

FILED
COURT OF APPEALS
DIVISION II

2014 OCT 16 PM 1:05

NO. 45742-3-II

STATE OF WASHINGTON

BY

DEPUTY

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

GREG HOOVER,

Respondent,

v.

SCOTT WARNER and "JANE DOE" WARNER, individually and the
marital community composed thereof; ERNEST WARNER and "JANE
DOE" WARNER, individually and the marital community composed
thereof,

Appellants,

and

WARNER FARMS,

Defendant.

REPLY BRIEF OF APPELLANTS

DAVID CORBETT PLLC
David J. Corbett
2106 N. Steele Street
Tacoma, Washington 98406
Telephone: (253) 414-5235
david@davidcorbettlaw.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii-iv
I. ARGUMENT IN REPLY.....	1
1. Introduction.....	1
2. Hoover’s restatement of the case distorts the evidence and the facts actually found by the trial court.....	1
3. The trial court erred by finding the Warners liable to Hoover for negligence, nuisance, and trespass.....	6
a. There is not substantial evidence in the record supporting the trial court’s findings of causation.....	7
b. Even if the Warners caused damage to Hoover’s property, they did not breach their duty of due care to Hoover, and are hence shielded from liability under the common enemy doctrine.....	13
4. Both permanent injunctions issued by the trial court must be struck down.....	18
5. The trial court abused its discretion by awarding Hoover \$50,648.45 in fees and costs under CR 37(c).....	21
6. Hoover is not entitled to an award of fees and costs on appeal, either under CR 37(c) or RAP 18.9(a).....	25
II. CONCLUSION.....	25

TABLE OF AUTHORITIES

Cases

<i>Bale v. Allison</i> , 173 Wn. App. 435, 294 P.3d 789 (2013).....	5, 6, 16
<i>Bjorvatn v. Pacific Mechanical Const., Inc.</i> , 77 Wn.2d 563, 464 P.2d 432 (1970).....	17
<i>Borden v. City of Olympia</i> , 113 Wn. App. 359, 53 P.3d 1020 (2002).....	6, 7, 17
<i>Burr v. Clark</i> , 30 Wn. 2d 149, 190 P.2d 769 (1948)	17
<i>Cass v. Dicks</i> , 14 Wash. 75, 44 P. 113 (1896).....	14
<i>Currens v. Sleek</i> , 138 Wn. 2d 858, 983 P.2d 626 (1999)	passim
<i>Evans v. City of Seattle</i> , 182 Wash. 450, 47 P.2d 984 (1935)	13, 17
<i>Green River Community College, Dist. No. 10 v. Higher Educ. Personnel Bd.</i> , 107 Wn. 2d 427, 730 P.2d 653 (1986)	24
<i>House v. Giant of Maryland LLC</i> , 232 F.R.D. 257 (E.D. Va. 2005)	24
<i>Keller v. City of Spokane</i> , 146 W. 2d 237, 44 P.3d 845 (2002).....	7
<i>Keys v. Romley</i> , 64 Cal. 2d 396, 412 P.2d 529 (1966).....	14
<i>Kuhner v. Griesbaum</i> , 59 Ill. 48 (Ill. 1871)	10
<i>Lee v. Tacoma Baseball Club</i> , 38 Wn.2d 362, 229 P.2d 329 (1951).....	18
<i>Marcum v. Dep't of Soc. & Health Servs.</i> , 172 Wn. App. 546, 290 P.3d 1045 (2012).....	16
<i>Nejin v. City of Seattle</i> , 40 Wn. App. 414, 698 P.2d 615 (1985).....	12, 13
<i>Nw. Gas Ass'n v. Washington Utilities & Transp. Comm'n</i> , 141 Wn. App. 98, 168 P.3d 443 (2007)	19

<i>Pruitt v. Douglas Cnty.</i> , 116 Wn. App. 547, 66 P.3d 1111 (2003).....	6, 15
<i>Satomi Owner’s Association v. Satomi</i> , 167 Wn.2d 781, 225 P.3d 213 (2009).....	16
<i>State v. Moon</i> , 48 Wn. App. 647, 739 P.2d 1157 (1987).....	3
<i>Streater v. White</i> , 26 Wn. App. 430, 613 P.2d 187 (1980).....	24
<i>Thompson v. King Feed & Nutrition Serv., Inc.</i> , 117 Wn. App. 260, 70 P.3d 972 (2003).....	24
<i>Walla Walla County Fire Protection Dist. No. 5 v. Washington Auto Carriage, Inc.</i> , 50 Wn. App. 355, 745 P.2d 1332 (1987)	7
<i>Wallace Real Estate Inv., Inc. v. Groves</i> , 72 Wn. App. 759, 868 P.2d 149, <u>aff’d</u> , 124 Wn. 2d 881, 881 P.2d 1010 (1994)	6
<i>Washington Fed’n of State Employees, Council 28, AFL-CIO v. State</i> , 99 Wn.2d 878, 665 P.2d 1337 (1983).....	18
<i>Wilkening v. State</i> , 54 Wn.2d 692, 344 P.2d 204 (1959).....	18

Statutes and Constitutions

Wash. Const. art. I, § 3.....	20
-------------------------------	----

Rules

CR 37	passim
CR 52	12
RAP 2.5.....	7, 16, 20, 21
RAP 10.1.....	1
RAP 10.3.....	1

RAP 18.9..... 23, 24

Other Authorities

3 Wash. Prac., Rules Practice RAP 18.9 (7th ed.)..... 24

14 Wash. Prac., Civil Procedure § 17:18 22

Moore’s Federal Practice 3d at §37.73 22

I. ARGUMENT IN REPLY

1. Introduction.

The trial court in this matter made multiple errors of fact and law requiring reversal. Respondent Greg Hoover's arguments to the contrary in his "Reply Brief" distort the evidence, the findings actually made by the trial court, and the arguments made by appellants Scott and Ernest Warner ("the Warners") in their Opening Brief.¹ For all of the reasons explained in the Warners' Opening Brief and further elaborated below, this Court should hold that the Warners are not liable to Hoover in negligence, nuisance, or trespass, and either reverse the award of fees and costs made to Hoover under CR 37(c) or remand that award to the trial court for recalculation of an appropriate sanction.

2. Hoover's restatement of the case distorts the evidence and the facts actually found by the trial court.

Hoover is obviously free to take issue with the Warners' statement of the case.² However, any re-statement of the case by a respondent must itself conform to RAP 10.3(a)(5), and contain "a fair statement of the facts and procedure relevant to the issues presented for review, without argument," supported by citations to the record.³ Here, not only is Hoover's restatement of the facts plainly argumentative and inadequately

¹ The brief filed by Hoover on September 17, 2014 was titled "Reply Brief of Respondent Greg Hoover." Pursuant to RAP 10.1(b), it is actually a response brief, and will be referred to below as "Respondent's Brief."

² RAP 10.3(b).

³ RAP 10.3(a)(5).

cited to the record, it distorts the evidence and the facts actually found by the trial court.

Hoover began this case in 2012, alleging that six years earlier the Warners had built a massive new, dam-like road along their entire shared property boundary. CP 14, at ¶ 2.6; RP at 101:12. However, the trial court expressly found that the road at issue to the north of the Hoover parcel was a “preexisting road,” not a “new” road. CP 455, at ¶ 1.9.⁴ Hoover is not cross-appealing, and has not assigned error to this finding of fact. Accordingly, Hoover’s continued assertion that “[t]he Warners filled and created a new east-west driveway” to the north of his parcel is a plainly improper distortion of the trial court’s findings.⁵

The trial court also found that the “historical driveway on the Warner property running east to west from Smith Prairie road” ran to “an old cabin.” CP 430, ¶ 1.7. This old cabin is indisputably located at least twenty yards to the south of the Hoover’s northwest corner, along Hoover’s western boundary. Ex. 12 at p. 4, Ex. 39 at p. 5 and p. 18.⁶ For this reason alone, it is a distortion of the evidence—and contradictory to an unchallenged finding of fact—for Hoover to maintain that “there has

⁴ This finding is amply supported by substantial evidence, including RP 38:22 to 39:22; 60:13-25; 67:15-22; 68:16-18; and 319:1-13. In their Opening Brief, the Warners did not assign error to FOF 1.9.

⁵ Respondent’s Brief, at p. 6 (emphasis added).

⁶ The fact that there is a preexisting road extending even only twenty yards south along Hoover’s western boundary is significant, given Hoover’s theory that his property “mostly drains toward the northwest corner.” Respondent’s Brief, at p. 1. See also Ex. 39 at p. 7 (showing alleged surface drainage path precisely at Hoover’s northwest corner).

never been a road or a driveway on the Warner property running along Hoover's west boundary."⁷ Moreover, in its formal written findings, the trial court found that "many years prior to 2006, unknown parties deposited material consisting of cobbles and sand on the Warner property immediately to the west of what is now the Hoover property." CP 430, ¶ 1.8. Although not expressly stating in its formal findings that this old fill area was a road, the trial court did find this fill area to be a road in its prior Letter Decision. CP 276.⁸ Because the Letter Decision simply adds consistent detail to its formal findings, the trial court effectively held that the fill area to the west of Hoover's parcel was also an old, pre-existing road.⁹ At the very least, it made no finding that the old fill areas to the west of Hoover's parcel had never been part of a road, and Hoover's assertions to the contrary are incorrect and potentially misleading.

Hoover's statement of the case also obscures the trial court's findings about how much new material the Warners brought in and added to the preexisting road. Hoover states that a county employee who

⁷ Respondent's Brief, at p. 3. It is also a distortion to refer to the old cabin being "just off of Hoover's northwest corner," as if the road to it would not have to turn south for at least twenty yards. *Compare* Respondent's Brief, at p. 3 *with* Ex. 12 at p. 4 and Ex. 39 at p. 5 and p. 18.

⁸ The Letter Decision states that "Defendants improved a road that runs along the North *and* West boundaries of Plaintiff's property." CP 276 (emphasis added). That the old fill area to the west of Hoover's property generally has the width of a small road is confirmed by Ex. 39, at p. 7.

⁹ *See, e.g., State v. Moon*, 48 Wn. App. 647, 653, 739 P.2d 1157 (1987) (holding that "[a]n appellate court is permitted to use the trial court's oral decision to interpret findings of fact and conclusions of law if there is no inconsistency").

inspected the area six years after the work had been performed “concluded that 2 to 3 feet of fill material . . . had been brought in.”¹⁰ Although a county employee may have “concluded” this, the trial court did not. Instead, the trial court simply found that “some rock and/or other material was brought in and deposited in the area to the North and West of the Hoover property.” CP 431 at ¶ 1.11 (emphasis added).¹¹ It also found that this import of material “raised the grade of the preexisting road to the north of Hoover’s property” and also “raised the grade of the area to the west of the Hoover property.” CP 430 at ¶ 1.19. However, the trial court made no finding quantifying the amount of material brought in, nor specifying how much the grade was raised as a result.

The trial court’s reticence on these points was well founded, as Hoover’s expert’s before-and-after LIDAR maps of the affected areas show no increase in elevation resulting from the Warners’ work in 2006. Ex. 29 at pp. 5-6; Ex. 39 at pp. 8-9.¹² As the trial court noted in the context of a discussion of the LIDAR evidence and FOF 1.9:

I would agree that there was no scientific findings [regarding raising the grade]. However, the court found that material was brought in, and granted, some of it was spread out, *but it only makes sense to me that there must have been some, no matter how slight, elevation gain for the road, and so that’s the intention of that finding.*

¹⁰ Respondent’s Brief, at p. 5, citing to RP 193-94.

¹¹ As discussed in more detail below, the Warners assigned error to FOF 1.11, but not to the finding that some material was brought in.

¹² Hoover acknowledges that “LIDAR . . . accurately depicts changes in elevation to within one foot.” Respondent’s Brief, at p. 1, note 1.

RP 611:3-8 (emphasis added). In short, the trial court found that there was at least a “slight” increase in elevation, even though it did not show up on LIDAR. The Court emphatically did not find that the Warners had added “two to three feet of fill material” to the road.

Finally, Hoover asserts that the Warners’ road work was “illegal,” and that the Warners “lied” and “submitted false affidavits to Thurston County in order to avoid the need for a grading permit.”¹³ Not only did the trial court make no such findings, it expressly struck the word “illegal” from Hoover’s proposed Findings and Conclusions . CP 433, ¶ 2.8.

As the appellants, the Warners certainly don’t believe the trial court’s findings of fact are beyond reproach. Indeed, they have identified ten of those findings which they maintain are not supported by substantial evidence.¹⁴ However,

[i]t is one thing for an appellate court to review whether sufficient evidence supports a trial court's factual determination. That is, in essence, a legal determination based upon factual findings made by the trial court. In contrast, where a trial court finds that evidence is insufficient to persuade it that something occurred, an appellate court is simply not permitted to reweigh the evidence and come to a contrary finding. It invades the province of the trial court for an appellate court to find compelling that which the trial court found unpersuasive.¹⁵

Here, although Hoover is clearly invested in portraying the Warners as evil-doers engaged in a fraudulent scheme to build a massive new illegal

¹³ Respondent’s Brief, at p. ii, no. 5 (“illegal”); p. 4; and p. 16.

¹⁴ Appellants’ Opening Brief, at p. 2.

¹⁵ *Bale v. Allison*, 173 Wn. App. 435, 458, 294 P.3d 789 (2013).

road around his property, the trial court found none of these things to be true. The evidence was clearly insufficient to persuade the trial court that the Warners built a *new* road, added a massive amount of material to the existing road, raised its elevation by more than a slight amount, lied to the county to avoid being subject to a permit requirement, or acted illegally in performing their work on the road. In the absence of a cross appeal, *Bale* requires this Court to resist Hoover’s invitation to reweigh the evidence on these points and come to different conclusions than the trial court.¹⁶

3. The trial court erred by finding the Warners liable to Hoover for negligence, nuisance, and trespass.

The entire judgment against the Warners—except for the award of attorney’s fees under CR 37(c)—must be reversed if the Warners were not negligent. As Hoover acknowledges, in the context of a surface water case under the common enemy doctrine, nuisance and trespass claims are derivative of the negligence cause of action, and necessarily fail if the negligence claim fails.¹⁷

¹⁶ Put another way, Hoover had the burden of proof with regard to whether the Warners lied in the permit process, performed illegal work, built a new road, or added a massive amount of material to the preexisting road. The trial court’s failure to make findings on these points must be treated as the equivalent of findings against Hoover. *See, e.g., Wallace Real Estate Inv., Inc. v. Groves*, 72 Wn. App. 759, 773, 868 P.2d 149, aff’d, 124 Wn. 2d 881, 881 P.2d 1010 (1994).

¹⁷ Respondent’s Brief at pp.20-21. *See also Borden v. City of Olympia*, 113 Wn. App. 359, 373, 53 P.3d 1020 (2002) (noting that when the claimed improper interference with the use of property “is blocking the claimant’s drainage,” then the “nuisance claim is simply ‘a negligence claim in the garb of nuisance’”); and *Pruitt v. Douglas Cnty.*, 116 Wn. App. 547, 554, 66 P.3d 1111 (2003) (noting that Washington courts “treat

Proof of negligence requires a showing of four elements: duty, breach, causation, and harm.¹⁸ The Warners accept that they, like all Washington landowners, owe other landowners a duty of “due care” when undertaking projects that affect surface water flows. Nor on appeal do they challenge Hoover’s claims that his property has been damaged by water. However, the Warners *do* dispute that Hoover established the second and third elements of negligence: breach and causation.

a. There is not substantial evidence in the record supporting the trial court’s findings of causation.

claims for trespass and negligence arising from a single set of facts as a single negligence claim”). In their Opening Brief, the Warners also pointed out that under *Borden*, the trespass claim against them fails even if the negligence claim does not. *See* Appellants’ Opening Brief, at pp. 34-35. Since Hoover makes no meaningful objection to the substance of this argument, it will not be repeated in detail here. As for Hoover’s claim that the Warners waived their specific objection to the trespass claim (Respondent’s Brief at p. 21), the Warners point out that their trial counsel explicitly stated that “I don’t think the actions of the Warners in backing up the surface and subsurface water on to the property constitute trespass.” RP 621:23-25. RAP 2.5(a) does not prohibit the Warners from citing new authority in support of their defense on this point. *See, e.g., Walla Walla County Fire Protection Dist. No. 5 v. Washington Auto Carriage, Inc.*, 50 Wn. App. 355, 745 P.2d 1332 (Div. 3 1987)(stating that “[t]here is no rule preventing an appellate court from considering case law not presented at the trial court level”).

¹⁸ *See, e.g., Borden*, 113 Wn. App. at 369 (asking “(A) whether the City owed a duty of due care; (B) whether the evidence is sufficient to support a finding that the City breached such a duty; and (C) whether the evidence is sufficient to support a finding that the breach, if any, proximately caused . . . damages”). *See also Keller v. City of Spokane*, 146 W. 2d 237, 242, 44 P.3d 845, 848 (2002) (noting that “[t]he elements of negligence are duty, breach, causation, and injury”).

There is no substantial evidence supporting the trial court's findings to the effect that prior to 2006, water drained off the Hoover parcel toward the Warner parcel, either on or below the surface. In turn, this invalidates the court's findings of causation (FOF 1.12 and 1.13 on CP 431). Given the nature of the case, there can be no substantial evidence that the Warners blocked Hoover's drainage in the absence of evidence that Hoover's drainage flowed in the direction of the Warner parcel.

Hoover does not directly contest the Warners' claim that there is no substantial evidence of water draining off on the surface of Hoover's parcel, in any direction, prior to 2006. This is not surprising, since it was Hoover's own testimony at trial that particularly emphasized the fact that there was no such drainage. RP at 31:20-21; 32:4-5. Nor does Hoover attempt to argue that the trial court could properly infer the existence of some amount of surface drainage based only on surface contours. RP 608:19 to 609:1.¹⁹ Indeed, Hoover maintains that "the only inference to be drawn from the test diggings and the scientific testimony was that prior to 2006, the precipitation hit the surface organic layer, *soaked down to the impermeable silt loam layer*, and then flowed downhill."²⁰ Accordingly,

¹⁹ Compare RP 565:1-11, where the trial judge noted that "if I were to accept the evidence that's been presented by the plaintiff, prior to 2006, water would be absorbed into the ground and then flow beneath the surface."

²⁰ Respondent's Brief at pp. 2-3. Although the Warners and Hoover are in accord on the basic point that Hoover's property drained under the surface, Hoover's statement is in need of correction on two points. First, there were no test pits dug on Hoover's property. EX. 39 at p. 18. Second, Respondent's Brief misstates the nature of Skipopa silt loam soil.

Warner submits that it is undisputed that the trial court erred in making FOFs 1.4, 1.8, and 1.12, in so far as those findings state or imply that water drained off on the surface of Hoover's property prior to 2006.

Hoover also implicitly concedes, as he must, that no one ever studied the actual direction of water flows under the surface of the Hoover parcel.²¹ Instead, he maintains that there is sufficient circumstantial evidence of those flow directions to support the trial court's findings of causality. Specifically, he claims that "since the Hoover property slopes downward to the west and northwest, and that surface water would naturally drain onto the Warner property, the only inference to be drawn is that the [sub]surface water hitting the silt layer must [follow] the same law of gravity as surface water."²²

Skipopa silt loam soil is neither uniformly impermeable, nor distinct from the organic-rich surface layer. *Cf.* Respondent's Brief, at p. 1. Rather, Skipopa silt loam is a complex of different layers, including a permeable and organic-rich surface layer, and culminating in an impermeable substratum several feet below the surface. As described in the USDA Thurston County Soil Survey, "[t]ypically, the surface layer is dark brown silt loam about 8 inches thick. The upper 7 inches of the subsoil is brown silt loam, and the lower 3 inches is grayish brown, mottled silty clay loam. The substratum to a depth of 60 inches or more is greenish gray, mottled silty clay and clay." CP 156. It is the more clay-intensive layers of the subsoil and substratum that are largely impermeable. CP 157 (noting that "permeability is moderate in the subsoil of the Skipopa soil and very slow in the substratum").

²¹ *See, e.g.*, RP 159:7-16 (Hoover's expert McClure acknowledging that he "did no investigation to determine anything below the surface of these soils"); RP 220:24 to 221:10 (Hoover's expert Palazzi confirming that she did not dig any test pits), *and* Ex. 39 at p. 18.

²² Respondent's Brief, at p. 11 (emphasis in original). Consistent with footnote 20 above, the Warner's submit that Hoover should have referred

This sentence requires only a slight amount of unpacking to reveal the inadequacy of the circumstantial evidence supporting the conclusion that underground flows from the Hoover parcel go to the north and northwest. First, it is undisputed that water flowing on the surface of the Hoover parcel *would* generally flow toward the north and northwest . . . *if* there were such flows. Prior to 2006, there were no such flows. RP 26:17; 31:20-21. Second, the Warners submit that it is obvious that the direction of water flowing along an impermeable subsurface layer depends on the contours of the impermeable subsurface layer, not the contours of the surface.²³ The laws of gravity pull water down toward the low point of the impermeable layer against which the water is resting, not toward the low point of a surface above where the water is found.

The Warners have never argued or implied that water flows uphill.²⁴ Indeed, it is odd that Hoover makes this charge, since he is the one who overlooks an obvious consequence of the laws of gravity: water could not back up on the surface against the road to the foundation of his house and well, since those are located *at least* a foot above the top of the road.²⁵ With regard to *subsurface* flows, however, the critical issue is the

to water hitting the clay-rich substratum, not to water hitting the “silt layer,” since the entire Skipopa silt loam soil complex is silt.

²³ For example, water flowing along the floor of a house will follow the slope of the floor, not the slope of the roof.

²⁴ *Cf.* Respondent’s Brief, at p. 12, citing to *Kuhner v. Griesbaum*, 59 Ill. 48, 49 (Ill. 1871) for the obvious proposition that “[w]ater must and will obey the laws of gravity, and run down hill.”

²⁵ *See* Appellant’s Brief at pp. 23-25, and Ex. 39 at pp. 19-20 (establishing elevation of house of at least 550 feet); Ex. 39 at p 9 (2011 LIDAR

slope of the *subsurface* impermeable layer. Here, no one ever testified that there was an intact impermeable layer under the Hoover parcel. In fact, Hoover's expert Vince McClure testified that there are "often" lenses of silt and sand beds under the surface which could affect the magnitude and direction of subsurface flows. RP 159:7-16. It is also obvious from the extent of the development of the Hoover parcel that someone there had moved a lot of dirt at points in the past, potentially affecting the direction of underground flows. RP 231:6-7. Most importantly, no one ever testified *at all* about the contours and slope of whatever impermeable layer there may be under the surface of the Hoover parcel.²⁶

In finding that subsurface flows from the Hoover parcel go in the direction of the Warner parcel, the trial court thus based its holding on a point that was nothing more than a naked assumption, or an inference

showing crest of road to the north as between 547 and 548 feet from the northwest corner to more than halfway to Smith Prairie Road); Ex. 30 at p. 1 (showing centerline elevations of road to north ranging from 549.320 at point 20 toward Smith Prairie Road to 548.25 at point 22 closer to the northwest corner). Respondent's Brief makes no attempt to rebut this point, nor to explain why if on one occasion water was backing up against the road and running down the well head (RP 46:19-22) he would dig a ditch connecting the well head area with the road. RP 51:9-15; Ex. 25 at picture 5. However, such a ditch might have made sense if water were coming *out* of the wellhead rather than running *down* it.

²⁶ If the surface of the Hoover parcel were very steep, this might support an inference that subsurface strata (including any impermeable layer) follow the slope of the surface, as would subsurface water drainage. Here, however, the Hoover parcel is "just about as flat as a fritter." RP 144:19-22. Only a slight deviation of the slope of any subsurface impermeable layer from the slope of the surface would suffice to send water in a different direction than it would follow if it flowed on the surface.

piled upon inference: that the subsurface water flows under the Hoover parcel go in the same direction as surface flows would go, if they existed.²⁷ Under *Nejin v. City of Seattle*, this was error.²⁸ As in *Nejin*, here too there is a competing theory of causation of Hoover's damages—impaired drainage due to overgrazing and soil compaction.²⁹ True, the trial court ultimately rejected overgrazing as the cause of Hoover's damages, but its reasoning simply reinforces the conjectural nature of its causation finding: "Even if Plaintiff has damaged his land by overgrazing, restoration of the property will not restore the subsurface flow *if* it is blocked by the work that has been done on the roadway." CP 278 (emphasis added). Was drainage actually blocked by the road? This could be so only if Hoover's drainage flowed toward the Warner parcel underground, for which the only evidence is conjecture. As the court held in *Nejin*, "[w]here causation is based on circumstantial evidence, the factual determination may not rest upon conjecture; and if there is nothing

²⁷ To the extent Hoover argues that the Warners failed to make this argument to the trial court, his objection is misplaced. See Respondent's Brief at p. 11, note 9. The issue here is whether findings of fact are supported by substantial evidence, and as CR 52(b) states, "[w]hen findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the court an objection"

²⁸ *Nejin v. City of Seattle*, 40 Wn. App. 414, 698 P.2d 615 (1985).

²⁹ Compare Appellants' Brief at pp. 22-25 (discussing the Warners' alternative causal explanation of overgrazing) with Respondent's Brief, at p. 12 (asserting red herring that "water flowing uphill can never be a competing, equally probable theory").

more substantial to proceed upon than two theories, under one of which a defendant would be liable and under the other of which there would be no liability, a jury is not permitted to speculate on how the accident occurred.”³⁰ That rule applies here, and requires reversal of the trial court’s findings of fact regarding causation.

b. Even if the Warners caused damage to Hoover’s property, they did not breach their duty of due care to Hoover, and are hence shielded from liability under the common enemy doctrine.

Under Washington’s common enemy doctrine, landowners in this state all have a duty of due care with regard to actions affecting surface water.³¹ However, the mere existence of a duty of due care does not

³⁰ *Nejin*, 40 Wash. App. at 420. See also *Evans v. City of Seattle*, 182 Wash. 450, 456-57, 47 P.2d 984 (1935) (finding that where there was no testimony that an alleged underground impermeable “stratification is regular or continuous to any extent . . . the existence of an underground stream . . . is wholly speculative, and expert testimony based thereon to a contrary effect is no more than a guess or a wish”). Here, unlike in *Evans*, the issue is not the existence or location of a defined underground stream, but rather the direction of a diffuse underground flow. However, as in *Evans*, the absence of testimony about the contours of the alleged impermeable stratum under the Hoover parcel renders the conclusion that underground water flows toward the Warner parcel “wholly speculative.”

³¹ *Currens v. Sleek*, 138 Wn. 2d 858, 983 P.2d 626 (1999), as corrected (Dec. 14, 1999), *amended*, 993 P.2d 900 (Wash. 1999). Hoover consistently misrepresents the holding of *Currens*. *Currens* did not adopt the “reasonable use rule,” but instead expressly rejected this rule. Compare *id.* at 867 (“refus[ing] the invitation to discard our common enemy jurisprudence in favor of the reasonable use rule”) with Respondent’s Brief at p. 15. Nor did *Currens* adopt a “reasonable use exception”; instead, it adopted a “due care exception.” Compare *Currens*, 138 Wn.2d at 865-68 with Respondents’ Brief, at pp. 15-16. Finally, *Currens* did not hold that the defendants were liable, it simply reversed summary judgment in their favor. Compare *Currens*, 138 Wn.2d at 860 with Respondent’s Brief, at p. 16.

suffice to make a defendant liable for damages he caused by means of surface water: the plaintiff also has to show that *the damages resulted from a breach of the duty*. To hold otherwise would be to abandon the common enemy doctrine, and adopt in its place a rule of strict liability for damages caused by any interference with the natural flow of surface water. The Washington Supreme Court has clearly refused to take this step.³²

To show a breach of the duty of due care in a surface water case, the plaintiff has to establish either that the defendant acted in bad faith, or that the defendant caused “unnecessary damage.”³³ “[T]o prove bad faith, one must show ‘actual or constructive fraud ’ or ‘a neglect or refusal to fulfill some duty ... not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive.’”³⁴ Hoover made no

³²A rule of strict liability for damage caused by interfering with the natural flow of surface water would be akin to the “civil law rule,” an approach to surface water which has been consistently rejected in Washington since *Cass v. Dicks*, 14 Wash. 75, 78, 44 P. 113 (1896) (discussing and rejecting the civil law rule). See also *Keys v. Romley*, 64 Cal. 2d 396, 402, 412 P.2d 529, 532 (1966) (noting that “[t]he civil law rule is that a person who interferes with the [n]atural flow of surface waters so as to cause an invasion of another's interests in the use and enjoyment of his land is subject to liability to the other”). In *Currens*, although the state Supreme Court acknowledged that some states follow the civil law rule, it did not consider this rule to be an option for Washington. See *Currens*, 138 Wash. 2d at 861, note 1. Instead, the *Currens* court considered adopting the reasonable use rule, but in the end “decline[d] to abandon our common enemy jurisprudence in favor of the reasonable use rule.” *Id.* at 866.

³³*Currens*, 138 Wn.2d at 865 (holding that “under our common enemy jurisprudence, landowners who alter the flow of surface water on their property must exercise their rights with due care by acting in good faith and by avoiding unnecessary damage to the property of others”).

³⁴*Pruitt*, 116 Wn. App. at 557-58.

such showing here, and the trial court did not find that the Warners acted in bad faith.³⁵

Thus, even assuming that the record supports a finding that the Warners caused Hoover's damages, the propriety of the court's judgment against the Warners on the claims of negligence, nuisance, and trespass hinges on whether those damages are properly characterized as "unnecessary." The trial court found that they were, but in so doing, it relied on a comparison of the utility of the project to the Warners with the damaged it caused to Hoover. CP 431 at ¶ 1.15; CP 278; RP 617:15-20. This was an error of law requiring reversal.³⁶

Hoover concedes that the trial court erred by focusing on the utility comparison, but claims the error was harmless, given what he calls "the other overwhelming proof of the Warners' unreasonableness and bad

³⁵ The trial court summarized its finding regarding breach of the duty of due care by paraphrasing *Currens*, stating that the Warners actions "were not taken in good faith and in a manner to avoid unnecessary damage to plaintiff." CP 431. *See also Currens*, 138 Wn.2d at 865. This is not a finding of bad faith, because as a matter of simple logic, a conclusion of "not good faith and X" does not imply the conclusion "not good faith." Moreover, as noted above, the trial court expressly rejected Hoover's efforts to characterize the Warner's project as "illegal," and did not find that the Warners lied to the county about the project. CP 433 at ¶ 2.8; RP 624:17-23. Finally, even if the Warners had lied to the county six years after the project was completed, this would not support a finding that the project was undertaken in bad faith.

³⁶ *See Currens*, 138 Wn.2d at 866-67 (holding that "a landowner's duty under the common enemy doctrine *is not determined by weighing the nature and importance of the improvements against the damage caused to the one's neighbor*") (emphasis added).

faith.”³⁷ This is nonsense. Hoover’s supposedly “overwhelming proof” consists of factual claims that were either expressly rejected by the trial court (such as the claim that the project was illegal) or not deemed sufficiently supported, or relevant to the issues at hand, to warrant a finding of fact (such as the irrelevant and baseless claim that the Warners lied to the county six years after completing the project).³⁸ Neither RAP 2.5(a) nor *Satomi Owner’s Association v. Satomi*, 167 Wn.2d 781, 808 n. 21, 225 P.3d 213 (2009) supports Hoover’s implicit assertion that this Court can re-weigh evidence already considered by the trial court and find its own facts.³⁹ Yet that is what this Court would have to do to determine that the trial court’s error harmless.

If instead of focusing on comparing the utility of the project to the Warners with the costs to Hoover, the trial court had focused on whether the Warners knew or should have known in 2006 that their actions would have adverse drainage consequences for Hoover, the outcome of the trial

³⁷ Respondent’s Brief, at p. 17

³⁸ *Id.* at p. 16. Compare CP 427-34, and in particular, CP 433 at ¶ 2.8.

³⁹ Compare Respondent’s Brief at p. 17 (citing *Satomi*), with *Bale*, 173 Wn. App. at 458 (holding that “where a trial court finds that evidence is insufficient to persuade it that something occurred, an appellate court is simply not permitted to reweigh the evidence and come to a contrary finding”); and *Marcum v. Dep’t of Soc. & Health Servs.*, 172 Wn. App. 546, 560, 290 P.3d 1045 (2012) (noting that “[a]n appellate court does not make findings”). Properly understood, both RAP 2.5(a) and *Satomi* stand for the proposition that the Court of Appeals can affirm a trial court on the basis of a legal theory not presented to the trial court, if the facts found by the trial court support that alternative theory. This possibility is not relevant here, as Hoover is not advancing an alternative legal theory, but rather an alternative set of factual findings.

would have been different.⁴⁰ Given that in 2006 there were no visible flows of water on the surface draining toward the Warner parcel, how could the Warners have been expected to know that adding material to the top of their pre-existing road would block surface flows? Given that no one has even now established the direction of subsurface flows coming off the Hoover parcel, how could the Warners have been expected to know that compacting their preexisting road would block subsurface flows?

Contrary to Hoover's assertion, the Warners are not "attempt[ing] to limit the holding of *Currens* to water that can be seen on the surface."⁴¹

⁴⁰ Whether damages are "unnecessary" or "in excess of that necessary for the completion of the project," *Currens*, 138 Wn.2d at 868, is closely related to the question of whether the defendant knew or should have known in advance of the damaging consequences of his actions. "The duty to use care is based upon the knowledge of danger, and the care which must be used in any particular situation is in proportion to the actor's knowledge, actual or imputed, of the danger to another in the act to be performed." *Burr v. Clark*, 30 Wn. 2d 149, 155, 190 P.2d 769, 773 (1948). See also *Borden*, 113 Wn. App. at 371 (considering the breach of the duty of due care in a case under the common enemy doctrine, and focusing on whether the defendant "knew or should have known" that its actions would cause flooding on the plaintiff's property).

⁴¹ Respondent's Brief, at p. 17. The key case that holds that due care standard applies to subsurface waters is *Borden*, 113 Wn. App. at 368 (stating that "Washington now recognizes a negligence cause of action for altering the flow of naturally occurring surface *and ground water*") (emphasis added). By contrast, the cases that Hoover cites do not impose a negligence standard on acts that affect subsurface flows. See *Evans*, 182 Wash. at 459 (focusing on whether a defendant "was making reasonable use of its own property" without regard to knowledge of effects on others); *Bjorvatn v. Pacific Mechanical Const., Inc.*, 77 Wn.2d 563, 566-67, 464 P.2d 432 (1970) (declining to apply negligence concept when liability hinged on existence of taking); and *Wilkening v. State*, 54 Wn.2d 692, 344 P.2d 204 (finding no liability for interference with subsurface flows under

Rather, the Warners simply believe that *Currens* effectively mandates an inquiry as to whether a defendant knew or should have known of the drainage consequences of his actions.⁴² Whether drainage flows are visible or otherwise readily determinable is clearly of great importance to the question of due care. Here, because the Warners neither knew nor should have known of the alleged drainage consequences of their actions, the trial court erred by finding that they breached their duty of due care. As a consequence, this Court should reverse the judgment entered against the Warners on Hoover's negligence, nuisance, and trespass claims.

4. Both permanent injunctions issued by the trial court must be struck down.

Clearly, permanent injunctive relief against a party is only proper if the party is liable on *some* claim.⁴³ Because the Warners are not liable

common enemy doctrine as it existed before creation of the due care exception).

⁴² Although *Currens* does not expressly discuss the "knew or should have known" aspect of any breach of duty of due care, it implicitly incorporates that aspect by focusing on whether damages were "in excess of that necessary for the completion of the project." *Currens*, 138 Wn.2d at 868. See, e.g., *Lee v. Tacoma Baseball Club*, 38 Wn.2d 362, 365, 229 P.2d 329 (1951) (noting that "the duty to use due care is predicated upon knowledge of danger, and the care which must be used in any particular situation is in proportion to the actor's knowledge, actual or imputed, of the danger to another in the act to be performed").

⁴³ See, e.g., *Washington Fed'n of State Employees, Council 28, AFL-CIO v. State*, 99 Wn.2d 878, 888, 665 P.2d 1337 (1983) (noting that to obtain injunctive relief, a party must establish (1) he has a clear legal or equitable right; (2) he has a well-grounded fear of immediate invasion of that right by the entity against which he seeks the injunction; and (3) the acts about which he complains are either resulting or will result in actual and substantial injury to him). A plaintiff "must satisfy these three basic requirements regardless of whether the injunction he seeks is temporary or

on any of Hoover's claims, no form of permanent injunctive relief is proper. This point applies both to the permanent injunction in the trial court's Findings and Conclusions and to the maintenance injunction in the Stipulation and Order Approving the Completion of the Remediation Plan ("Stipulation and Order"). CP 433 at ¶ 2.10; CP 508 at ¶ 1.

Hoover asserts that "[t]he Warners waived their right to appeal [the ongoing inspection and maintenance requirement] by their failure to make a timely objection."⁴⁴ However, this ignores the fact that the Stipulation and Order also expressly states that "[t]his Order is without prejudice to the Warners' rights to appeal any or all aspects of the Court's decision in this matter." CP 508 at ¶ 3. More generally, neither the law nor common sense supports the argument that a party which complies with a judgment against it (either by paying money, or by doing an act it has been ordered to perform) thereby loses the ability to appeal from that judgment. Because they are not liable to Hoover for negligence, nuisance, or trespass, the Warners cannot properly be forced to maintain the ditches they dug to comply with the trial court's judgment.

As for the permanent injunction stated in the trial court's initial findings and conclusions, it rests on an error of law and should be struck down, even if this Court upholds the finding that the Warners were negligent. This injunction prohibits the Warners from "undertaking any

permanent." *Nw. Gas Ass'n v. Washington Utilities & Transp. Comm'n*, 141 Wn. App. 98, 115, 168 P.3d 443, 452 (2007).

⁴⁴ Respondent's Brief at p. 27.

further actions . . . that adversely affect the drainage on the Hoover property.” CP 433 at ¶ 2.10. However, under the common enemy doctrine, Hoover does not have a right to be protected from any and all “adverse effects” on his drainage. Instead, he only has a right to be protected from “unnecessary” damaging effects.⁴⁵ Given Hoover’s theory that his damages were caused by compaction of diffuse underground drainage, the prohibition on any “adverse effects” essentially precludes the Warners from using heavy equipment anywhere on their property. As framed, the injunction is overbroad, and an abuse of discretion.

Hoover’s assertion that the Warners’ waived this argument by failing to raise it in the trial court is unavailing.⁴⁶ This is so not just because the Warners denied Hoover’s entitlement to any relief, and thereby implicitly denied Hoover’s right to injunctive relief. CP 265-271. To strip the Warners of more property rights than are necessary to uphold Hoover’s right to be free of unnecessary damage is to commit a manifest error that affects the Warners constitutional right to use their property in those manners permitted by law.⁴⁷ Under RAP 2.5(a)(3), the Warners can thus raise this particular assignment of error for the first time on appeal.

⁴⁵ *Currens*, 138 Wn.2d at 865.

⁴⁶ Respondent’s Brief, at p. 23.

⁴⁷ The Washington State Constitution states that “[n]o person shall be deprived of life, liberty, or property, without due process of law.” Wash. Const. art. I, § 3. By definition, it is a violation of due process to restrict the use of property in a manner not authorized by law. Thus, the trial court’s error here in issuing an injunction that exceeds the scope authorized by law directly implicates the Warners’ constitutional rights, and therefore also implicates RAP 2.5(a)(3).

5. **The trial court abused its discretion by awarding Hoover \$50,648.45 in fees and costs under CR 37(c).**

The Warners assigned error to the trial court's finding of fact 1.11, which states as follows:

The Court finds by a preponderance of the evidence that some rock and/or other material was brought in and deposited in the area to the North and to the West of the Hoover property. The requests for admission were of substantial importance to Plaintiff's case, and none of the exceptions of Rule 37(c)(1)-(4) exist that would justify Defendants' failure to admit. Therefore an award of costs and attorney's fees in favor of the Plaintiff and against Defendants is mandatory per CR 37(c).

CP 431 at ¶ 1.11.⁴⁸ However, as should be clear from the issue associated with this assignment of error and the nature of the Warners arguments on appeal, they are not disputing the finding that "some . . . material was brought in."⁴⁹ Rather, the Warners are disputing the trial court's finding and conclusion that an award of costs and fees was proper under CR 37(c).

In their Appellants' Opening Brief, the Warners identified three distinct ways in which the trial court abused its discretion by making the award of fees and costs. First, the admission sought was of no substantial importance to Hoover's case, given his failure to establish that water

⁴⁸ See also Appellants' Opening Brief, at p. 2 (assigning error to FOF 1.11).

⁴⁹ Appellants' Opening Brief at p. 4, issue number 9, and pp. 37-43. Significantly, the Warners also did **not** assign error to FOF 1.9, which states in part that "[i]n 2006 Warner graded and deposited fill material . . . on the Warner property along Hoover's north and west property lines."

drained in the direction of the Warner parcel.⁵⁰ Second, the Warners' failure to admit that they brought in "some material" did not cause Hoover to incur additional expenses, because he still tried to prove that they brought in a massive amount of material.⁵¹ This attempted—but failed—proof entailed the use of precisely the same witnesses, testimony, and exhibits as were used to establish that "some" material was brought in. Third, even if an award of fees and costs were proper, it was an abuse of discretion to award more than the "reasonable expenses incurred in making . . . proof" that some material was brought in.⁵² The Warners stand by each of these arguments here.

Hoover has made no effort to show that the admissions sought were of substantial importance, nor does he show how the failure to admit that some material was added increased his costs of making his case.⁵³ Accordingly, this Court should reverse the award of fees and costs under CR 37(c). Moreover, although Hoover attempts to conceal the point by citing to incomplete figures, he does not deny that the total amount of fees awarded exceeds the total amount of fees Hoover incurred from the point

⁵⁰ Appellants' Opening Brief at p. 39, citing to 14 Wash. Prac., Civil Procedure § 17:18 (2d ed.) (noting that "[a]n award of expenses should *not* be made if . . . the admission sought was of no substantial importance").

⁵¹ Appellants' Opening Brief, at p. 40, citing to Moore's Federal Practice 3d at §37.73 for the proposition that "if a party's failure to admit did not cause the propounding party to incur additional expenses . . . no award is justified."

⁵² Appellants' Opening Brief at pp. 40-43.

⁵³ Respondent's Brief at p. 24.

the admissions were denied through the end of trial.⁵⁴ Such an award was a clear abuse of discretion by the trial court. So too was the trial court's decision to award Hoover *all* of the costs he incurred, despite the fact that almost half of them were demonstrably incurred prior to the day Hoover received the Warners' denial. CP 294-95; 341; 354-57. Thus, if this Court does not reverse the award of fees and costs outright, it should remand to the trial court for the calculation of an appropriate sanction which does not award Hoover fees and costs which he would have incurred regardless of the Warners' denial of the requests for admission.

6. Hoover is not entitled to an award of fees and costs on appeal, either under CR 37(c) or RAP 18.9(a).

Under certain circumstance, CR 37(c) allows a trial court to make an award of the "reasonable expenses in making [the] proof" of a matter which should have been admitted.⁵⁵ The rule provides no basis whatsoever for making an award of fees on appeal, since appellate review

⁵⁴ Hoover concedes that he incurred \$30,347.41 in fees prior to his receipt of the allegedly improper denial of his request for admissions. Respondent's Brief at p. 25. Compare Appellants' Opening Brief at p.41, citing figure of \$30,308.45 in pre-denial fees. What Hoover overlooks is that he also billed \$4,890 for post-trial work, a sum which is also not eligible for reimbursement under CR 37(c). See Appellants' Opening Brief at p. 41, and CP 295 at ¶ 8, 337-38. Thus, even if *all* of the fees Hoover incurred between October 14, 2013 (the date he received the Warners' denial) and November 20, 2013 (the last day of trial), were expended in proving that some material was brought in, the maximum allowable fee award would have been \$30,232. See Appellants' Opening Brief, at p. 42. Compare CP 433 at ¶ 2.97 (awarding \$32,714.85 in fees).
⁵⁵ CR 37(c).

is not a forum for “making proof” of factual matters.⁵⁶ Moreover, in this appeal the Warners are not challenging the finding that they added some material to the road, but are instead challenging the propriety of the fee award made by the trial court.⁵⁷ Hoover is not entitled to an award of appellate fees under CR 37(c).

Neither is he entitled to an award of fees under RAP 18.9(a). That rule allows this Court to make an award of fees against a party that “files a frivolous appeal.”⁵⁸ An appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal.⁵⁹ Plainly, neither this appeal as a whole, nor the Warners’ argument against awarding Hoover trial court fees under CR 37(c), is frivolous.⁶⁰ With

⁵⁶ See, e.g., *Thompson v. King Feed & Nutrition Serv., Inc.*, 117 Wn. App. 260, 269, 70 P.3d 972 (2003) aff’d, 153 Wn. 2d 447, 105 P.3d 378 (2005) (declining to award CR 37 fees on appeal even though it upheld an award of such fees for trial). See also *House v. Giant of Maryland LLC*, 232 F.R.D. 257, 261 (E.D. Va. 2005) (denying fees under Fed. R. Civ. P. 37(c) for post-trial motions).

⁵⁷ See Appellants’ Opening Brief at pp. 37-43. Compare Respondent’s Brief at p. 26 (asserting without foundation that “the making of that proof is challenged . . . at the appellate level”).

⁵⁸ RAP 18.9(a).

⁵⁹ *Green River Community College, Dist. No. 10 v. Higher Educ. Personnel Bd.*, 107 Wn. 2d 427, 730 P.2d 653 (1986). See also 3 Wash. Prac., Rules Practice RAP 18.9 (7th ed.).

⁶⁰ Under the terms of RAP 18.9(a) and cases interpreting it such as *Streater v. White*, 26 Wn. App. 430, 434, 613 P.2d 187 (1980) (holding that an appeal is frivolous only if it presents “no debatable issues”), only an entire appeal may be deemed frivolous and subject to sanctions.

particular regard to the award of fees under CR 37(c), the trial court clearly abused its discretion by awarding more in fees and costs than Hoover expended during the entire trial. Indeed, since Hoover made no showing whatsoever that his fees and costs were increased by the Warners' failure to admit that they added some material to the road, the entire award was *at least* arguably an abuse of discretion. Hoover has no proper basis for claiming fees or costs on appeal, and this Court should deny his request.

II. CONCLUSION

The trial court's finding that the Warners caused Hoover's damage is not supported by substantial evidence, because nothing in the record supports an inference that either surface or subsurface drainage from Hoover's parcel flowed toward the Warner parcel prior to 2006. Moreover, the trial court relied on a prohibited utility comparison when it found that the Warners breached their duty of due care. Had the trial court instead properly focused on whether the Warners knew or should have known about the drainage consequences of their actions, it could not have found them liable. Accordingly, this Court should reverse the judgment against the Warners on the claims of nuisance, negligence, and trespass. For the reasons set forth above, it should also either reverse the award of attorney's fees and costs against the Warners, or remand that award to the trial court for the determination of an appropriate sanction under CR 37(c).

DATED this 16th day of October, 2014.

DAVID CORBETT PLLC

By David J. Corbett
David J. Corbett, WSBA# 30895
2106 N. Steele Street
Tacoma, WA 98406
(253) 414-5235
david@davidcorbettlaw.com

Attorney for Appellants


CERTIFICATE OF SERVICE

I certify under penalty of perjury of the laws of the State of Washington that on October 16, 2014 I emailed a PDF copy of the attached Reply Brief of Appellants to Respondent's counsel J. Michael Morgan at the following email addresses:

jmmorgan@worthlawgroup.com and JFulks@worthlawgroup.com.

Mr. Morgan has previously agreed to accept email service of documents to be filed in this appeal.

Dated this 16th day of October, 2014.

By: 
David J. Corbett