

COURT OF APPEALS  
DIVISION II

Court of Appeals Cause No. 36610-0-II

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STATE OF WASHINGTON  
BY [Signature]  
DEPUTY

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON

VINCENT F. SCALESE and KATHRYN SCALESE, husband and wife

Appellants,

v.

KEN L. DAVIS, SR. and TRACY L. DAVIS, husband and wife, and the marital community composed thereof; JEFFREY P. RAUTH and MARY E. RAUTH, husband and wife, and the marital community composed thereof; ROBERT HENRY ROUSE and JANE DOE ROUSE, husband and wife, and the marital community composed thereof, dba NEW HORIZON HOMES; AMERICAN BANKERS INSURANCE CO. Bond No. LPM370681,

Respondents.

APPELLANTS' BRIEF

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## I. INTRODUCTION

This lawsuit is between adjoining property owners arising from blockage, by the lower owner, of a natural ravine drainway. The case was filed in August, 2004 after Plaintiffs discovered that repeated floodings of their basement were caused by fill and impervious material placed in the ravine by Defendants Davis and their predecessors, Defendants Rauth.

In their Complaint Plaintiffs claimed that all Defendants failed to exercise due care, caused water to be diverted onto Plaintiff's property constituting trespass and nuisance, and causing damage to Plaintiff's property and home. Plaintiffs also sought an order directing Defendants Davis to extend a six inch drain line from Plaintiff's property (Lot 2) in the natural drainway across the Davis property (Lot 3).

The contractor who built the home on Lot 3, Robert Rouse, was dismissed on summary judgment based on the builder's statute of repose. The remaining Defendants' motions for summary judgment were denied and the matter proceeded to non-jury trial on July 24, 25 and 26, 2006 before the Honorable James Stonier. The court thereafter rendered a written decision on August 30, 2006 (CP

147-152), and Findings of Fact and Conclusions of Law (CP 181-187) and a Judgment (CP 103-104) were entered May 11, 2007.

Plaintiffs filed a timely Motion for Reconsideration which was denied in a written letter (CP 208-209) followed by a formal order dated June 29, 2007 (CP 210-215). This appeal followed.

## II. ASSIGNMENTS OF ERROR

Appellants assign error to the following Findings of Fact:<sup>1</sup>

1. That portion of Finding of Fact No. 5, which found:

Mr. Sessions also constructed a French (curtain) drain that collected subsurface water and ran along the backside of Lot 1 and then paralleled the boundary between Lots 1 and 2 joining up with the six-inch tile pipe.

2. Finding of Fact No. 6, which found:

On Lot 2 Mr. Sessions also constructed a foundation drain around the house. This drain collects subsurface water and empties into a dry well on the downhill side of Lot 2 and the dry well empties into a four-inch PVC pipe that also ran onto Lot 3 and emptied in the vicinity of the six-inch PVC pipe.

3. Finding of Fact No. 7, which found:

Some of the roof drains on Lot 1 and 2 also emptied into the drainage system that ultimately emptied through the

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<sup>1</sup> A copy of the Findings of Fact and Conclusions of Law is attached as Appendix A.

six-inch PVC pipe on Lot 3.

4. Finding of Fact No. 17, which found:

At the point at which the six-inch pipe crossed between Lots 2 and 3, the water in the pipe was both surface and non-surface (sub-surface) water.

5. That portion of Finding of Fact No. 20, which found:

Prior to the development of Lots 1, 2 and 3 the water flowed to the front of the lots and then flowed down a natural ravine.

6. Finding of Fact No. 23, which found:

Plaintiffs Scalesse and their predecessor violated one of the exceptions to the common enemy doctrine in that they, and their predecessor and current neighbor, the Sessions, artificially collected water, both surface and sub-surface, from Lot 1 and Lot 2 and channeled it onto Lot 3.

Appellants assign error to the following Conclusions of Law:

7. Conclusion of Law No. 2, which held:

This case is governed by the common enemy doctrine. See Currens v. Sleek, 138 Wn.2d 858, 983 P2d 626 (1999).

8. Conclusion of Law No. 3, which held:

The Plaintiffs did not prove by a preponderance of the evidence that inhibiting the natural drain-way was the proximate cause of the flooding of their finished basement because they were unable to quantify the amount of water attributed to either surface or sub-surface water.

9. Conclusion of Law No. 4, which held:

Defendants Davis and Rauth have no duty to allow sub-surface water to cross their property. Therefore, the Plaintiffs failed to prove the developer violated the standard of care, although the standard of care would be breached in this case if the pipes conveyed only surface water.

10. Conclusion of Law No. 5, which held:

The court would order the Defendants provide Plaintiffs with a gravity fed or similar reliable drainage system if the water pooling on Lots 2 and 3 and caused flooding to Plaintiff's basement was exclusively surface water. Because Plaintiffs did not prove the pooling water is exclusively surface water, Plaintiffs failed to prove Defendants had a duty to provide drainage.

11. Conclusion of Law No. 6, which held:

Plaintiffs failed to prove a nuisance by a preponderance of the evidence because Plaintiffs did not prove the pooling water was exclusively surface water.

12. Conclusion of Law No. 7, which held:

Plaintiffs failed to prove a trespass by a preponderance of the evidence because the Plaintiffs did not prove the pooling water was exclusively surface water.

13. Conclusion of Law No. 8, which held:

Defendants Davis established an encroachment by a preponderance of the evidence and the Court orders the Plaintiffs either remove or block the six-inch drainpipe and the four-inch drainpipe.

14. Appellants assign error to the trial court's Judgment which awarded judgment to Defendants on all Plaintiffs' claims and awarded statutory attorney fees to Defendants.

15. Appellants assign error to the trial court's Judgment which granted the ejectment claim of Defendants Davis.

16. Appellants assign error to the failure of the trial court to grant plaintiffs the relief prayed for in their Complaint and/or established by the evidence.

17. Appellants assign error to the denial of their Motion for Reconsideration.

### III. STATEMENT OF THE CASE

Plaintiffs/Appellants are owners of Lot 2 of a four lot subdivision located off Columbia Heights Road and adjacent to West Beacon Hill Drive in Cowlitz County, Washington (Finding of Fact Nos. 1-4, CP 182). Prior to the development, the area was drained by a ravine which ran from below Columbia Heights Road through each of the four lots starting at Lot 1 (Exhibit 1) (Finding of Fact No. 4, CP 182). In 1991, James Sessions bought Lot 2 and built a home for himself (RP 203 – 204). He installed drainage systems on his lot and on Lot 1, owned by his parents, to collect surface waters (RP 205). No new watersheds or other sources of water were channeled into the ravine (RP 207 - 209). The systems ended in two plastic pipes, four inches and six inches in diameter, which drained into the ravine

from Lot 2 (RP 209, 214). The pipes protruded from the earth and were clearly visible (RP 246 - 247).

In 1995, Defendants Rauth bought Lot 3, leveled it and built a house. In doing so, they filled in the natural ravine drainway and buried the six and four inch pipes (Finding of Fact 8, CP 183). The Rauths sold to Defendants Davis in January, 1997 (RP 104).

In 1999, Plaintiffs first experienced flooding in their basement but could not determine the cause (Finding of Fact No. 10, CP 184). In February, 2003, the basement again flooded and Mr. Scalesse began excavating the areas to determine what had happened. He learned that the drains were blocked by the fill on Lot 3 (Findings of Fact No. 11, CP 184). Since that time the flooding has become more frequent and severe (Finding of Fact No. 12, Id.).

As a temporary remedy, Mr. Scalesse dug holes outside his basement door and installed first one and then a second sump pump which carry water uphill along his lower lot line, emptying into the street (RP 41 – 42). During periods of normal rainfall the pumps operate intermittently, but during heavy rainfall, water accumulates in the sumps and the pumps operate full time (RP 47). During such times one or more family members must remain home in case of pump failure (RP 44 - 47).

The trial court found that Defendants Davis and their predecessors, Defendants Rauth, violated an exception to the common enemy doctrine by blocking the natural drainway when Lot 3 was filled and leveled. (Finding of Fact No. 22, CP 185). Nevertheless, the court denied relief to Plaintiffs because they did not show that the drains blocked by Defendants contained exclusively surface water (Conclusion of Law No. 5, CP 186). Although there was no testimony that the drains carried subsurface water, the trial court apparently assumed that such water was present. As shown below, the court's assumption was unwarranted and contraindicated by the testimony. Further, Washington case law permits the collection and disbursement of waters into a natural drainway as done by Plaintiffs, and prohibits the blockage thereof as done by Defendants.

#### IV. ARGUMENT

##### A. Assignments of Error 1, 2, 4.

The trial court's findings of fact will only be sustained when there is evidence to support them. Worthington v. Worthington, 73 Wn2d 759, 765, 440 P2d 478 (1968). Findings of fact not supported by the record cannot stand. Department of Licensing v.

Sheeks, 47 Wn.App. 65, 70, 734 P2d 24 (1987).

In Findings of Fact 5, 6 and 17, quoted above, the trial court found that the drainage system installed by Plaintiff's predecessor "collected sub-surface water" which emptied onto Lot 3, owned by Defendant Davis. These findings were not supported by any testimony, and yet were the key factor in the court's denial of relief to Plaintiffs. The only evidence in the record relevant to alleged collection of sub-surface water was the following:

1. James Sessions installed curtain drains along the back side of Lots 1 and 2 which consisted of tile and perforated pipe (Findings of Fact No. 5, CP 182 – 183)(RP 206 – 209).

2. Mr. Sessions also installed a foundation drain around the house on Lot 2 which consisted of drain tile (RP 206).<sup>2</sup>

Because the curtain drain system consisted of gravel, perforated pipe and tile, the purpose and effect was to collect surface water and disburse it into the natural drainway. There is no evidence in the record that any subsurface water came into the system or that any ever reached Lot 3, yet the court specifically found that subsurface water was emptied onto the Davis property.

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<sup>2</sup> The Uniform Building Code in effect in Cowlitz County in 1991 provided: Provisions shall be made for the control and drainage of surface water around buildings. 1991 Uniform Building Code Sec. 2905(f),

Likewise, there was no evidence that the foundation drain collected subsurface water and directed onto Lot 3. Contrary to the court's findings, the unrefuted testimony was that the only times any significant water collected in the sumps was shortly after heavy rainfall (RP 266). Thus, the only inference justified by the evidence was that all the water that emptied onto Lot 3 was surface water.

The court's unwarranted belief that some subsurface water was being dumped on Defendants' property was critical to the court's denial of relief to Plaintiffs. There is no evidence in the record to support those portions of Findings of Fact Nos. 5, 6 and 17 which so hold and thus no basis for denial of Plaintiff's claims.

B. Assignment of Error No. 3.

In Finding of Fact No. 7, the court found that some of the roof drains on Lots 1 and 2 emptied onto Lot 3. In fact, the testimony was that only one roof drain fed into the drainage system, all others were piped out into the street (RP 30).

Even if multiple roof drains fed into the six-inch pipe that ended on Lot 3, the roof drains collect surface water and the evidence was unrefuted that the pipe emptied into a natural drainway (RP 230). As such, there was no violation for the common enemy doctrine.

“Surface waters” are those produced by rain, melting snow or springs. King County v. Boeing Co., 62 Wn2d 545 at 550, 384 P2d 122 (1963). Collecting of surface waters and directing their flow to a natural drainway is permissible and not a violation of the common enemy doctrine. Trigg v. Timmerman, 90 Wash. 678, 682, 156 P. 846 (1916); Laurelon Terrace Inc. v. Seattle, 40 Wn2d 883, 892-893, 246 P2d 1113 (1952); Currens v. Sleek, 138 Wn2d 858, 862-863, 983 P2d 626 (1999).

The rule is the same in other jurisdictions following the common enemy doctrine. In Jorgensen v. Stephens, 143 Neb. 528, 10 NW2d 337 (1943), suit was brought to enjoin the defendant from collecting water in roof drains and discharging it onto plaintiff's lands. The trial court denied relief which ruling was affirmed on appeal. The court held:

To require defendant, as plaintiff prays, to provide an unnatural and artificial outlet for his surface waters which would carry it away before reaching the land of plaintiff would be both an innovation in our law and a stumbling block in the path of progress and the development of urban real estate. If such a rule were adopted development of rolling or hilly urban real estate would entail the oppressive burden, for each upper parcel, of providing for dispersion and disposal of surface waters through outlets other than over lower parcels within and without the area of the development. In other words urban development, except on level areas, would be arrested by the

burden of overcoming the operation of the law of gravity.

Jorgenson, 10 NW2d at 340.

Finding of Fact No. 7 was factually inaccurate and legally irrelevant. It demonstrates, however, the trial court's overemphasis on the collection of water by Plaintiffs and their predecessors as the determining factor in denying relief. Contrary to the trial court's ruling, the acts of Plaintiffs and their predecessors were reasonable and not in violation of any Washington rule of water drainage law, particularly since at the time the drain pipes were installed, Lot 3 consisted of nothing more than a natural ravine (RP 215, 218).

C. Assignments of Error Nos. 7, 8, 9, 10, 11, 12, 14 and 16.

1. Defendants Are Strictly Liable to Plaintiffs.

This is a blockage case. The unrefuted testimony established that the area of the development was drained by a natural ravine drainway and the court so found (Finding of Fact No. 4, CP 182). It was also clearly established that when Defendant Rauth developed Lot 3, he filled in the natural drainway and blocked off the drains installed by Mr. Sessions (Finding of Fact No. 8, CP 183).

Washington law imposes strict liability for blockage of a natural drainway. As stated in Gregory C. Sisk, *Toward a Unified Reasonable Use Approach to Water Drainage in Washington*, 59 Wash. L. Rev. 61 (1983):

While the common enemy rule absolves a landowner from liability for harmful interference with surface water flow, a quite different, strict liability standard applies to injurious diversion or obstruction of a watercourse or natural drain.

Sisk, 59 Wash L. Rev. at 68.

\* \* \* \*

This strict liability rule has been applied in Washington both to instances in which the obstruction has caused flooding upstream and to situations in which a dam or jam broke and caused flooding downstream. Strict liability also exists for diversion or 'straightening' of stream flow which erodes the property along the river. The only defenses to this standard of strict liability for harmful interference with a watercourse are (1) where the alteration does not actually interfere with riparian rights, or (2) where the flooding damage is primarily attributable to an act of God, such as an unprecedented flood, rather than the obstruction. [footnotes omitted]

Id. at 69.

Where a natural drainway is obstructed, the common enemy defense does not apply. King County v. Boeing Company, 62 Wn2d 545, 384 P2d 122 (1963). In Island County v. Mackie, 36 WnApp 385, 675 P2d 607 (1984) the county maintained a culvert under its road to facilitate the flow of water in a natural drainway.

Although the county employed a system of ditches to gather upland water, no additional watershed waters were directed into the culvert. The lower owner blocked the culvert causing water to pond on the upland side of the road resulting in damage. The trial court held that the common enemy doctrine did not apply which ruling was affirmed on appeal. As held in *Mackie*:

In any event, Washington cases decided after *Trigg* have consistently held that the common enemy rule does not apply to natural drains. See *Boeing*, at 550-52, 384 P.2d 122; \*391 *Wilber*, at 173, 540 P.2d 470. Thus, even if it were true that these cases departed from prior authority, the Mackies fail to indicate why this departure was unwarranted as a matter of policy. If the common enemy rule does not apply to watercourses, no reason suggests why the rule should also not apply to natural drains. As it is undisputed that the culvert and the Mackie property lie within a natural drain, the Mackies were not entitled to block the culvert under the common enemy rule. See *Wilber*, at 173, 540 P.2d 470.

Mackie, 36 WnApp at 390-391. The ruling of the trial court permanently enjoining blockage of the culvert was affirmed on appeal.

In Wilber v. Western Properties, 14 WnApp 169, 540 P2d 470, review denied 85 Wn2d 1004 (1975) the lower owner filled in a natural drainway on his property and replaced it with a 24 inch pipe. After a period of wet weather, water from above backed up and flooded the plaintiffs' apartment buildings when the pipe proved inadequate to handle the flow of water. An award of damages was

affirmed on appeal, as was the following jury instruction:

A person who so obstructs a natural drain that damage is caused by flooding, which damage would not have resulted without the obstruction, is liable for such damage regardless of negligence.

Wilber, 14 WnApp at 173. The court held:

A lower landowner who would impede or obstruct the flow of water through a natural drainway must provide adequate drainage to accommodate the flow during times of ordinary high water. If the obstruction does not accommodate that amount of flow, it has been negligently and wrongfully constructed as to the upland owner whose land becomes flooded. *Dahlgren v. Milwaukee & Puget Sound Ry.*, 85 Wash. 395, 148 P. 567 (1915). See also 78 Am.Jur.2d Waters § 134 at 583 (1975). Undoubtedly, Western had the right to substitute pipeline drainage for the open ditch on its property, but in doing so it must allow the waters to flow without obstruction in normal conditions and in times of recurrent floods. *Turner v. Smith*, 217 Ark. 441, 231 S.W.2d 110 (1950). Western's duty to Wilber was akin to a duty of strict liability. *Johnston v. Sultan Ry. & Timber Co.*, 145 Wash. 106, 258 P. 1033 (1927). Violation of one's duty to provide adequate drainage is unreasonable use of one's property.

Id. at 173-174.

In an earlier case, *Dahlgren v. Chicago Milwaukee & Puget Sound Ry. Co.*, 85 Wash. 395, 148 Pac. 567 (1915), the defendant railroad built its roadbed across a natural drainway which carried "surface and other waters." The plaintiff landowner alleged and the jury found that the roadbed impeded the natural flow, and that a culvert installed by the railroad was inadequate to carry away the natural flow. The judgment was affirmed on appeal, the court

holding:

It is not a case of *damnum absque injuria*. On the contrary, if the embankment impeded a natural water course, and left no sufficient vent for the escape of the water, and the water was caused thereby to overflow the premises of the respondents, to their injury, the construction was negligent and wrongful as to the respondents, no matter how carefully the work of construction was performed.

Dahlgren, 85 Wash. at 406.

In its Conclusion of Law No. 2, the court determined that the common enemy doctrine was the controlling law in the case, citing Currens v. Sleek, 138 Wn2d 858, 983 P2d 626 (1999). Conclusions of Law Nos. 3, 4, 5, 6 and 7 determined that Plaintiffs were not entitled to relief because they did not prove that only surface water was pooling due to the blockage done by Defendants. In denying Plaintiffs' claims and entering judgment for Defendants the court erred (Assignment of Error No. 14).

In Currens, the Supreme Court, in dicta, suggested that the prohibition against blocking a natural drainway was an exception to the common enemy doctrine. Whether so viewed as an exception, or as a separate branch of drainage law, it is clear that Washington courts have long held that natural drainways cannot be blocked by a lower landowner. As shown by the cases

above, the lower landowner must allow water to continue to flow in a natural drainway even if the upland owner has collected the waters in ditches or pipes.

In this case, defendants Rauth caused fill to be placed in a natural drainway blocking the natural gravitational flow of water. They failed, and defendants Davis continue to fail, to provide an adequate means of drainage for the water. Defendants are strictly liable for the blockage and the trial court erred in excusing their conduct. The court further erred in awarding attorney fees to Defendants and should have awarded fees to Plaintiffs.

2. There Is No Distinction Between Surface and Subsurface Waters Flowing Into A Natural Drainway. The key to the trial court's decision was based on its finding that the water in the two plastic pipes contained subsurface water. But for the court's belief that Plaintiffs were collecting subsurface water and directing it into the natural drainway, the court would have granted relief to Plaintiffs (Conclusion of Law No. 5, CP 186). In fact, the court found Defendants improperly blocked the flow of surface water from Plaintiffs' land because the water flowed in a natural drainway (Finding of Fact No. 22, CP 185). As shown above, under

Washington law a lower owner who, under the common enemy doctrine, would be able to block the flow of surface water onto his property cannot do so where the water is discharged into a natural drainway. Given that both the four inch and six inch pipes emptied into the ravine, the court erred in drawing a distinction between surface waters and percolating waters. There is no basis in Washington law for the distinction; moreover, it is illogical to apply one. As stated in Gregory C. Sisk, *Toward a Unified Reasonable Use Approach to Water Drainage in Washington*, 59 Wash. L. Rev. 61 (1983):

Thus, for purposes of disposal of water in drainage law, a drainage channel formed by nature is governed by the same rule as watercourses. *Nichol v. Yocum*, 173 Neb. 298, 113 N.W.2d 195, 200 (1962)(stating that natural drainways, whether viewed as a riparian watercourse or not, could not be obstructed); *Wilber v. Western Properties*, 14 Wn. App. 169, 172-74, 540 P.2d 470, 473-74 (1975)(unlawful obstruction of a drainage ditch which had become a natural channel through antiquity); *Miller v. Eastern Ry. & Lumber Co.*, 84 Wash. 31, 33, 35-36, 146 P. 171, 172-73, 173-74 (1915)(unlawful obstruction of a watercourse). See generally H. FARNHAM, *supra* note 8, § 889d, at 2599-2607.

Sisk, Footnote, 34, 59 Wash. L. Rev. at 68.

\* \* \* \* \*

Wherever the common law prevails, every proprietor upon water flowing in a definite channel so as to

constitute a water course has the right to insist that the water shall continue to run as it has been accustomed, and that no one can change or obstruct its course injuriously to him without being liable to damages. See also *Johnson v. Whitten*, 384 A.2d 698, 701 (Me. 1978). This liability rule would likely apply to underground streams as well, since subterranean streams flowing in a known and defined channel are governed by the same rules that apply to a watercourse above ground. See *State v. Ponten*, 77 Wn.2d 463, 468, 463 P.2d 150, 153 (1969); *Evans v. City of Seattle*, 182 Wash. 450, 452-53, 47 P.2d 984, 985 (1935).

Sisk, Footnote 37, *Id.* at 69.

In *Dahlgren v. Chicago, Milwaukee and Puget Sound Ry. Co.*, 85 Wash. 395, 148 Pac. 567 (1915), the court imposed liability for blocking a natural drainway which carried surface and other waters. *Dahlgren* at 404-405. Likewise, in *Miller v. Eastern Ry. & Lumber Co.*, 84 Wash. 31, 146 Pac. 171 (1915), a lower owner was held liable for blocking a ditch carrying nonsurface waters. More recently, in *Borden v. City of Olympia*, 113 WnApp. 359, 53 P.2d 1020 (2002), Justices Morgan, Armstrong and Hunt of this Court recognized that for purposes of drainage law, surface water and ground water are treated the same. In *Borden*, the Plaintiffs sued the City of Olympia when a new storm water drainage system caused increased runoff that supercharged or saturated the ground preventing the ground from accepting storm

water that would otherwise drain away from plaintiffs' property. Relying on the common enemy doctrine, the trial court dismissed the claim.

This Court reversed holding that a cause of action existed under the due care exception to the common enemy rule established in Currens v. Sleek, 138 Wn2d 858, 983 P2d 626 (1999). The court applied the due care exception to both surface and ground water.

In reality if not in terminology, this [due care exception] also means that Washington now recognizes a negligence cause of action for altering the flow of naturally occurring surface and ground water.

\* \* \* \* \*

"As already seen, this "exception" amounts to a limited cause of action for negligently altering the flow of surface or ground water."

Borden, 113 WnApp at 368 – 369 (emphasis supplied).

The court further recognized that the Bordens' claim included the altering of ground water.

"The Borden's claim, in effect, that the City owed them a duty of care because the record supports inferences that the City participated in the 1995 drainage project and that the 1995 drainage project altered the flow of surface and ground water on their land." . . . For the reasons that follow, we agree with the Bordens.

Id. at 369.

See also, Wilkening v. State, 54 Wn2d 692, 344 P.2d 204 (1959), a case where the upland owner failed to prove that there was a natural drainway and the court refused to impose liability, holding there was no reason to distinguish between surface waters and underground percolating waters. Wilkening, 54 Wn2d at 698.

Plaintiffs herein had the right to discharge surface and nonsurface waters into the natural drainway, and Defendants could not block the flow. The court erred in permitting blockage of waters discharged into the ravine and under Washington law Defendants are strictly liable for damages. Further, Defendants are required to provide an adequate means for the waters coming from Plaintiff's lands to flow into the ravine and the court erred in not ordering Defendants to do so, as prayed for in the Complaint and as established by the evidence.

3. Burden of Proof. In Conclusions of Law 3, 4, 5, 6 and 7, the trial court denied Plaintiffs relief because they did not prove that the water flowing into the natural drainway was exclusively surface water. As argued above in Assignments of Error 1, 2 and 4, there was no evidence that anything other than surface water was directed into the ravine. Moreover, the court erroneously imposed the burden of proof on Plaintiffs when it

properly belonged on Defendants.

As shown above, Defendants blocked a natural drainway, giving rise to strict liability under Washington law. Defendants response, in part, was that they were entitled to block the ravine to the extent that non surface waters were being collected and fed into the ravine by Plaintiffs. As stated by Defendants, “. . .the defense clearly made an issue of subsurface water at the time of trial” (Response to Plaintiffs’ Motion for Reconsideration, p. 2, CP 202). The burden of proof rests on the party asserting the existence of facts which excuse what would otherwise be a wrongful act. Olpinski v. Clement, 73 Wn2d 944, 442 P2d 260 (1968).

The trial court denied relief to Plaintiffs because they, in the court’s view, failed to prove that the water being directed into the ravine was exclusively surface water. Since Defendants blocked the natural drainway it was their burden to prove they were legally entitled to do so. Imposing the burden of proof on Plaintiffs was error and justifies reversal of the trial court’s decision.

D. Assignments of Error Nos. 5 and 6.

In Finding of Fact No. 20, the trial court found that before development, water flowed to the front of the lots and then into the

ravine. As shown by Exhibit I, the ravine was back from the street. In addition, Mr. Sessions, who developed Lots 1 and 2, testified that the ravine was approximately forty feet back from the curb (RP 204, L. 12). Further, he testified that all of the drains he installed put water into the ravine (RP 207, L. 3; RP 209, L. 4-5; RP 209, L. 21-25; RP 213, L. 14-16; RP 214, L. 4-5; RP 218, L. 20). The location of the ravine and the fact that the drain pipes emptied into the ravine was confirmed by Mr. Scalesse (RP 31, L. 7-15).

The trial court's findings of fact will only be sustained when there is evidence to support them. Worthington v. Worthington, 73 Wn2d 759, 765, 440 P2d 478 (1968). Findings of fact not supported by the record cannot stand. Department of Licensing v. Sheeks, 47 Wn.App. 65, 70, 734 P2d 24 (1987).

The error by the court is significant because the court also found that the plaintiffs were in violation of the common enemy doctrine (Finding of Fact No. 23, CP 185). Contrary to the court's holding, a landowner is entitled to collect waters and direct them into a natural drainway. Island County v. Mackie, 36 Wn.App. 385, 675 P2d 607 (1984)(County entitled to collect upland water in drainage ditches where no additional watershed waters were directed into natural drainway); Trigg v. Timmerman, 90 Wash. 678,

156 Pac. 846 (1916) (private upland owner would not be restrained from collecting waters in drainage ditches and directing them into natural swale); Strickland v. City of Seattle, 62 Wash.2d 912, 385 P.2d 33 (1963)(no liability for artificially accelerating through ditches and culverts a flow that remained in a natural drainway, quoting with approval the following language from Manteufel v. Wetzel, 133 Wis. 619, 114 N.W. 91, 19 L.R.A., N.S. 167:

“Where the upper proprietor does no more than collect in a ditch, which ditch follows the course of the usual flow of surface water which formerly took the same course toward the land of the lower adjacent proprietor, and causes to pass through this ditch the surface water which formerly took the same course but spread out over the surface, he has committed no actionable legal wrong of which the lower proprietor can complain, or upon which such lower proprietor can maintain an action. In other words, causing surface water to flow in its natural direction through a ditch on one’s own land instead of over the surface or by percolation as formerly, where no new watershed is tapped by said ditch and no addition to the former volume of surface water is caused thereby, except the mere carrying in a ditch what formerly reached the same point on defendant’s land over a wider surface by percolation through the soil, or by flowing over such wider surface, is not, when not negligently done, a wrongful or unlawful act.”

Similarly, Plaintiffs and their predecessors, through the series of catch basins and roof drains, did not collect any water in addition to that which would flow down the natural drain way. Collecting the same water in pipes as would naturally flow and

discharging it down the natural drainway is not a wrongful act. Finding of Fact No. 23 is not supported by the evidence because Plaintiffs did not collect any water in addition to or outside of that already existing in the natural drainage. All drainage system elements (pipes, drains, catch basins and dry wells) were placed within the natural drain way. Moreover, because some roof drains were diverted to the street, the total volume of drainage was decreased from its natural state.

Further, where a natural drainway is involved, the common enemy doctrine does not apply. Island County v. Mackie, supra; King County v. Boeing Company, 62 Wn2d 545, 384 P2d 122 (1963).

The only evidence in the case shows that the natural drainway was well back from the front of the lots and that the waters collected by the drainage systems were discharged into the ravine. The trial court's Findings of Fact Nos. 20 and 23 were inaccurate and not supported by any evidence. In addition, Finding of Fact No. 23 which applied the common enemy doctrine to this case was erroneous as a matter of law and should be reversed.

E. Assignments of Error Nos. 13 and 15.

As part of its rulings, the trial court found that Plaintiffs' drain

pipes encroached on the land of Defendants Davis, and ordered removal of the pipes. The authorities cited above establish that Plaintiffs did not violate any principle of Washington drainage law, and were entitled to collect and discharge waters into the natural drainway. For example, in Island County v. Mackie, 36 WnApp 385, 675 P2d 607 (1984), the county built a system of ditches to collect upland waters. The waters fed into a culvert which emptied onto the defendant's land. Rather than order removal or blocking of the culvert, the trial court granted an injunction restraining defendants from blocking the culvert or otherwise interfering with the natural drainway. The Court of Appeals affirmed. Mackie, 36 WnApp at 391.

Here, the trial court erred in finding an encroachment and ordering removal of the pipes. Since the pipes emptied into a natural drainway, Defendants could not block the flow without providing an adequate means of drainage for normal conditions and recurrent heavy flows of water. Mackie, supra; Wilber v. Western Properties, 14 WnApp 169, 540 P2d 470 (1975); Dahlgren v. Chicago, Milwaukee & Puget Sound Ry. Co., 84 Wash. 395, 148 Pac. 567 (1915). Rather than order Plaintiffs to remove the drains the court should have restrained Defendants Davis from interfering

with the flow of waters and ordered them to provide adequate drainage across and through their property.

F. Assignment of Error No. 17.

Following entry of the trial court's Findings of Facts and Conclusions of Law, Plaintiffs timely moved for reconsideration raising the issues discussed above. For the reasons argued above and based on the authorities cited the trial court erred in not reconsidering its rulings and granting Plaintiffs the relief requested.

V. CONCLUSION

As shown in the arguments above, Plaintiffs and their predecessors acted reasonably and permissibly in collecting waters on their property and directing the waters into the natural ravine drainway. Defendants, who developed their lot several years later, are strictly liable under Washington law for blocking the drainway and must provide an adequate means for water from the uplands to continue to flow into the ravine. The trial court, at the urging of Defendants, assumed without evidence that Plaintiffs were collecting subsurface water and erroneously ruled that the presence of such water would make a difference in this blockage case. The cases cited clearly hold otherwise and the trial court

erred in denying relief to Plaintiffs.

Plaintiffs ask this court to reverse the rulings of the trial court and direct entry of judgment for Plaintiffs. The judgment should require Defendants to provide an adequate system for drainage of the upland waters across Defendants' property. The court should further award Plaintiffs their attorney fees at trial and incurred in this appeal.

Respectfully submitted this 4 day  
of January, 2008:

REITSCH WESTON & BLONDIN, PLLC

  
GERRY A. REITSCH, WSB #3704

FILED  
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COWLITZ COUNTY  
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SUPERIOR COURT OF WASHINGTON FOR COWLITZ COUNTY

VINCENT F. SCALESSE and KATHRYN )  
SCALESSE, husband and wife, )

Plaintiffs, )

v. )

KEN L. DAVIS, SR. and TRACY L. DAVIS, )  
husband and wife, and the marital community )  
composed thereof, JEFFREY P. RAUTH and )  
MARY E. RAUTH, husband and wife, and )  
the marital community composed thereof, )  
ROBERT HENRY ROUSE and JANE DOE )  
ROUSE, husband and wife, and the marital )  
community composed thereof, dba NEW )  
HORIZON HOMES, AMERICAN BANKERS )  
INSURANCE CO. Bond No. LPM370681, )

Defendants. )

No. 04-2-01511-2

FINDING OF FACT AND  
CONCLUSIONS OF LAW

THIS MATTER was tried by the Court without a jury on July 24, 25, and 26, 2006,  
the Honorable James Stonier presiding. The Plaintiffs Vincent F. Scalesse and Kathryn  
Scalesse appeared personally and by and through their attorney, David A. Nelson.  
Defendant Ken L. Davis, Sr. and Tracy L. Davis appeared personally and by and through  
their attorney, Douglas Foley. Defendant Jeffrey P. Rauth and Mary E. Rauth appeared  
personally and by and through their attorney, Craig McReary.

FINDING OF FACT AND  
CONCLUSIONS OF LAW

(87)

**NELSON LAW FIRM, PLLC**  
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Facsimile (360) 425-1344

1 The Court received the evidence and testimony offered by the parties, considered  
2 the pleadings filed in the action and heard the oral argument of the parties' counsel. The  
3 Court being in all respects fully advised, now makes its,

4 FINDINGS OF FACT

5 1. Plaintiffs are owners of the residential property located at 124 West Beacon  
6 Hill Drive (Lot 2) Longview, Washington.

7 2. The house on Lot 2 was built in 1993 by James Sessions and was purchased  
8 by the Plaintiffs in 1994.

9 3. In 1993, Mr. James Sessions also owned and developed the lot (Lot 1)  
10 adjacent to and uphill from Lot 2, where he currently resides.

11 4. Lot 1 is uphill from Lot 2. Prior to the development of the lots, surface water  
12 drained from the backside of these lots towards West Beacon Hill Drive and then downhill  
13 through a natural drain way across Lot 2 and farther downhill across 128 West Beacon Hill  
14 Drive (Lot 3), currently owned by Defendants Davis.

15 5. In 1993, when Mr. Sessions developed Lots 1 and 2, he constructed a  
16 drainage system, which involves a dry well collecting surface water flowing from Lot 1 and  
17 the property uphill from Lot 1. The drywell collected this surface water and emptied into a  
18 six-inch tile pipe, which ran underground across Lot 1 onto Lot 2. Mr. Sessions also  
19 constructed a French (curtain) drain that collected subsurface water and ran along the  
20 backside of Lot 1 and then paralleled the boundary between Lots 1 and 2 joining up with  
21 the six-inch tile pipe. After crossing onto Lot 2 the tile pipe was joined at a right angle to a  
22 nonperforated pipe which directed the water towards the back of Lot 2 running parallel to

23 FINDING OF FACT AND  
24 CONCLUSIONS OF LAW

1 the boundary line between Lots 1 and 2 where it joined at a right angle with a French  
2 (curtain) drain consisting of a perforated six-inch pipe. This perforated pipe and the French  
3 drain ran across the back side of Lot 2 turning at a right angle and running toward the front  
4 of Lot 2 to a point some 25 feet from West Beacon Hill Drive. At that point, the perforated  
5 pipe joins with a six-inch PVC pipe at a right angle and the PVC pipe runs across the  
6 boundary line between Lots 2 and 3 and 10 feet onto Lot 3 where it empties the collected  
7 water. Prior to the development of Lot 3 this pipe stuck out of the hillside on Lot 3 and  
8 emptied onto the sloping surface.

9 6. On Lot 2 Mr. Sessions also constructed a foundation drain around the house.  
10 This drain collects subsurface water and empties into a dry well on the downhill side of Lot  
11 2 and the drywell empties into a four-inch PVC pipe that also ran onto Lot 3 and emptied in  
12 the vicinity of the six-inch PVC pipe.

13 7. Some of the roof drains on Lot 1 and 2 also emptied into the drainage system  
14 that ultimately emptied through the six-inch PVC pipe on Lot 3.

15 8. In 1995 Defendant Rauth developed Lot 3, building a house on that lot. In  
16 leveling the lot, Defendant Rauth filled in the natural drain way and covered up both the six-  
17 inch and the four-inch PVC pipes.

18 9. On August 12, 1994, Plaintiffs purchased Lot 2 from the Sessions, unaware  
19 that the drainage system included two open pipes draining onto Lot 3.

20 10. In December 1999, the first flooding of the basement occurred at 124 West  
21 Beacon Hill Drive. After coming home from work Mr. Scalesse discovered water in his  
22 finished basement. Mr. Scalesse was unable to determine the source and cause of the  
23

24 FINDING OF FACT AND  
CONCLUSIONS OF LAW

1 1999 flooding.

2 11. In February 2003, the finished basement of Lot 2 again flooded, after which  
3 Mr. Scalesse excavated the area of the water pooling outside his basement, discovering  
4 the six-inch PVC pipe. Upon further investigation he determined that the pipe had been  
5 blocked by the rock and fill on Lot 3.

6 12. Since February 2003 the flooding of the finished basement became more  
7 frequent and severe, to the extent that Mr. Scalesse observed almost monthly flooding of  
8 the basement during some periods of heavy and sustained rainfall.

9 13. In January 2004, Mr. Scalesse built a trench to collect the pooling water  
10 outside the basement and installed first one sump pump and later a second one to pump  
11 the water into the street.

12 14. Since installing the sump pumps Mr. Scalesse has not experienced any  
13 flooding in the basement but does experience water collection at the area of sump pumps  
14 causing them to be activated during some periods of heavy and sustained rainfall.

15 15. The roadway off West Beacon Hill Drive is higher than the ground outside the  
16 back door leading to the basement; to drain the water to the street requires a sump pump.

17 16. At the same time the Plaintiffs Scalesse were experiencing flooding in their  
18 basement, the Davis property developed a sinkhole in the area of the opening of the buried  
19 PVC pipes. Defendants Davis used more fill to cover the sinkhole.

20 17. At the point at which the six-inch pipe crossed between Lots 2 and 3, the  
21 water in the pipe was both surface and non-surface (sub-surface) water. ~~The four-inch~~  
22 ~~pipe contained non-surface water.~~ 

23 FINDING OF FACT AND  
24 CONCLUSIONS OF LAW

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1 18. The record does not disclose what quantity or percentage of the water flowing  
2 from the six-inch pipe is surface water.

3 19. The development of Lots 1, 2 and 3 and the leveling of those lots has  
4 resulted in a benching effect. As each lot was developed it materially altered and  
5 completely inhibited the natural drain way.

6 20. Prior to the development of Lots 1, 2 and 3 the water flowed to the front of the  
7 lots and then flowed down a natural ravine. While that ravine, drain way, was somewhat  
8 shifted by the development of West Beacon Hill Drive, it was not materially altered until the  
9 lots were developed.

10 21. The water emptying from the two PVC pipes onto Lot 3 caused the flooding of  
11 the Plaintiffs' finished basement.

12 22. Defendants Davis and their predecessor, Defendants Rauth, violated an  
13 exception to the common enemy doctrine by blocking the flow of surface water along a  
14 natural drain-way when they filled and leveled Lot 3 (Davis).

15 23. Plaintiffs Scalesse and their predecessor violated one of the exceptions to the  
16 common enemy doctrine in that they, and their predecessor and current neighbor, the  
17 Sessions, artificially collected water, both surface and sub-surface, from Lot 1 and Lot 2  
18 and channeled it onto Lot 3.

19 CONCLUSIONS OF LAW

20 1. The Court has jurisdiction over the parties and subject matter of this claim.

21 2. This case is governed by the common enemy doctrine. See Currens v.  
22 Sleek, 138 Wn.2d 858, 983 P2d 626 (1999).

23 FINDING OF FACT AND  
24 CONCLUSIONS OF LAW

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1           3.     The Plaintiffs did not prove by a preponderance of the evidence that inhibiting  
2     the natural drain-way was the proximate cause of the flooding of their finished basement  
3     because they were unable to quantify the amount of water attributable to either surface or  
4     sub-surface water.

5           4.     Defendants Davis and Rauth have no duty to allow sub-surface water to  
6     cross their property. Therefore, the Plaintiffs failed to prove the developer violated the  
7     standard of care, although the standard of care would be breached in this case if the pipes  
8     only conveyed surface water.

9           5.     The Court would order the Defendants provide Plaintiffs with a gravity fed or  
10    similar reliable drainage system if the water pooling on Lots 2 and 3 and causing flooding  
11    to Plaintiffs' basement was exclusively surface water. Because Plaintiffs did not prove the  
12    pooling water is exclusively surface water, Plaintiffs failed to prove Defendants had a duty  
13    to provide drainage.

14          6.     Plaintiffs failed to prove a nuisance by a preponderance of the evidence  
15    because Plaintiffs did not prove the pooling water was exclusively surface water.

16          7.     Plaintiffs failed to prove a trespass by a preponderance of the evidence  
17    because the Plaintiffs did not prove the pooling water was exclusively surface water.

18          8.     Defendants Davis established an encroachment by a preponderance of the  
19    evidence and the Court orders the Plaintiffs either remove or block the six-inch drainpipe  
20    and the four-inch drainpipe.

21          9.     The Defendants failed to establish by a preponderance of evidence that the  
22    Plaintiffs claim is barred by the statute of limitation as the cause of the flooding was not  
23

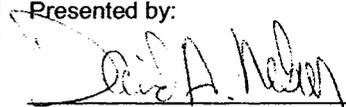
24     FINDING OF FACT AND  
      CONCLUSIONS OF LAW

1 reasonably discoverable until February 2003.

2 DONE IN OPEN COURT this 11<sup>th</sup> day of May, 2007.

3  
4 Cowlitz County Superior Court

5  
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7   
8 JUDGE

9 Presented by:  
10   
11 David A. Nelson WSB #19145  
12 Attorney for Plaintiffs

13 Approved as to form:  
14 \_\_\_\_\_  
15 Douglas Foley WSB #13119  
16 Attorney for Defendant Davis

17 Approved as to form:  
18 \_\_\_\_\_  
19 Craig McReary WSB #26367  
20 Attorney for Defendant Rauth

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22  
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24 CONCLUSIONS OF LAW

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