
Court of Appeals Cause No. 36610-0-II

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' REPLY BRIEF

GERRY A. REITSCH, WSBA#3704
1408 -16th Avenue
Longview, Washington 98632
Telephone #(360) 423-4050

Attorney for the Appellants

April 1, 2008

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DIVISION II

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A. INTRODUCTION

Plaintiffs' opening brief accurately reflected the record in this case and cited numerous Washington cases showing that the trial court's legal analysis was erroneous. In response, Defendants have cited no legal authorities to support the trial court's rulings. Instead, even though no cross appeal was filed, they attempt to deny several Findings of Fact and claim that Plaintiffs are the wrongdoers.

The trial court correctly found that the parties' properties lie in a natural drainway, that Plaintiffs are entitled to divert naturally occurring waters away from their home and into the ravine, and that Defendants wrongfully blocked the drainway when they developed Lot 3. Plaintiffs appealed the court's denial of relief because that denial was based on the erroneous conclusion that the possible presence of subsurface water mandated judgment for Defendants. Respondents' brief provides no legal reason for denial of Plaintiffs' claims.

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B. APPELLANTS' REPLY TO RESPONDENTS' ARGUMENTS

1. Natural Ravine Drainway. In the "Introduction" and "Statement of the Case" defendants Davis attempt to persuade the court that Mr. Sessions, who built homes on Lots 1 and 2, developed all four lots and in doing so, filled in the natural ravine drainway such that it "ceased to exist". There is no such testimony in the record, and the trial court found otherwise in the following Findings of Fact:

2. The house on Lot 2 was built in 1993 by James Sessions and was purchased by the Plaintiffs in 1994.
3. In 1993, Mr. Sessions also owned and developed the lot (Lot 1) adjacent to and uphill from Lot 2, where he currently resides.
8. In 1995 Defendant Rauth developed Lot 3, building a house on that lot. In leveling the lot, Defendant Rauth filled in the natural drainway and covered up both the six-inch and the four-inch PVC pipes.

22. Defendants Davis and their predecessor, Defendants Rauth, violated an exception to the common enemy doctrine by blocking the flow of surface water along a natural drainway when they filled and leveled Lot 3 (Davis). (CP182,183,185)

See also Exhibit 2, showing the condition of Lot 3 when the home on Lot 2 was being built. (RP 214).

At the time he built houses on Lots 1 and 2 Mr. Sessions, like any other builder, installed drains and pipes to protect the homes from prevailing rainfall. The water was directed away from the home and back into the ravine¹ (RP 215, 218), which still existed across Lots 3 and 4. Defendants produced no evidence that the work done by Mr. Sessions was negligent. As shown in Appellants' opening brief, a landowner is entitled to collect upland waters by means of drains, ditches and pipes and direct them into a natural drainway. Island County v. Mackie, 36 Wn App 385, 675 P.2d 607 (1984); Trigg v. Timmerman, 90 Wash 678, 156 Pac. 846 (1916); Strickland v. Seattle, 62 Wn2d 912, 385 P.2d 33 (1963).

¹ Initially, the water was directed out into the street. The County complained and ordered Sessions to redirect the water back into the ravine (RP 209; Ex. 16).

It is also important to note that the sequence of building on the four lots was thus:

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| 1993 | Homes built on Lots 1 and 2 by Mr. Sessions (Finding of Fact No.'s 2 and 3, CP 182). |
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When Mr. Rauth built his home on Lot 4 he installed a catch basin and culvert, in part to conduct the water coming from above through Lot 4 and further down into the ravine (RP 100-101).

2. Presence of Subsurface Water. Defendants Davis also went to great lengths in their brief in an attempt to show, through questions asked of Mr. Sessions, that subsurface water was collected in the drains he installed. Although their brief uses the term "subsurface water" their attorney at trial consistently used the term "groundwater" without defining or differentiating that term from "surface water". There is nothing in the record to show that Mr. Sessions, a layman, understood the legal distinction between surface water and ground water relied on here by Defendants.

The unrefuted testimony was that significant accumulations of water from the drains only occurred shortly after heavy and sustained rainfall (RP 266), and the court so found in Finding of Fact No. 14 (CP184). It was also unrefuted that the drains (the perforated pipe as emphasized by Defendants) were very close to the surface, (RP 82). The only reasonable inferences are that only surface water was being collected.

Moreover, the Washington cases establish that an upland owner is entitled to collect and channel into a natural drainway both surface and subsurface water, which may not be blocked by the lower owner. Dahlgren v. Chicago Mikwaukee and Puget Sound Ry. Co., 85 Wash.395, 148 Pac.567 (1915); Miller v. Eastern Ry & Lumber Co., 84 Wash.31, 146 Pac. 171 (1915). There was no evidence that any water flowing from the six inch and four inch pipes into the ravine was any different in volume or source than that which was there before homes were built on Lots 1 and 2. Neither Mr. Sessions nor Plaintiffs brought into the ravine any water from any other watershed or drainage. Island County v. Mackie, 36 Wn App 385, 675 P.2d 607 (1984). Thus, because a natural drainway existed, the channeling of water away from the homes on Lots 1

and 2 (as required by the county building code) and back into the ravine could not be blocked by Defendants.

3. Defendants Fail to Answer Plaintiffs' Central Argument. In their opening brief Plaintiffs, with extensive citations to the record and to Washington case law, showed that they were entitled to divert waters away from their home and into the natural drainway. The trial court agreed with Plaintiffs but denied relief for the sole reason that it believed (a) that some portion of the water was subsurface water, and (b) the possible presence of subsurface water made a difference. Based on the record, including the Findings of Fact, and applicable case law, Plaintiffs argued that the trial court erred.

Defendants do not meet Plaintiffs' argument. Rather, even though they have not cross appealed or otherwise challenged the trial court's Findings of Fact, they argue (over and over) that there is no ravine, and that somehow the installation of roof drains and a foundation drain is an illegal use of Plaintiffs' property. On the contrary, such drains are common practice and were and are required by building codes².

² See e.g. Uniform Building Code (1998) § 2905, §3207; International Residential Code (2006) §R401; §R903.

Not surprisingly, when Mr. Rauth developed Lot 4 he installed a catch basin and drainage culvert to capture water coming from above and keep it away from his home and driveway. (RP 99-101). Likewise, when he later developed Lot 3 he relied on his contractor to install drainage systems (RP 103).

The point is that the installation of drains to keep water away from the structure was a perfectly reasonable thing for Mr. Sessions to do when he built on Lot 2. Routing the drains into the ravine which still existed on Lots 3 and 4 was not only reasonable, but was required by the county (RP 209). Routing drain water into the natural drainway was also permissible under Washington law as shown by the cases cited in the Plaintiff's opening brief.

4. Discussion of Plaintiffs' Cases. Beginning at page 21 of Respondents' Brief, Defendants claim the cases relied on by Plaintiffs are inapposite. Defendants' reasoning is that they did nothing to block a natural drainway, yet the trial court specifically found that they had. Finding of Fact No. 22 provided:

22. Defendants Davis and their predecessor, Defendants Rauth, violated an exception to the common enemy doctrine by blocking the flow of surface water along a natural drainway

when they filled and leveled Lot 3 (Davis). (CP 185).

Again, Defendants have not cross appealed or otherwise challenged the court's Findings of Fact.

The fact that Mr. Sessions directed water away from the home and into pipes that emptied into the ravine does not defeat Plaintiffs' claim, as argued by Defendants, because no additional watershed waters have been directed into the ravine. In Island County v. Mackie, 36 Wn App 385, 675 P.2d 607 (1984), the county collected upland water through a system of ditches and drains and then concentrated the collected water into a culvert that flowed onto the Defendants' land. The court referred to its earlier opinion in a case between the same parties and stated:

This court found that the culvert and the Mackie property are located in a natural drainway, and that the culvert merely facilitates the natural passage of water through the drainway and under Humphrey Road. It also found that the County, through a system of drainage ditches upland of the Mackie property, had not redirected any additional watershed waters into the drainway and onto the property.

Mackie, 36 Wn App at 387. The court found that the county had done nothing wrong and held that the Defendants were not entitled to dam up the culvert. The court held:

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 Wn App at 391. The facts in Mackie are very similar to what happened when Rauth filled in Lot 3, blocking the natural drainway. The holdings of the case clearly support Plaintiffs' claims and this court should order that Defendants are not entitled to block the drainage pipes coming from above.

Defendants' claims about Wilber v. Western Properties, 14 Wn App 169, 540 P.2d 470 (1975), review denied, 86 Wn 2d 1004, are likewise erroneous. Defendants again assert there was not natural drainway on Lot 3 contrary to the trial court's Findings of Fact Nos. 8 and 22. In Wilber the lower owner installed a pipe in the natural drainway then filled in the remaining ditch. Prolonged rainfall and resulting drainage exceeded the capacity of the pipe, causing water to back up and flood the upland owner. An award of damages was affirmed on appeal, the court holding:

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 (1917). 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. Johnson 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.

Wilber, 14 Wn App at 173-174. In the instant case, Defendants Rauth filled in the ravine on Lot 3 thereby obstructing the natural drainage. They also totally failed to provide any means for drainage from the lots above, causing flooding on Plaintiffs' property. The holdings in Wilber support Plaintiffs' claims and the court should order Defendants, who obstruct the natural drainway, to provide adequate means of drainage. Finally, Defendants claim on Page 27 that Plaintiffs introduced "wholly different sources of water" into the ravine. There is nothing in the record to support Defendants' assertion and the court should disregard it. In fact, the only water flowing into to ravine from Lots 1 and 2 was from rainfall.

Dahlgren v. Chicago Milwaukee & Puget Sound Ry. Co., 85 Wash. 395, 148 Pac. 567 (1915), is similar to Wilber. There the railroad built an embankment across a natural drainway and

installed a culvert to allow the passage of water under the embankment. The pipe was installed two feet higher than the existing drainway and was too small to handle the flow, causing water to back up onto the upland property. The Supreme Court affirmed a verdict for the upland owner holding:

“It is doubtless true, as the appellant argues, that it had a lawful right to construct an embankment for the use of its railway, but it does not follow that it had a lawful right to construct it in such a manner as to cause injury to the property of the respondents. 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 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. The case supports Plaintiffs claims, and the acts of Defendants in filling the ravine were wrongful.

5. Condemnation of Easement. Defendants argue in section D of their brief, as they did at trial, that Plaintiffs should have attempted to condemn a private easement under RCW 8.42.010 et. seq. The trial court rejected the argument as should this court. Plaintiffs’ claim is that Defendants wrongfully blocked a natural drainway and the court should order Defendants Davis to

accommodate the flow of water from above. Under the case law, Defendants can do so in any manner they choose so long as their method is adequate to handle normal conditions and recurrent floods.

Further, the trial court denied Defendants motions to dismiss based on the Condemnation argument (CP 152) and Defendants have not cross appealed.

C. CONCLUSION

In this appeal, Plaintiffs seek reversal of the trial court's rulings that the possible presence of some subsurface water directed into a natural drainway compelled denial of their claims. In their opening brief Plaintiffs showed that the common enemy doctrine, relied on by Defendants and the trial court, does not apply where the parties' properties lie in a natural drainway, a fact established at trial and unchallenged on appeal.

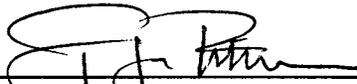
Respondents' brief does not rebut Plaintiffs' argument or cite any authority supporting the trial court's legal rulings. Rather, Defendants attempt to attack the court's fact finding that they blocked a natural drainway, even though they have not cross appealed. This court should disregard the attempt to reshape the physical and legal terrain.

The trial court found that a natural drainway existed on Lot 3 before its development. Under the authorities cited by Plaintiffs, they were entitled to collect and channel surface and other waters into the ravine. Likewise, the cases establish that Defendants, as developers and owners of Lot 3, cannot block the ravine and must provide an adequate means for upland waters to continue to flow.

Plaintiffs ask this court to reverse the trial court and remand the case for entry of an order directing Defendants to provide an adequate means of drainage.

Respectfully submitted this 1st day
of April, 2008:

REITSCH WESTON & BLONDIN, PLLC



GERRY A. REITSCH, WSB #3704

Reitsch Weston & Blondin

ATTORNEYS AT LAW

REITSCH WESTON & BLONDIN, P.L.L.C. • 1408 16TH AVENUE, PO BOX 250, LONGVIEW, WA 98632
TEL (360) 423-4050 • FAX (360) 425-8980 • www.rw-law.com

GERRY A. REITSCH
CRAIG W. WESTON
KEVIN G. BLONDIN
RYAN P. JURVAKAINEN

April 1, 2008

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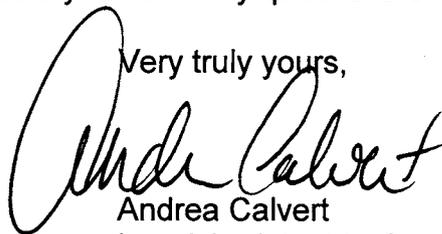
Re: Scalesse v. Davis, et al.
Court of Appeals Case No. 36610-0-II

Dear Clerk:

Enclosed for filing in the above-referenced matter please find original and two (2) copies of Appellant's Reply Brief.

At your earliest convenience please file the original Brief, conform the file (yellow) copy and return it to me in the enclosed envelope. Please do not hesitate to contact me at the telephone number above should you have any questions or concerns.

Very truly yours,



Andrea Calvert
Legal Assistant to Gerry A. Reitsch

GAR:ac

Enclosures

cc: Vincent & Kathryn Scalesse
Douglas Foley
Craig McReary

Ready 3-6-08

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GERRY A. REITSCH, WSBA#3704
1408 -16th Avenue
Longview, Washington 98632
Telephone #(360) 423-4050

Attorney for the Appellants

April 1, 2008

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395, 148 P. 567 (1917). 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. Johnson 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.

Wilber, 14 Wn App at 173-174. In the instant case, Defendants Rauth filled in the ravine on Lot 3 thereby obstructing the natural drainage. They also totally failed to provide any means for drainage from the lots above, causing flooding on Plaintiffs property. The holdings in Wilber support Plaintiffs' claims and the court should order Defendants, who obstruct the natural drainway, to provide adequate means of drainage. Finally, Defendants claim on Page 27 that Plaintiffs introduced "wholly different sources of water" into the ravine. There is nothing in the record to support Defendants' assertion and the court should disregard it. In fact, the only water flowing into to ravine from Lots 1 and 2 was from rainfall.

Dahlgren v. Chicago Milwaukee & Puget Sound Ry. Co., 85 Wash. 395, 148 Pac. 567 (1915), is similar to Wilber. There the railroad built an embankment across a natural drainway and

installed a culvert to allow the passage of water under the embankment. The pipe was installed two feet higher than the existing drainway and was too small to handle the flow, causing water to back up onto the upland property. The Supreme Court affirmed a verdict for the upland owner holding:

“It is doubtless true, as the appellant argues, that it had a lawful right to construct an embankment for the use of its railway, but it does not follow that it had a lawful right to construct it in such a manner as to cause injury to the property of the respondents. 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 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. The case supports Plaintiffs claims, and the acts of Defendants in filling the ravine were wrongful.

5. Condemnation of Easement. Defendants argue in section D of their brief, as they did at trial, that Plaintiffs should have attempted to condemn a private easement under RCW 8.42.010 et. seq. The trial court rejected the argument as should this court. Plaintiffs' claim is that Defendants wrongfully blocked a natural drainway and the court should order Defendants Davis to

accommodate the flow of water from above. Under the case law, Defendants can do so in any manner they choose so long as their method is adequate to handle normal conditions and recurrent floods.

Further, the trial court denied Defendants motions to dismiss based on the Condemnation argument (CP 152) and Defendants have not cross appealed.

C. CONCLUSION

In this appeal, Plaintiffs seek reversal of the trial court's rulings that the possible presence of some subsurface water directed into a natural drainway compelled denial of their claims. In their opening brief Plaintiffs showed that the common enemy doctrine, relied on by Defendants and the trial court, does not apply where the parties' properties lie in a natural drainway, a fact established at trial and unchallenged on appeal.

Respondents' brief does not rebut Plaintiffs' argument or cite any authority supporting the trial court's legal rulings. Rather, Defendants attempt to attack the court's fact finding that they blocked a natural drainway, even though they have not cross appealed. This court should disregard the attempt to reshape the physical and legal terrain.

The trial court found that a natural drainway existed on Lot 3 before its development. Under the authorities cited by Plaintiffs, they were entitled to collect and channel surface and other waters into the ravine. Likewise, the cases establish that Defendants, as developers and owners of Lot 3, cannot block the ravine and must provide an adequate means for upland waters to continue to flow.

Plaintiffs ask this court to reverse the trial court and remand the case for entry of an order directing Defendants to provide an adequate means of drainage.

Respectfully submitted this 1st day
of April, 2008:

REITSCH WESTON & BLONDIN, PLLC



GERRY A. REITSCH, WSB #3704