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COURT OF APPEALS
DIVISION I
SEATTLE, WA

No. 64478-5

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

REBECCA FENSKE,

Appellant,

vs.

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

Respondents.

REPLY BRIEF OF APPELLANT

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ORIGINAL

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I INTRODUCTION

The crucial fact in this case is that only the Tegmans had the ability to restore the drainage system to prevent the continued flooding of Ms. Fenske's property. The Tegmans could have repaired their property at any point up to the time of trial as a means of limiting the damages available to Ms. Fenske. Instead, they chose not to repair the drainage even after the trial court determined their liability for obstructing a natural drainway. The Tegmans now ask the Court to reward their bad behavior by disallowing Ms. Fenske recovery of those damages that make her whole.

II. ARGUMENT

As discussed below in Section III, much of the Tegmans' argument in their brief to this Court relies on evidence that is not in the record and, as such, should be disregarded by the Court. The record that is before the Court establishes that Ms. Fenske lost the use of her basement for the four-year period leading up to trial. The trial court should have awarded Ms. Fenske damages compensating her for this loss of use. With respect to the propriety of an award of damages reflecting the diminution of value to Ms. Fenske's property, the pivotal fact is that Ms. Fenske had no way of restoring the drainage on her property, and necessarily had to rely on the Tegmans to restore the natural drainway. Because the Tegmans chose not

to remedy the obstructed drainway, Ms. Fenske's property flooded over a four-year period, resulting in a diminution in value to her property. The Tegmans should not be allowed to avoid paying the damages that they caused and that only they could have alleviated.

III. PROCEDURAL MATTERS

An appellate court is limited to the record before it. *Womack v. Von Rardon*, 133 Wn.App. 254, 260, 135 P.3d 542 (2006). Respondents fill their brief with contentions to which they provide no citation, simply because their contentions never made it into evidence before the trial court and are not part of the record on appeal. Ms. Fenske requests that the Court of Appeals disregard the Tegmans' multiple references to settlement negotiations and post-trial activities, neither of which is properly before this Court in its review of the trial court's decisions. Once the Court disregards the evidence that is outside the record, the uncontradicted evidence establishes that Ms. Fenske suffered a loss of use of her property and that the value of her property was diminished by the four years of flooding—a condition unremediated and ongoing at the time of trial.

A. The Trial Court Excluded from Evidence and from Its Consideration Any Settlement Discussions between the Parties and Respondents' Repeated References to Settlement Discussions is Improper and outside the Scope of This Appeal.

Respondents place before this Court their version of the settlement negotiations that they contend took place before trial. Settlement negotiations between the parties were not before the trial court because it specifically excluded such evidence. Ms. Fenske filed Motion in Limine No. 2: "Evidence of conduct or statements made in compromise negotiations is not admissible to prove the invalidity of a claim or its amount, and should be excluded under Evidence Rule 408." (CP 17.) The trial court granted this motion. (CP 175.) No witness testified to any settlement negotiations that took place between the parties and no document reflecting such negotiations became part of the record on appeal. This Court should strike any references made by respondents to settlement discussions.

The persons with knowledge of the settlement discussions that took place prior to trial were Appellant Fenske, Respondents Tegman and Respondents' expert, Ken Harris. Respondents' attorney's cross examination of Fenske is set forth at RP III, pp. 30-88. A review of that transcript reveals no references to settlement negotiations. Neither the Tegmans nor Mr. Harris testified at trial.

In the Brief of Respondent, at page 3, lines 4-11 (first full paragraph) and page 4, lines 9-14, Respondents set forth their version of settlement negotiations between the parties. They provide no citations to the record, simply because they are setting forth contentions, and not the facts that were before the trial court. Under *Womack v. Von Rardon*, 133 Wn.App. 254, 260, 135 P.3d 542 (2006), the appellate court is limited to that record that the trial court had to consider. Respondents' attempt to introduce their version of matters that were not included in the trial court's record and, in fact, were specifically ordered excluded from evidence, is improper. Ms. Fenske requests that the Brief of Respondent at page 3, lines 4-11 (first full paragraph) and page 4, lines 9-14 be stricken.

B. The Unsubstantiated Claims of Respondents' Post-Trial Activities are not Part of the Record on Appeal, were not Part of the Evidence before the Trial Court, and are not Properly Part of this Court's Review.

Respondents dedicate a substantial amount of their brief to their view of what occurred after the conclusion of the trial. What occurred following the trial is neither part of the record on appeal, nor part of what the trial court considered in reaching its decisions that are now subject to review. As such, Respondents' view of post-trial facts should be disregarded by this Court.

The Respondents' Brief contains the following unsupported references to post-trial activities:

- Page 4, lines 5-8;
- Page 5, section E;
- Page 11, lines 12-14;
- Page 17, first full paragraph;
- Page 21, first full paragraph;
- Page 24, last paragraph to page 25, lines 12-14
- Page 27, lines, 2-3.

At issue in this case are whether the record contains substantial evidence to support the trial court's findings on damages, and whether the trial court correctly decided the measure of damages available to Fenske. The trial court ordered Respondents to remediate the drainage on their property at the conclusion of the trial. But Respondents, by refusing to fix a drainage problem that they had known of for more than three years before trial, and contesting their liability to fix the drainage throughout trial, gave away any chance to introduce evidence of the design, cost and efficacy of such repair. The trial court had no such evidence before it at trial, and this reviewing Court has nothing but Respondents' unsubstantiated contentions about post-trial remedies before it. The

above-enumerated references to post-trial activities in the Brief of Respondents should be stricken.

IV. SUBSTANTIVE ISSUES PROPERLY BEFORE THE COURT OF APPEALS

A. Loss of Use Damages.

The record is replete with testimony establishing Mr. Fenske's loss of use damages. Ms. Fenske testified at length about her family's need for and many uses of the 940 square-foot basement of her home. She explained how her family's needs had altered over time, and how their use of the basement had been affected by the recurring flooding after December 2005. The trial judge visited the site on one summer day in August 2009 and observed the condition of the basement. At the conclusion of the trial, he found that Fenske had suffered no loss of use between December 2005 and the October 2009 trial because she continued to use the basement for storage. Such a finding required a complete disregard of the evidence before the court.

Adding a basement to the small farmhouse placed on the Fenske property increased the living area from approximately 1340 to 2280 square feet, a significant addition. (RP II, 49:22-51:2.) With no other buildings on the property, the basement provided a utility room, storage area, work shop, second bathroom, and potential expansion of living space for the

family. The basement served these functions as a completely usable space from 1985 to 2005. With the exception of the single Markland incident in 1988, and a small area of dampness in 2004, the basement remained dry enough that items were stored directly on the concrete floor in cardboard boxes and bags. (RP II, 65:5-14, 80:13-20; III, 1:20-6:25.)

With the collapse of the drainage system on the adjacent Tegman property in December 2005, inches of water flooded the Fenske basement with every significant rainstorm. Unlike the dry and usable basement that the Fenskes had come to rely upon for 20 years, it became a humid, foul smelling, moldy place in which Ms. Fenske refused to store her mother's things or her new husband's furniture. (RP II, 51:10- 14, 63: 19- 20, 72:19-73:12, 84:19-86:4; III, 18:6- 20:7.) Water became so deep that it snuffed out the hot water heater pilot light. (RP II, 87:3- 88:5.) Ms. Fenske waded to and from the laundry through inches of water. (RP III, 15:10-16:2.) The toilet was removed and the outlet to the sewer was used to drain flood water. (RP II, 65:1- 25.)

After Ms. Fenske's co-worker installed a sump pump in the basement, a hose snaked across the floor from the pump to the drain to the sewer. Even with the sump pump operating, water seeped up through the concrete floor. (RP III, 12:3-15:2.) The basement continued, up to the

of flooding between December 2005 to the time of trial. Phrased another way, was Ms. Fenske's ability to use her basement the same between December 2005 and trial, as it was prior to the four-year period of flooding? To answer this question, the Court must evaluate questions such as:

- Is having a dry place to store family stuff the same as having a wet, smelly, moldy basement in which you refuse to put items that you value?
- Is having a laundry room the same as having a laundry room that you have to wade to?
- Is having a second bathroom for a family of four the same as having one bathroom for a family of four?
- Is having a dry and completely usable concrete basement the same as having a basement into which water seeps and has a hose running across the floor from the sump pump to the hole where the toilet used to be?
- Is having a space in the house that you can expand to when the children get older the same as having a space in the house that cannot be used for living space?

Fenske's answers to all of these questions at trial established unequivocally that she had lost the use of her 1985 to 2005 basement for

the four-year period up to trial. The Tegmans introduced no evidence to contradict this loss of use. The trial court erred when it disregarded the substantial evidence before it and found that Fenske should recover no loss of use damages. Fenske requests that this Court reverse this error of the trial court and enter judgment for loss of use damages in the amount established through Fenske's testimony at trial.

B. Diminution in Value Damages.

The central fact to Ms. Fenske's case is that no action that she could have taken on her property would have eliminated the flooding problem in her house.¹ In its May 22, 2009, Order, the trial court recognized this fact when it found that the "failure of Defendants Tegman to provide adequate drainage across their property in the natural drainway resulted in recurring flooding of the Fenske property from December 2005 to present." (CP 14.) Ms. Fenske did not have the ability to go onto the private property of the Tegmans, restore the drainage across their property and, thereby, eliminate the flooding in her house. The question this appeal presents is whether Ms. Fenske can recover the loss of value of her property that resulted from four years of recurring flooding where there

¹ Respondents contend that "Ms. Fenske could have chosen to seek only damages and repaired the property herself." (Brief of Respondents, p. 26, final two lines.) There is no evidence that the drainage problem causing the flooding on the Fenske property could be repaired on the Fenske property. The Court's May 22, 2009 Order reflects that the problem is inadequate drainage through the natural drainway on the Tegman property. (CP 13-15.)

was nothing she could do on her own property to stop that damage caused by the Tegmans' inadequate drainage.

Ms. Fenske's situation must be distinguished from that circumstance in which a property owner can eliminate the damage-causing condition and restore her property. Where a defendant causes harm to a plaintiff's property, and the plaintiff can eliminate the damage-causing condition and take action to restore her property, at trial she should certainly recover her restoration costs. But if that trial is some years removed from the time of damage, and plaintiff has chosen not to restore her property during that time, she should not be allowed at trial to recover damages such as loss of use and diminution of value that her property sustained because she failed to restore it promptly. In such a case, the burden to avoid such loss of use and value cannot be placed on the defendant, who is unable to go onto plaintiff's property and put a stop to the accumulation of damages. Instead, the party bearing that burden should be the party with the ability to take some action to control the accrual of the damages, in this scenario, the plaintiff. Undisputedly, the Fenske case does not fit this fact pattern.

A second scenario is that in which a defendant causes harm to a plaintiff's property, promptly afterward eliminates the damage-causing condition, and restores plaintiff's property. In this scenario, should the

plaintiff pursue litigation, the defendant can present evidence of the restoration costs incurred. However, because of the prompt remediation, the defendant can establish minimal loss of use by the plaintiff of her property and minimal diminution in value of the plaintiff's property due to the short term of the problem. At trial, there would be evidence of the design of the fix, the construction costs, the permits issued, and an evaluation of the effectiveness of the fix prior to trial. The court could base any award to plaintiff of loss of value damages that may attach to the property upon this concrete evidence. *See Brickler v. Myers Construction*, 92 Wn. App. 269, 966 P.2d 335 (1998).

Much as they may like to, the Tegmans cannot bring themselves within this second scenario. As established by the record on appeal, Ms. Fenske informed the Tegmans that the drainage problem was on their property on January 12, 2006. (RP II, 69:7-19). The Tegmans did nothing to restore the drainage on their property that would have alleviated the flooding on the Fenske property between 2006 and 2009. Even after the trial court ruled that their failure to do so was an "unreasonable use of their property," the Tegmans declined to repair the drainage system on their property. (CP 14.) Instead, they forced the case to trial in August 2009, but at trial submitted into evidence no engineering design, no information as to the affect such a design would have on the Fenske

property, no City permit, and no evaluation of the effectiveness of the design to restore the drainage on their property.

Despite this complete failure of the Tegmans to present any defense of their inaction, the trial court ruled that Fenske could not recover any loss of use damages caused by the nearly four years of recurring flooding. The trial court allowed the Tegmans, who had refused for nearly four years to correct the drainage on their property, to avoid paying any damages except those incurred to restore the drainage on their own property. In effect, the trial court granted to the Tegmans all of the benefits that they would have received had they promptly restored their property and alleviated the flooding on Fenske's property. The burden of the loss of property value was placed squarely on Fenske—the party with no ability to control or mitigate the damages.

The trial court reasoned that imposing the cost of restoration upon the Tegmans and granting loss of property value to Fenske at the time of trial would amount to double recovery. The question raised by the trial court's rationale is what "double recovery" Fenske would receive if awarded (1) a restoration of the "adequate drainage through the natural drainway to accommodate the flow both in normal conditions and in times of recurrent flooding conditions" (CP 14) on the neighboring Tegman property, and (2) the loss in value of her house because of four years of

recurring flooding, measured as of the time of trial and prior to any fix of the drainage problem? Fenske's position is that such a recovery would "return the injured party as nearly as possible to the position he would have been in had the wrongful act not occurred"² in that she would, after restoration, have a property that does not flood and have in equity what the property was worth prior to the start of the flooding. This places her in her "pre-flood" position, in accord with Washington case law.

The trial court based its rationale of double recovery not on the evidence before it, but on its own speculation. It reasoned that the affect of four years of recurring flooding on the Fenske property would be erased once the drainage across the Tegman property was restored. But the trial court had no evidence before it to support this conclusion. No evidence was received about the design, cost, permitting, or effectiveness of the fix the Tegmans intended to put in place once ordered to do so by the trial court. Nor did the court have any evidence from an expert witness as to the affect such a fix would have on the value of the neighboring Fenske property. Instead, the trial court declined to grant Fenske the loss of value of her property based on pure speculation.

Regardless of its reasoning, the practical effect of the trial court's decision here was to reinforce the Tegmans' decision not to fix the

² *Thompson v. King Feed & Nutrition Service, Inc.*, 153 Wn.2d 447, 459, 105 P.3d 378 (2005).

drainage on their property until forced to do so by the court. Had the Tegmans gone ahead and fixed the drainage promptly, they would have incurred restoration costs, but could have presented evidence of plaintiff's minimal loss of use and loss of value damages because they took prompt action and restored the drainage and minimized the flooding. But the Tegmans were awarded this same result by refusing to fix the drainage, counting on the court not to order them to do so prior to trial,³ forcing the neighbor to pursue her case all the way through trial, and not presenting a single witness once at trial. It is for this court to decide which of those courses it chooses to encourage.

Under the facts of this case—specifically, that situation in which the plaintiff cannot eliminate the damage-causing condition or alleviate the damages to her property—plaintiff's damages should be measured as of the time of trial. The court, in ordering the recalcitrant defendants to correct the damage-causing condition, should consider the concrete evidence of damage that has accrued to the plaintiff's property over the years of damage and up to the time of trial. It should not, as the trial court did here, speculate that the injunctive relief that it orders will correct the condition and eliminate any loss of value accrued over four winters of

³ Injunctive relief is an “extraordinary remedy.” See *Kucera v. Washington Department of Transportation*, 140 Wn.2d 200, 209, 995 P.2d 63 (2000); and *Arnold v. Melani*, 75 Wn.2d 143, 152-53, 437 P.2d 908 (1968).

flooding. The trial court especially should avoid such speculation where the defendant has presented, as here, no evidence of an engineering design, no information as to the affect such a design would have on the neighboring property, no cost estimate, no City permit, and no evaluation of the effectiveness of the design to restore the drainage on their property. The trial court should place the burden of showing that no loss of value took place on the party that had the ability to control that damage, in this case, the defendants.

Appellant Fenske requests that the Court of Appeals reverse the trial court's decision and order that pre-restoration loss of value damages measured as of the time of trial are available to her. In this case, the amount of such damages was established by uncontradicted expert testimony at between \$74,800 and \$110,000.

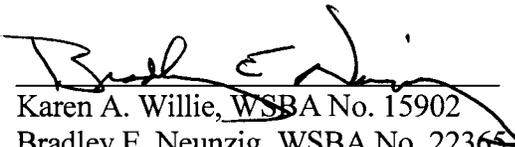
V. CONCLUSION

Appellant Rebecca Fenske respectfully requests that the Court of Appeals restrict its review of the trial court's decisions to the record that was before the trial court, and decline to consider Respondents' view of pre-trial and post-trial matters. Appellant further requests that the Court of Appeals reverse the findings of the trial court with respect to loss of use damages, and remand her case with instructions to enter judgment for her loss of use damages in the amount of \$35,200. Ms. Fenske further

requests that the Court reverse the findings of the trial court with respect to diminution in fair market value damages, and remand her case with instructions to award her diminution in value damages in the range of \$74,800 to \$110,000.

DATED this 1st day of June, 2010.

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ORIGINAL

I, RACHEL E. HOOVER, declare the following to be true and correct under penalty of perjury under the laws of the State of Washington:

That I am now and at all times herein mentioned was a citizen of the United States and a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action and am competent to be a witness therein.

That on the 1st day of June, 2010, I cause to be served via Pacific Coast Attorney Services, a copy of Reply Brief of Appellants and Proof of Service to the following party:

Counsel for Respondents

A. Clarke Johnson
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Tacoma, WA 98403

DATED this 1st day of June, 2010.



Rachel E. Hoover