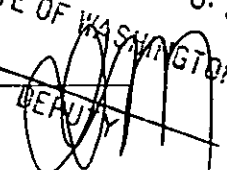


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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
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NO. 45742-3-II

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.

SUPPLEMENTAL OPENING BRIEF OF APPELLANTS

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I. INTRODUCTION

On August 7, 2014, Commissioner Bears granted the Motion to Consolidate brought by Appellants Scott and Ernest Warner (the "Warners"), and authorized the filing of this Supplemental Opening Brief of Appellants to address the issues arising out of the trial court's Stipulation and Order Approving the Completion of the Remediation Plan ("Stipulation and Order"), dated July 18, 2014.

In the Stipulation and Order, the trial court approved certain ditches dug by the Warners as an effective means of draining the property owned by Respondent Greg Hoover ("Hoover"), and required the Warners to maintain the ditches. For the reasons previously set forth in their initial Opening Brief, the Warners are not liable for any impairment of Hoover's drainage. As a consequence, the trial court erred by requiring them to construct, inspect, and maintain the ditches. This Court should reverse the trial court, and free the Warners of any obligation to inspect or maintain the ditches.

II. SUPPLEMENTAL ASSIGNMENT OF ERROR

1. The trial court erred when it required the Warners to regularly inspect and maintain the drainage ditches dug to complete the remediation plan. CP 508.

III. ISSUE PERTAINING TO SUPPLEMENTAL ASSIGNMENT OF ERROR

1. Should this Court relieve the Warners of the obligation to inspect and maintain the ditches, since the Warners are not liable for any impairment to Hoover's drainage?

IV. SUPPLEMENTAL STATEMENT OF THE CASE¹

At the conclusion of the trial in this matter, the superior court judge found the Warners liable in negligence, nuisance and trespass for adversely affecting the surface and subsurface drainage of the Hoover parcel. CP 432-34. In addition to awarding Hoover \$97,000 in damages for annoyance, inconvenience, repairs, and loss of use and enjoyment, the trial court awarded \$156,000 for permanent damage to the Hoover property. CP 433. However, the trial court held the \$156,000 award in abeyance to give the Warners a chance to develop and implement a remediation plan which would succeed "in restoring . . . the surface and subsurface flows off the Hoover property." CP 433.

In compliance with the trial court's order, the Warners submitted a remediation plan calling for the digging of a ditch approximately 165 feet long on the Warner's side of the parties' shared boundary (to the east of the Hoover parcel), along with three cross ditches. CP 496. On March 7, 2014, the trial court approved the remediation plan, subject to field approval of the as-built ditch by experts for each party. CP 504. The trial court also ordered that "Defendants shall regularly inspect and maintain

¹ The Warners incorporate here by reference the entire Statement of the Case included in their initial Opening Brief at pp. 4-9.

the drainage system (at least annually) to ensure that it functions.” CP 504.

The Warners dug the ditches called for by the court-approved plan. Before approving the plan, Hoover’s expert required significant additional ditching, including 9 new cross ditches, one of which was to be located more than 100 feet inside the Warner parcel. CP 510-11. The Warners dug the additional ditches, and the parties stipulated to the success of the remediation plan. CP 506-07. On July 18, 2014, the trial court accepted the parties’ stipulation, found as a matter of fact that the remediation work succeeded in restoring Hoover’s drainage, and concluded as a matter of law that the Warners had an ongoing obligation to inspect and maintain the drainage system. CP 508. The Warners appealed from this decision on July 30, 2014, and on August 7, 2014 Commissioner Bearse approved their motion to consolidate this new appeal with their prior appeal.

V. SUPPLEMENTAL ARGUMENT²

For the reasons set forth in the Warners’ initial Opening Brief, the trial court erred when it found the Warners liable for impairing Hoover’s drainage. Because there was no proper legal basis for holding the Warners liable to Hoover, there was also no basis for forcing the Warners to choose between taking steps to restore Hoover’s drainage and paying an additional \$156,000 in damages. CP 433. The Warner’s argument here is based on the common sense principle that a court cannot properly force a

² The Warners incorporate here by reference the arguments made in their initial Opening Brief at pp. 10-45.

party to choose between two disadvantageous alternatives unless the law supports restricting the party to at least one of those alternatives.

However, the Warners' argument is also based on the established law of injunctions, under which a party is not entitled to injunctive relief unless it establishes a clear equitable or legal right to that relief.³ Here, because the Warners are not liable to Hoover on any of Hoover's claims, Hoover has no equitable or legal right to any relief. Accordingly, this Court should reverse the trial court's Stipulation and Order, and free the Warners of the requirement to inspect and maintain the ditches.

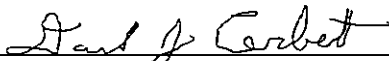
VI. CONCLUSION

Because there was no proper legal basis for holding the Warners liable for impairing Hoover's drainage, the trial court erred when it forced the Warners to choose between paying an additional \$156,000 in damages and taking steps to remediate Hoover's property. The trial court consequently also erred when it required the Warners to inspect and maintain the drainage ditches they dug as part of the remediation plan. This Court should reverse the trial court and release the Warners from any obligation to inspect or maintain the ditches.

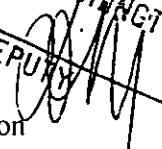
³ See, e.g., *Washington Fed'n of State Employees, Council 28, AFL-CIO v. State*, 99 Wn.2d 878, 888, 665 P.2d 1337 (1983)

DATED this 18th day of August, 2014.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury of the laws of the State of Washington that on August 18, 2014 I emailed a PDF copy of the attached Supplemental Opening 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 18th day of August, 2014.

By: 
David J. Corbett