

CASE NO: 66156-6-I

COURT OF APPEALS, DIVISION I OF THE STATE OF
WASHINGTON

CRYSTAL LOTUS ENTERPRISES, LTD.,

Appellant,

v.

CITY OF SHORELINE and CITY OF LAKE FOREST PARK,

Respondents.

REPLY BRIEF OF APPELLANT

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ORIGINAL

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Currens v. Sleek 138 Wn.2d 858, 983 P.2d 626, 993 P.2d 900 (1999) cited on Pages 2-3, 5, 14, 18, and 24.

Fradkin v. Northshore Util. Dist. 96 Wn. App. 118, 977 P.2d 1265 (1999) cited on Pages 5-6 and 24.

Grundy v. Brack Family Trust 151 Wn. App 557 213 P 3d 619 (2009) cited on Page 22.

Phillips v. King County 136 Wn.2d 946, 968 P.2d 871 (1998) cited on Pages 5-6 and 24.

Ripley v. Grays Harbor Co. 107 Wn. App. 575, 27 P.3d 1197 (2001) cited on Pages 2-3, 5, 13, 18, and 24.

Rothweiler v Clark Co. 108 Wn. App. 91, 29 P.3d 758 (2001) cited on Pages 2-3, 5, 14, 18, and 24.

Woldson v. Woodhead 159 Wn.2d. 215 149 P.3d 361 (2006) cited on Pages 5-6, 21, and 24.

I. **APPELLANT'S DISCUSSION OF GENERAL ISSUES**
RAISED IN RESPONDENTS OPENING BRIEF

It is Undisputed That Respondents Have collected & Channeled Public Stormwater from Approximately Forty [40] to Fifty [50] Acres of City Residences, Public Roads & their Public Stormwater Management Systems.

Respondents acknowledge that they have collected and channeled public stormwater from approximately forty [40] to fifty [50] acres of city residences, public roads and their public stormwaters management systems. It is also undisputed that Respondents have diverted this amount of public stormwater collected from the approximately forty [40] to fifty [50] acres of city residences, public roads and their public stormwaters management systems through a diversion pipe unto private property. Respondents' assert they are justified in this action based upon the "Common Enemy" rule.

It is Undisputed That the "Common Enemy Rule" Requires the Respondents to Make Adequate Provision for the Proper Outflow of the Public Stormwater That Respondents Have Collected, channeled & Discharged onto Private Property Which Adversely Impacts Appellant's Lots 6 & 7.

The Respondents have asserted that the “Common Enemy Rule” provides a justification and or “right” to discharge these aforementioned collected and channeled public stormwaters onto private property and therefore they are not “trespassers”. But the courts have carved out exceptions to the unrestrained actions of public entities attempting to use the “Common Enemy Rule” in order to prevent their actions from causing damage to private property.

The Washington appellate courts in Ripley v. Grays Harbor Co. 107 Wn. App. 575, 27 P.3d 1197 (2001), Rothweiler v. Clark Co. 108 Wn. App. 91, 29 P.3d 758 (2001) & Currens v. Sleek 138 Wn.2d 858, 983 P.2d 626, 993 P.2d 900 (1999) have set forth an exception to the “common enemy rule”:

“Another exception provides that surface waters may not be artificially collected and discharged on adjoining lands in quantities greater than or in a manner different from the natural flow thereof. It is not permitted to concentrate and gather such water into artificial drains or channels and throw it on the land of an individual owner in such manner and volume as to cause substantial injury to such land and without making adequate provision for its proper outflow, unless compensation is made.” [emphasis added]

It is Undisputed That Respondents Have Never Made Any Provision for the Proper Outflow of the Respondents' Collected and Channeled Public Stormwaters Which are Discharged on Private Property and Adversely Impact Appellant's Lots 6 & 7.

It is undisputed by the Respondents that they have collected, channeled and diverted public stormwaters from approximately forty [40] to fifty [50] acres of city residences, public roads and public stormwaters which are discharged onto private property (1) "*in quantities greater than... the natural flow thereof*" and (2) without "*making adequate provision for its proper outflow*" in violation of the standards set forth in Ripley, Rothweiler & Currens [supra]:

1. As outlined in detail in Appellant's opening brief in the Statement of the Case, it is clear that Respondents have never made any provision for the outflow the Respondents' collected channeled and diverted public stormwaters:
 - a. Both Eric Gorbman the owner of lot 8 and Donald Koler the president of Appellant, have stated that absolutely no provisions at any time, have ever been made by the Respondents for the outflow of Respondents' collected, channeled and diverted public stormwaters which they have continuously discharged onto private property through

Respondents' diversion pipe which adversely impact Appellant's lots 6 & 7.

- b. Neither of the Respondents has ever alleged at any time that they have made any provisions for 'the proper outflow' [per Ripley, Rothweiler & Currens (supra)] of the Respondents' collected, channeled and diverted public stormwaters which are being discharged onto private property water through Respondents' diversion pipe which adversely impact Appellant's lots 6 & 7.
- c. No money has been paid by the Respondents, to either the Appellant or the owner of lot 8, for the right to discharge the Respondents' collected, channeled and diverted public stormwaters onto private property through Respondents' diversion pipe which adversely impact Appellant's lots 6 & 7.
- d. Neither of the Respondents has ever alleged that they have paid either Appellant or the owner of lot 8 for the right to discharge the Respondents' collected, channeled and diverted public stormwaters onto private property through Respondents' diversion pipe which adversely impact Appellant's lots 6 & 7.

Respondents Have a Duty to Abate or Mitigate the Adverse Impact of the Collected, Channeled and Diverted Public Stormwaters which

**They Are Discharging onto Private Property Pursuant to the
'Common Enemy Rule' or They are Liable for This Continuous
Trespass for These Public Stormwaters Which Adversely Impacts
Appellant's Lots 6 & 7:**

Respondents' duty under the 'Common Enemy Rule' as defined in Ripley, Rothweiler & Currens (supra) requires them to make provision for 'the proper outflow' of these collected, channeled and diverted public stormwaters which they are discharging onto private property which adversely impact Appellant's lots 6 & 7 and failing that, to simply abate the discharge. The Respondents have never disputed that either of them has made any provision for the outflow of the collected, channeled and diverted public stormwaters which are discharged onto private property which adversely impact Appellant's lots 6 & 7. Therefore failing the Respondents' duty to make provision for 'the proper outflow' of the collected, channeled and diverted public stormwaters which are discharged onto private property which adversely impact Appellant's lots 6 & 7, the Respondents should be ordered to abate the discharge onto private property as a continuous trespass. Appellant has discussed the case law which defines a continuous trespass including Phillips v. King County, 136 Wn.2d 946, 968 P.2d 871 (1998), Fradkin v. Northshore Util. Dist. 96 Wn. App. 118, 977 P.2d 1265 (1999) & Woldson v.

Woodhead 159 Wn. 2d. 215 149 P.3d 361 (2006) at length in Appellant's opening brief and refers the court to the discussion therein.

This duty to make provision for 'the proper outflow' of the Respondents' collected, channeled and diverted public stormwaters which are discharged onto private property is not diminished by the Respondents' assertion that King County is the original party that took the first action to collect, channel and divert public stormwaters and discharged these public stormwater onto private property which adversely impact Appellant's lots 6 & 7. Neither of the Respondents have alleged that they had acquired any proscriptive easement rights by providing evidenced of a hostile taking of Appellant's right to its private property. Nor have Respondents ever asserted any legal basis or authority for their "taking of private property" by using the Appellant's lots 6 & 7 as a retention site for Respondents' collected public stormwaters. Further, since Respondents chose to not join King County in this cause of action they cannot look to King County for any contribution for their continuous trespass as described in Phillips, Fradkin & Woldson (supra).

It is also undisputed that:

1. King County originally collected and channeled these public stormwater from approximately forty [40] to fifty [50] acres of city residences, public roads and their public stormwaters management

systems and diverted the public stormwater onto private property which adversely impact Appellant's lots 6 & 7 and has never made any provision for 'the proper outflow' there from.

2. Both Respondents each acquired their respective city boundaries at issue in this cause of action as well as the public stormwater management systems developed by King County by their respective annexation of the King County territory, thereby bringing both the King County land and public stormwater management systems within their respective jurisdictions.
3. That when Respondents acquired their respective right, title and interest in the heretofore King County owned and controlled public surface water management system, upon annexation of the King County area into each of their city boundaries; they also assumed:
 - a. All resultant liabilities of King County; and
 - b. The duty to mitigate the continuous trespass created by the aforementioned diversion of public stormwaters onto private property which adversely impact Appellant's lots 6 & 7, when they assumed the heretofore King County owned and controlled public surface water management systems.
4. That as part of the Respondents' due diligence when they acquired the King County designed public stormwater management systems within

their respective boundaries, the Respondents knew that King County had created an intentional continuous trespass on Appellant's lots 6 & 7, which the Respondents' thereafter continued to maintain it in a manner which constituted a continuous trespass, consequentially the Respondents:

- a. Assumed the liability from King County continuous trespass on Appellant's lots 6 & 7; and
 - b. By their continuation of the King County public stormwaters management systems that they acquired from King County the Respondents are liable for the present continuous intentional trespass action which adversely impact Appellant's lots 6 & 7.
5. Based upon a review of the video attached to the declaration of Vinesh Gounder [Sub 20] it is obvious that there is a public stormwater catch basin on the eastern side of 25th Ave NE, which is within the city limits of Lake Forest Park and feeds down-slope to the west into the aforementioned main diversion pipe of Respondent Shoreline, just before it daylights and dumps the collected and channeled public stormwater onto private property lot 8 and therefore both the Respondent Shoreline and Lake Forest Park are responsible fore the continuous trespass on Appellant's lots 6 & 7.

6. It is undisputed that the Respondents have continued without interruption to collect and channel public stormwater from approximately forty [40] to fifty [50] acres of city residences, public roads and public stormwaters for the past three years, which are diverted from their natural flow downhill along the western side of 25th Ave N.E. and directed across to the eastern side of 25th ave N.E. and this practice under their respective regimes is an on-going uninterrupted continuous intentional trespass going back to the original actions of King County, which discharged channeled public stormwater continues to create surface pools on the low lying areas of Appellant's lots 6 & 7 during the rainy season.
7. The Respondents have not ever abated the collection and channeling of public stormwater from the approximately forty [40] to fifty [50] acres of city residences, public roads and public stormwaters, which are diverted onto private property which create surface pools on the low lying areas of Appellant's lots 6 & 7.
8. The Respondents have not ever made any provision for 'the proper outflow' of these aforementioned collected and channeled public stormwaters from approximately forty [40] to fifty [50] acres of city residences which are diverted onto private property which adversely

impact Appellant's lots 6 & 7, which is required by Ripley, Rothweiler & Currens (supra).

9. The Respondents have not ever made any provisions to pay the Appellant for using the Appellant's lot 6 & 7 as a storage site / retention site for these collected, channeled and diverted public stormwater which has been collected and channeled from approximately forty [40] to fifty [50] acres of city residences, public roads and their public stormwaters management systems and diverted onto Appellant's lot 6 & 7 and cause pools of surface water to damage Appellant's property.

Abatement Alternatives and /or Making Provisions for the Proper Outflow of the Collected, Channeled and Diverted Public Stormwaters Which are Discharged onto Private Property and Create Surface Water Pools on Appellant's Private Property.

Respondents have acknowledged that they have collected and channeled public stormwater from approximately forty [40] to fifty [50] acres of city residences, public roads and their public stormwaters management systems. It is also undisputed that Respondents have diverted this amount of public stormwater collected from the approximately forty [40] to fifty [50] acres of city residences, public roads and their public stormwaters

management system through a diversion pipe unto private property which adversely impact Appellant's lots 6 & 7.

Respondents have disputed that the public stormwater from approximately forty [40] to fifty [50] acres of city residences would naturally flow along the western side of 25th Ave. N. E. from N.E. 175th St. to N.E. 178th St. but for the diversion through the diversion pipe and argue that to establish this it would require 'expert testimony'. Yet gravity and common sense would dictated that the natural flow of these collected and channeled public stormwaters would flow downhill along the western side of 25th Ave. N. E. from N.E. 175th St. to N.E. 178th St. if they were not diverted through the diversion pipe.

Consequentially based upon an elementary knowledge of gravity and common sense the Appellate Court can take judicial notice that:

1. Open water generally flows downhill from a higher point to a lower point; and
2. After a short review of the video attached as Exhibit D to the declaration of Vinish Gounder [Sub # 20] it is clear that the video illustrates the significant steep slope of 25th Ave. N. E. and the open ditch adjacent to the road on the western side thereof, which is cut into the hill where 25th Ave. N. E. travels downhill from N.E. 175th St. [and

includes the diversion point midway between these two streets which intersect 25th Ave N.E.] to N.E. 178th St.; and

3. Clearly would support the fact that the public stormwater ditch which follows downhill along the western side of 25th Ave. N. E. would cause the public stormwater to flow along the western side of 25th Ave. N. E. downhill from N.E. 175th St. to N.E. 178th St. if the public stormwaters were un-diverted and the diversion pipe blocked.
4. Likewise the Respondents' assertion that the following statements made by Appellant's declarants were inadmissible expert testimony:
 - a. The declarants observed that they saw pools of surface water in the lower lying portions of the area; and
 - b. The surface pools were in the eastern portions of Appellant's lots 6 & 7.
5. Yet the application of the general knowledge of gravity and common senses would establish that:
 - a. Water flows downhill from a higher point of ground to lower point of; and
 - b. A review of the topographical map, attached as Exhibit G to the declaration of Donald Koler [Sub # 23] would establish that it is expectable and reasonable that the collected, channeled and diverted public stormwaters which are discharged onto lot

8 would collect in surface pools at the lowest points in the area which would be the eastern portions of Appellant's lots 6 & 7; and

- c. The Niagara-like waterfall described by Appellant's declarant as a discharge from the pipe which:
 - i. Creates an "arc in a sloping curve, a raging torrent and a waterfall which is discharged from the aforementioned pipe" when there are heavy rains; and
 - ii. Then "...the water disappears into the groundwater...[and] then comes to the surface in the lowest points downhill... the northeastern portion portions of lot 7 and the eastern portion of lot 6" based upon the declaration of Eric Gorbman [Sub # 18].

6. Likewise the Appellate Court can take judicial notice, based upon gravity and common sense that:

- a. These vast quantities of public stormwater which the Respondents have collected, channeled and dumped on private property, which would naturally flow downhill to the lowest lying areas in the area adjacent to the discharged public stormwaters, unless the Respondents had made provision for 'the proper outflow' of the public stormwaters [per Ripley,

Rothweiler & Currens (supra)] which they have been dumping onto private property; and

- b. Since it is undisputed that:
 - i. The Respondents have never made any provision for the outflow of the public stormwaters which they have been dumping onto private property; and
 - ii. Based upon gravity and common sense it is expectable and reasonable that the eastern portions of Appellant's lots 6 & 7 which are the lowest points in the area, would experience flooding from the vast quantities of water which are being dumped thereon by Respondents through the diversion pipe unless the Respondents' had made provisions for 'the proper outflow' as required by Ripley, Rothweiler & Currens (supra); and
- c. Therefore the pools of surface water which Appellant's declarants have reported in their declarations to be on the eastern Appellant's lots 6 & 7 are not something restricted to an expert as Respondents' would have the court believe, but this information is within the knowledge of the average person to wit: the affect of gravity on the vast quantities of water being discharged by Respondents' when the rain falls and the vast

amount of public stormwater collected and channeled from the approximately forty [40] to fifty [50] acres of city residences, public roads and public stormwaters which are diverted across 25th Ave N.E. and discharged on private property would surface at the lowest lying area which is Appellant's lots 6 & 7.

Abatement Alternatives

Respondents acknowledge that the amount of public stormwater collected from the approximately forty [40] to fifty [50] acres of city residences “could, of course cause flooding”, [Respondent's brief page 29] if the continuous trespass was abated and the diversion pipe were to be blocked and these vast quantities of public stormwaters were allowing to flow downhill along the western side of 25th Ave. N. E. from N.E. 175th St. to N.E. 178th St. In discussing the Appellant's proposal to abate the continuous trespass by blocking the diversion pipe the Respondents' state that – “this change could, of course, cause flooding of multiple other residential and commercial properties, not to mention public roads, all factors a stormwater engineer would consider” before undertaking such a change. [Respondents brief page 29].

The Respondents' acknowledgement that the amount of public stormwater collected and channeled from the approximately forty [40] to fifty [50] acres of city residences is significant and “could, of course, cause

flooding” if the diversion pipe were blocked, amounts to an admission that these same public stormwaters which could cause flooding on the Respondents’ property, clearly do cause flooding on the Appellant’s property. This admission further places emphasis on the importance of Appellant’s claim that an abatement is critical to prevent future damage to the Appellant’s private property from the acknowledged flooding consequences, every times it rains, of the collected and channeled public stormwaters discharged thereon. This does not mean that this is the only alternative solution available i.e. the blocking of the diversion pipe to prevent the Respondents’ unending future continuous trespasses. Obviously if closing the diversion pipe would require an all too expensive change to the Respondents’ public stormwater management systems, then the Respondents would need to both plan and make arrangements to find another accommodation for this vast volume of public stormwater if the Appellant’s lots 6 & 7 were no longer used as a stormwater management retention site.

Review of Abatement and Other Options in Light of Respondents’ Concern About the Possibility of Flood of Respondents’ Property as well as Other Citizen’s Private Property Caused by Blocking the Diversion Pipe & Allowing these Collected and Channeled Public Stormwaters to Re-Enter the Respondents’ Stormwater Management

System and the Possibility That they May Overwhelm their Existing Public Stormwater Management System.

If hypothetically:

1. The Respondents were to undertake the necessary planning and were to determine that the consequences of abating the continues trespass by simply blocking the diversion pipe to end the flooding on Appellant's lots 6 & 7 and thereafter allow the public stormwater to flow un-diverted downhill along the western side of 25th Ave NE; and
2. This examination could cause the Respondents to conclude that because of the vast amount of water that they are currently dumping on the Appellant's lots 6 & 7, which are being used as a public stormwater retention site, that the blocking of the diversion pipe could have the following consequences:
 - a. If it was likely that this would overwhelm their currently designed public stormwater management system and then require a costly change to their current public stormwater management system, then Respondents could either:
 - i. Tight-line the public stormwater diversion pipe at its outsource and channel it through a closed pipe to the ditch on the eastern side of Appellant's lots 6 & 7, thereby making a provision for 'the proper outflow' of

these collected, channeled and diverted public stormwaters [as required by Ripley, Rothweiler & Currens (supra)] which would specifically require that these public stormwaters which are diverted through a pipe onto private property be collected at the pipe's outsource on private property and transported through a closed pipe to the western side of 28th Ave N.E. which is the east boundary of Appellant's property as suggested by Respondent's agent Jesus Sanchez [see reference in Respondent's brief page 23 paragraph].

ii. It should be noted that Respondents have incorrectly noted in their brief [at page 23] that the ostensible reason given by Respondent's agent [Jesus Sanchez] that tight-lining could not be implemented was not because as Respondents' false assertion that -"Mr. Sanchez's attempts to convince the Department of Ecology to agree to issue a permit for this pipe failed." [page 23]

iii. The exact language in Mr. Sanchez's letter was that - "we recently met with Ginger Holser, Area Habitat Biologist for the Washington Department of Fish and

Wildlife (WDFW). We discussed...the potential stream relocation options (such as tight lining)...State law prohibits removing contributing flows to a stream or piping an existing stream channel”. [see Exhibit F and Sub # 23 Donald Koler declaration]

- iv. This spurious excuse given by Jesus Sanchez - that the Washington State Department of Fish would not allow the public stormwater pipe to be tight-lined because it would affect a stream is likewise patently false because there is no above ground stream or water-way on lot 8 where it is originally discharged or on Appellant’s lots 6 & 7 during the summer months, as is clearly stated by Appellants’ declarants. Further a review of the video [Exhibit D to the declaration of Vinesh Gounder Sub 20] clearly proves that there is no open stream or even the vestiges of a stream bed coming from the north eastern corner of Eric Gorbman’s property [as Mr. Sanchez incorrectly asserts as part his spurious ‘stream’ argument... which a short walk of the property would have illustrated] and this ‘straw man’ argument is patently false.

3. If alternatively, after this examination of the alternative of tight-lining the Respondents' diverted public stormwater from the outsource of the diversion pipe could again cause the Respondents' to conclude that because of the vast amount of water collected from the approximately forty [40] to fifty [50] acres of city residences, public roads and their public stormwaters management systems, that if these public stormwaters were collected from the pipe's outsource, tight-lined and discharged into the ditch on the western side of 28th Ave N.E. adjacent to Appellants eastern boundaries of lots 6 & 7, that the discharged public stormwater from the tight-lined pipe could have the following consequences:

a. They would overwhelm their current public stormwater system which would then require a costly change to their current public stormwater system, then Respondents could either:

- i. Purchase the Appellant's plots 6 & 7 and continue to use the lots as a public stormwater retention site;
- ii. Pay the Appellant for the use of the Appellant's lots 6 & 7 and continue to use them as a public stormwater retention site.

II. APPELLANT'S DISCUSSION OF ELEMENTS OF RESPONDENTS' OPENING BRIEF

In Respondents opening brief the Respondents make several frivolous arguments which are discussed briefly below:

A. (1) Respondent: Lake Forest Park does not own or control the stormwater system at issue in this lawsuit. Appellant has refuted this as more fully discussed above regarding the catch basin and pipe which feeds into the diversion pipe which is on the Respondent Lake Forest Parks' property. See specifically page 8 above and pages 6 to 8 regarding background.

A. (2) Respondent: Lake Forest Park is entitled to an award of attorney's fees. This argument is rendered moot as described in the above paragraph.

B. Respondent: Appellant's Inverse Condemnation claim was properly dismissed. Respondents' have not addressed anything new and specifically have not countered any of Appellant's arguments in it opening brief where the Appellant's inverse condemnation claim was tied to a further understanding of the issues raised in Woldson (supra). Appellant refer this Court to its argument in Appellant's opening brief, for a discussion of inverse condemnation base upon a reasoned extension of the Woldson case (supra) which Respondents' have neither addressed nor disputed.

C. (1) Respondent: Appellant's claim for damages based upon intentional trespass is barred based upon Grundy v. Brack Family Trust 151 Wn. App 557 213 P 3d 619 (2009). Respondents' reliance on Grundy (supra) is misplaced in part because Grundy was based upon the building of a seawall and not the deliberate collection, channeling and diversion of water or public stormwaters; and in part as described in Appellant's argument above in pages 5 to 10 that Respondents' were responsible for their continued actions in maintaining an intentional continuous trespass.

C. (2) Respondent: Appellant's claim for damages based upon intentional trespass is barred based upon Borden v Olympia 113 Wn. App 359, 53 P 3d 1020 (2002) As Appellant explained to the trial court Borden (supra) is inapplicable because Appellant's declarants clearly state that the public stormwaters create surface pools on Appellant's lots 6 & 7. Borden is limited to the situation where the water trespass is subterranean. See Appellant's opening brief Statement of the Case and discussion of this and a related theme above at pages 14 & 15.

D. Respondent: Municipalities are not strictly liable for damages caused by flooding caused by a public stormwaters drainage system. Based upon the caselaw discussed at length in Appellant's brief the Respondents' ARE liable for damages caused by their continuous trespass

which they know is causing flooding damages on Appellant's lots 6 & 7; in fact in Respondents' opening brief they admit that if the diversion pipe were blocked that this vast amount of public stormwaters which they are deliberately diverted onto private property which adversely impact Appellant's lots 6 & 7, would likely cause flooding of public and private property. See Appellant's discussion of the nature of Respondents' liability on pages 1 through 21 above.

E. The record does not contain any evidence of unclean hands.

Appellant has clearly addressed this issue showing Respondents' action which indicates they do not have clean hands above on pages 18 through 20.

V. A (1) through (3) Inadmissible evidence

Appellant has clearly addressed this issue regarding Respondents' argument that the trial court was wrong in admitting Appellant's declarations and that they should have been deemed inadmissible in Appellant's trial documents with which the trial court agreed and again has done so above on pages 11 through 15.

III. CONCLUSION

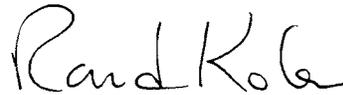
It is undisputed that the Respondents have collected and channeled public stormwaters by artificial means and diverted these public stormwaters from their normal flow by re-directing them through a pipe across 25th

Ave NE from west to east, which pipe daylights on Eric Gorbman's lot 8 and the public stormwaters surface in pools on lots 6 & 7... on the land of a private person, to *his or her* [the Appellant's] injury, which is a continuous trespass as defined by Phillips (supra) Fradkin (supra) and Woldson (supra). Also since the Respondents' have never made any provisions for 'the proper outflow' as required by Ripley, Rothweiler & Currens (supra) they are not entitled to the proceed under the 'common enemy rule' to discharge these public stormwaters. Further, it is also undisputed that the Respondents could easily abate or eliminated the discharge of public stormwaters onto Appellant's lots 6 & 7. In consequence of the above referenced undisputed facts and law regarding continuous trespass outlined in Phillips (supra) Fradkin (supra) and Woldson (supra) as well as the rules requiring the Respondent's to make provisions for 'the proper outflow' as required by Ripley, Rothweiler & Currens (supra); the Appellant respectfully request that the Court of Appeals reverse the trial courts Order of Summary Judgment dismissing Appellants case in full as there is clear and convincing evidence of Appellant's claim of a continuous trespass. Further Appellant respectfully requests that this court order that the Respondents be required to immediately abate the continuous trespass or make provision for 'the proper outflow' as required by Ripley, Rothweiler & Currens (supra).

IV. RELIEF SOUGHT

Reverse the trial court's Order of Summary Judgment on behalf of Respondents and deny Respondents' motion for summary judgment as unsupported in fact or in law. Grant Appellant's motion for partial summary judgment and enter a order that Respondents immediately abate the diversion of the collected & channeled public stormwater from approximately forty [40] to fifty [50] acres of city residences, public roads and public stormwaters which are diverted onto private property and adversely impacts Appellant's lots 6 & 7.

Dated this 16th day of March 2010.



Rand L. Koler, WSBA # 7679
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on March 16, 2011, I caused a true and correct copy of the Reply Brief of Appellant to be served on the following in the manner indicated below to the following counsel of record:

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Signed and dated this 16th day of March 2011.

RAND L. KOLER & ASSOCIATES, P.S.



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