
10. Collected rainwater that is uncontaminated;
11. Uncontaminated groundwater that seeps into or otherwise enters stormwater conveyance systems;
12. Air conditioning condensation;
13. Irrigation water from agricultural sources that is commingled with stormwater runoff; and
14. Other types of discharges as determined by the director.

D.1. Dye testing is allowable but requires verbal notification to the King County water and land resources division at least one day prior to the date of test. The King County department of public health is exempt from this requirement.

2. A person does not violate subsection A. of this section if:

RCW 7.48.190

Nuisance does not become legal by prescription.

No lapse of time can legalize a public nuisance, amounting to an actual obstruction of public right.

[Code 1881 § 1241; 1875 p 80 § 7; RRS § 9919.]

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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Bellevue, WA 98004
Phone: 425-746-7992
Attorneys for Appellants

*Filed
CWA
8-27-10
KW*

ORIGINAL

CERTIFICATE OF SERVICE

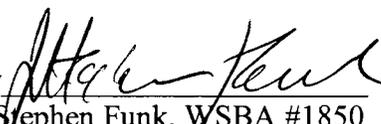
I certify that on August 27, 2010, I caused a true and correct copy of the Appellants' Brief to be served on the attorneys for Respondents in the manner indicated below:

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