

Kes. Davis  
**ORIGINAL**

No. 36610-0-11

COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION II

VINCENT F. SCALESSE and KATHRYN SCALESSE, husband and wife,  
Appellants,  
v.

FILED  
COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
BY DEPUTY

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 comprised thereof, ROBER 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.

**BRIEF OF RESPONDENTS KEN L. AND TRACY L. DAVIS**

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## INTRODUCTION

Prior to the development of the Lots<sup>1</sup> which are the subject of this case, the Lots were covered with natural timber and native shrubbery. A ravine crossed the properties. Mr. Sessions originally developed these Lots. *Id.* The trees were cut down, the shrubbery removed, and the ravine was entirely filled in. The Lots were also leveled and earth was moved from the back of the Lots to the front of the Lots and fill was also brought in from other sources. The “natural drain way,” which was provided by the ravine, ceased to exist. The properties were then developed. Houses were constructed on the lots, and driveways and sidewalks were established, as well. (RP 219-222)

Mr. Sessions collected ground water from Lot 1, and channeled water from his property onto Lot 2 with underground waterway ties. Groundwater was also collected on the perimeter of Lot 2 through the use of a foundation drain with perforated pipes which led to a dry well and four inch pipe on Lot 2. (RP 206-207) That four inch pipe

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<sup>1</sup> The Lots are presently owned by Sessions (Lot 1), Scalesse (Lot 2) and Davis (Lot 3). Sessions developed Lots 1 and 2, then sold Lot 2 to Scalesse.

trespasses across the property line of Lot 3 from Lot 2. (RP 207, 233-34) Mr. Sessions also installed a perforated underground drain system to catch *groundwater* that tied into the four inch pipe system, as well. (RP 207-208) Mr. Sessions further installed a six inch solid pipe from Lot 1 that fed into a French drain or curtain drain, which is a perimeter drain around the Lot 2 property, and which tied into a six inch pipe that trespasses onto Defendants Davis' property, Lot 3. Mr. Sessions did not intend to place these lines onto Lot 3. (RP 210, 233-34) There is ample evidence that *both* groundwater and surface water are artificially collected by the perimeter and other drain systems from Lot 1 and Lot 2, and artificially channeled from these Lots onto Lot 3.

In this case, the Plaintiffs have the burden of proof to establish that the Defendants, somehow, are responsible for allegedly interrupting a "natural" flow of pre-existing *surface* water. Plaintiffs cannot and did not meet that burden of proof. The pathway, through which the water flowed no longer exists (in other words, the ravine). Plaintiffs failed to prove that the *underground* water system installed after the destruction of the natural ravine and the construction of the houses with the loss of natural trees and shrubbery, is the same as the above-ground drainage that existed in a ravine area prior to the

development of the subject property, and which was located in a wholly different portion of the properties. Plaintiffs cannot show that the velocity or source of the water, which Plaintiffs ask this Court to require Defendants to accept through an underground system onto their property, and by two pipes that encroach onto Defendants' property line with no easement right, represent a natural and pre-existing flow of *surface* water that existed prior to the drastic alteration of the terrain and the construction of the manmade watersheds, including roof tops, driveways, sidewalks, and loss of natural absorbing elements, such as shrubbery and trees.

Additionally, it is important to note that Sessions, the developer of Lots 1 and 2, had no intent to place any part of the piping system on Lot 3, the Lot presently owned by Davis. There is no claim of right through easement, or any tenable theory, that Scalesse presently has the right to maintain these trespassing pipes that protrude onto Lot 3 from Lot 2 or to further encroach onto the Davis property with an extended piping system that would simply cause, in turn, a further encroachment onto the next downhill Lot.

Furthermore, Plaintiffs have failed to establish that their remedy at law is inadequate. Plaintiffs failed to sue to establish a private easement through statutory condemnation pursuant to RCW 8.24.010, *et seq.* Plaintiffs also have an adequate substitute system for water diversion which they have installed, and which has resulted in an elimination of any “flooding”<sup>2</sup> since the installation of that system. Plaintiffs now improperly seek to inversely condemn Defendants’ property through a legal “back door,” by creating, in effect, a private easement on Defendants’ property without pleading or meeting the terms of RCW 8.24.010, *et seq.*<sup>3</sup>

Mr. Scalesse never had any “flooding” in his basement when he first purchased the property in 1994. The Davis property (Lot 3) was built next to his (Lot 2) in approximately 1995. (RP 62) He had no

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<sup>2</sup> The “flooding” referred to by Plaintiffs before installing a pump system constitutes less than an inch of water in a basement.

<sup>3</sup> Plaintiffs could have pursued a remedy at law pursuant to RCW 8.24.010, *infra.*

flooding in 1995, 1996, 1997, or 1998. The first time he experienced any “flooding” was in 1999. *Id.*

Mr. Scalesse, in fact, does not have any flooding problem at this time. He installed a fully functional pump system in January, 2005. After that time, he has had no water in his basement. At trial, Mr. Scalesse admitted that his pumps have taken care of Plaintiffs’ problem.

#### **RESPONSE TO ASSIGNMENTS OF ERROR**

1. The Court made no error. The Court properly found at Finding of Fact 5 that the undisputed evidence was that Mr. Sessions did construct a French curtain drainage system that collected subsurface *groundwater*, along the back of Lot 1, and paralleling the boundary between Lots 1 and 2, joining with a six inch pipe that trespasses on Lot 3.

2. The Court properly found at Finding of Fact 6 that Mr. Sessions did, in fact, construct a foundation drain around the house, which collected *subsurface* water and emptied into a drywell on the downhill side of Lot 2 and into a four inch PVC

pipe that also trespasses onto Lot 3 in the vicinity of an intruding six inch PVC pipe.

3. The Court properly found at Finding of Fact 7 that Mr. Sessions did testify that his gutter systems were tied into the six inch PVC pipe which also fed into the six inch PVC pipe that trespasses onto Lot 3.

4. The Court appropriately found at Finding of Fact 17 that the six inch pipe which trespasses from Lot 2 onto Lot 3 carries both surface water and non-surface groundwater.

5. With respect to Finding of Fact No. 20, the Court properly found that a ravine previously existed on the *front* portions of the Lots which had been filled in during construction.

6. With respect to Finding of Fact No. 23, Plaintiffs Scalesse and their predecessor, Mr. Session, did violate one of the exceptions to the common enemy doctrine in that they artificially channeled water, being both surface and sub-surface water, from Lots 1 to 2 and then onto Lot 3 without right or authority.

7. With respect to the Conclusion of Law No. 2, the Court properly applied *Currens v. Sleek*, 138 Wn.2d 858, 983 P.2d 626 (1999).

8. With respect to Conclusion of Law No. 3, the Court did properly hold that 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 Plaintiffs' finished basement.

9. With respect to Conclusion of Law No. 4, the Court did properly hold that Defendants had no duty to allow subsurface water to cross their property or surface water to cross their property in an unnaturally channeled form where, as here, both surface water and subsurface water was being collected in an unnatural and concentrated fashion.

10. With respect to Conclusion of Law No. 5, the Court did not err in determining that Plaintiffs had failed to prove that the alleged "flooding" was exclusively surface water.

11. With respect to Conclusion of Law No. 6, the Court did not improperly hold that the Plaintiffs failed to prove a nuisance.

12. With respect to Conclusion of Law No. 7, the Court properly found that Plaintiffs did fail to prove a trespass by a preponderance of the evidence (which claim is duplicative of Plaintiffs' nuisance claim).

13. With respect to Conclusion of Law No. 8, the Court did appropriately determine that there was an encroachment onto Defendants' property by a preponderance of the evidence, and the Court appropriately ordered the Plaintiffs to either remove or block the six inch drain pipe or the four inch drain pipe that was intruding and encroaching onto Defendants' property.

14. Costs were appropriately awarded and a Judgment appropriately granted, based on an ejectment claim.

15. The Court did not err in failing to grant the Plaintiffs relief or in denying their Motion to Reconsider.

## STATEMENT OF THE CASE

Plaintiffs/Appellants' statement of the case is incomplete and inaccurate. Plaintiffs ignore the radical alterations to the natural configuration of the property caused by Plaintiffs' predecessor in interest, Mr. Sessions (presently residing in Lot 1). As explained herein, Mr. Sessions denuded the property, filled in the ravine, changed the configuration of the topography and brought fill from the back of the Lots to the front of the Lots and also imported fill to the Lots. The Lots were developed with homes, and roof gutters were attached to the drainage system. The Plaintiffs were unable to demonstrate that the volume, velocity, and absorption of the pre-existing surface waters that had been on the undeveloped Lots were the same as the property prior to development. The Plaintiffs had no evidence by which to demonstrate that the alleged surface runoff channeled into two pipes at a different location that the ravine was the same in terms of amount, volume and collection as previously when there was a natural and open ravine. Thus, Plaintiffs wholly failed to establish that the two pipes (four inch and six inch pipes) protruding onto the Defendants Davis' property (Lot 3) carried

the same water flow, and water characteristics as previous surface waters. Plaintiffs wrongly state that there was “no” testimony that the drains carried subsurface water and that the Trial Court apparently “only assumed” that such water was present. (Appellant’s Brief, p. 7) The Court did not make assumptions, but carefully weighed the testimony. Washington case law does not permit the collection and disbursement of waters in an overburdened or unnatural way or in a different source, amount, manner or location by which water was previously channeled. The Trial Court’s decision should be affirmed.

## **ARGUMENT**

### **A. Response to Assignments of Errors 1, 2, and 4**

The Trial Court properly made Findings of Facts at Findings Nos. 5, 6, and 17, that the Plaintiffs’ predecessor, Mr. Sessions, collected subsurface and surface water, which emptied through pipes that trespassed onto Lot 3. Due to Plaintiffs’ marked misstatements of the facts, extensive reference to the record is necessary. In Mr. Sessions testimony, he plainly stated that he was collecting “ground water” in the

drain system through a French or curtain drain that terminated in the trespassing six inch pipe. (RP 206-208) Additionally, he also installed a foundation drain around the house on Lot 2.

(RP 206-207) As he testified:

“Q: Then let’s talk about what you did to the west side of the property and is there another drywell on that side?

A: Yes, there is a drywell on the other side of the house approximately here. And it goes around and it’s a solid line. And it was just the *perforated* drain tile. It was just kind of – just basically an overkill type of thing if there was any *groundwater* or anything like that, it was a *perforated* tile that could catch the water and could go around the lower well.” (RP 207-208; emphasis supplied)

Mr. Sessions continued to explain that that water fed into the drywell, then the four inch pipe. (RP 207) When the house was being built on Lot 2, Mr. Sessions also installed a perimeter *perforated drain* around the house, which is a *foundation drain*. *Id.* Mr. Sessions also explained that this pipe connected into the four inch line. (RP 207) Furthermore, Mr. Sessions explained that he laid a six inch culvert that goes underneath the ground across the Lot, which ties into the front of the house on Lot 2,

into a French drain or curtain drain (groundwater), which goes around the perimeter of the lot and down to Lot 2. (RP 208-209) Additionally, Mr. Sessions has created curtain drains (groundwater) on the back of his Lot (Lot 1) which ties into the six inch line that trespasses to Lot 2. (RP 225-226) When questioned about this line, he responded:

“Q: Okay, so that’s going to be *groundwater*, curtain drain, is that correct?

A: Yes.

Q: Okay. And then – okay so the just the – the broken green line is --

A: That’s *perforated*.

Q: It’s *perforated* pipe. It’s kind of a French drain style.

A: Yes.

Q: Okay.

A: Actually --

Q: Go ahead

A: This is *perforated* here. Actually it’s going down along the sides and that is *perforated* too.

Q: Okay. So you’ve got one *curtain* drain that goes to the back part of the lot where

the one is on this diagram out to the six inch, is that correct? Now is that six inch pipe is that a solid pipe?

A: Yes. Going across the yard it's a solid. This is the black – um – its black corrugated like a culver type of material the pipe that's in lot 2 is a PVC *perforated.*" (RP 226; emphasis supplied)

In addition to channeling subsurface water from his own property from Lot 1 into Lot 2, which also collects subsurface water, and which runs into Lot 3 (RP 233-34), Mr. Sessions admitted that the drain system does *not* follow the course of the ravine:

“Q: Yes. So it's clear that this drainage system does not follow the course of the ravine?

A: No.

Q: So you've got – and the answer to that was actually yes. It does not follow – okay, is that correct?

A: Yes. (RP 227)

Q: Okay, in any event, so you've got this broken set of lines here, broken set of lines here, and that goes into the solid pipe and then you take a big dog leg back around – loop around the lot and this – *so we're collecting groundwater all throughout these curtain drains on the back side of*

*the lot and along both sides of the property line between 1 and 2.* Is that correct?

A: Yes. (RP 227)

Q: All right. And we're still collecting groundwater on the back on [Lot] 2 before it links into this part of the pipe with the solid black line at the bottom of [Lot] 2, is that correct?

A: Uh huh.

Q: And that's a yes?

A: Yes. \*\*\*" (RP 227; emphasis supplied)

Mr. Sessions continued:

"Q: So we've got a curtain drain. Actually you've got really two runs of the curtain drain that go right along the property line between 1 and 2, back to the backside of lot 2 and *then becomes solid from that point on and then it terminates apparently on lot 3*, you know, now. Is that correct?

A: Yes.

Q: All right, have we – let's see – if you were pushing water to the street from your roof, part of your roof *and part of your roof is not being pushed to the street*, is that accurate to say?

A: Yes." (RP 228; emphasis supplied)

Mr. Sessions next explained that part of his roof system also connects from his roof into the above-described drainage system, as well. (RP 228-229) Mr. Sessions further acknowledged that this feeds into an underground system on Lot 1 and is part of the drain system on Lot 2. (RP 229-230) Mr. Sessions obtained no easements for the flow of water. (RP 231) Mr. Sessions now realizes that he “accidentally” placed the four inch and six inch lines onto Lot 3 for the first time, only two days before trial. (RP 234) Mr. Sessions agrees that he diverted the natural flow of the water from where it was before:

“Q: And then in the third paragraph of that letter it says ‘The diversion of the natural flow from what was once natural drainage is now routed to the street.’

A: Right.

Q: Okay so you do agree with the statement in this letter that you diverted what was once a natural flow?

A: Yes. (RP 245)

**B. Response to Assignment of Error 3**

Appellants are wrong in claiming that the roof drains do not feed into the drainage system. Appellants' Brief mistakenly asserts: "In fact, the testimony was that only one roof drain fed into the drainage system, all others were piped out into the street."<sup>4</sup> This statement is plainly wrong. As Mr. Sessions testified:

"Q: How much of your roof is going to the street – is it half and how much is going into this groundwater system that runs up from the curtain drain or also the straight line?

A: It would probably be 50/50. (RP 229)

Q: Can you give us – can you answer the same question, how much of the Scalesse roof drains [Lot 2] are going into the system that ultimately terminates onto lot 3?

A: Probably 50/50 as well because there is a drain on the Westside of the lot 2 that goes out to the street.

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<sup>4</sup> Plaintiffs cite RP 30 (which makes no reference to this issue.

Plaintiffs' Appellate Brief likely refers to RP 230).

Q: How many – and I don't know if you know this from your recollection – but how many roof drains are there that come off the roof in total on the Scalesse property, do you know?

A: Probably half a dozen.

Q: Okay. And so about three of those go in and three of those don't go into the system here?

A: Yeah – well, I think there's one on the back of the deck [Lot 2]. They picked up the sun deck. I think that one of the front of the house actually dumps in the driveway and that goes out to the street. So actually it would normally be one or two on the Scalesse's lot that actually go down into the canyon.” (RP 230)

C. **Response to Assignments of Error 7, 8, 9, 10, 11, 12, 14 and 16**

According to Washington's common enemy doctrine, Plaintiffs are not allowed to create unnatural diversions of water or unreasonable interferences with natural water flow. In *Currens v. Sleek*, 138 Wn2d. 858, 862, 983 P.2d 626 (1999), the Court determined that a landowner who had logged her property could be liable for an increased and unnatural flow of water, despite the common enemy rule, as follows:

“An additional exception prevents landowners from collecting water and channeling it onto their neighbors' land. *Wilber Dev. Corp. v. Les Rowland Constr. Inc.*, 83 Wn.2d 871, 875, 523 P.2d 186 (1974) (“Surface waters may not be artificially collected and discharged upon adjoining lands in quantities greater than or in a manner different from the natural flow thereof.”), overruled on other grounds by *Phillips v. King County*, 136 Wn.2d 946, 968 P.2d 871 (1998). This rule prohibits a landowner from creating an unnatural conduit, but allows him or her to direct diffuse surface waters into preexisting natural waterways and drainways. *Laurelon v. City of Seattle*, 40 Wn.2d 883, 892, 246 P.2d 1113 (1952) (“[T]he flow of surface water along natural drains may be hastened or incidentally increased by artificial means, so long as the water is not ultimately diverted from its natural flow onto the property of another.”); *Trigg v. Timmerman*, 90 Wash. 678, 681-82, 156 P. 846 (1916) (“[T]he flow of surface water along such depressions or drain ways may be hastened and incidentally increased by artificial means *so long as the water is not diverted from its natural flow.*”)” *Id.* at 862; (emphasis supplied)

In the present case, Mr. Sessions filled in the ravine, diverted the natural flow of water, mixed surface and groundwater together and created an intensified and unnatural flow of water that Plaintiffs now request this Court to require

Defendants to accept where, as here, they cannot demonstrate the same source, amount, nature and velocity as the flow of water when it was in its natural state particularly when all of the natural vegetation, topography, and timber had been destroyed and altered.

The Plaintiff seeks to set the common enemy doctrine on its head. In the present case, the Plaintiffs are channeling waters onto *Defendants* property, which water consists not merely of surface waters (but ground water as well) that have no analogous flow to the waters that were otherwise naturally flowing into a ravine at a different location (which no longer exists). It is clear that Plaintiffs failed to prove that the source, amount, velocity, and nature of those waters is not in any manner the same as the water that flowed naturally into a ravine on part of the properties at an earlier time.

As explained in *Currens v. Sleek, supra*, where a landowner merely removes timber (which, at minimum, has occurred in the present case) and creates an increased, unnatural flow and unreasonable concentration of the same waters that were arguably present before, that landowner can be held liable for damages. Here, in a remarkable

reversal of the common enemy doctrine, even though Plaintiffs are unnaturally channeling waters, Plaintiffs are contending that Defendants are somehow violating the common enemy doctrine by failing to *accept* these unnaturally channeled waters. In fact, it is Plaintiffs who are violating the rule.

As already explained, Plaintiffs predecessor in interest destroyed the natural terrain, erased the natural ravine, leveled the lots, brought in fill and developed properties with entirely different characteristics and created an underground system (as opposed to the previous above-ground natural system), which channels both above-ground water and below ground surface water into two conduits, one which is four inches in diameter and the other which is six inches in diameter. Plaintiffs are thus asking that this Court to require Defendants to accept this water at the points arbitrarily chosen by Plaintiffs, and in the quantities and velocity they have determined through their actions. Whether such an equitable Order by this Court could create flooding, erosion, or require Defendants to even *sue* the *next* down-hill owner to accept four inch and six inch pipes across the length of their lot (which Plaintiffs are demanding that Defendant s accept at Defendants' *own expense*), is of no moment or concern to

Plaintiffs and Plaintiffs are asking this court to have no such concerns about the impact on Defendants property as well. In fact, as the court properly determined, the four inch and six inch pipes are trespassing on Defendants' property. Mr. Sessions did not intend and admits he accidentally installed these pipes across the property line. There is no prescriptive easement or property right or interest in these pipes on Defendants' property. A court of equity will not order a remedy that is impractical or where there are significant hardships to a party *Merle Arnold et al. v. A. F. Melani et al.*, 75 Wn.2d 143, 437 P.2d 908 (1968).

The authority cited by Scalesse is inapposite and, in fact, fully supports Defendants. In *King County v. Boeing*, 62 Wn.2d 545, 384 P.2d 122 (1963), the trial court concluded that the county had no legal right to discharge surface waters from an airport into the landowners' slip and dissolved the temporary restraining order. On appeal, the county argued that the slip was a natural water or drainage course and that the landowners were estopped from interfering with or obstructing the existing drainage system. Affirming, the court held that absent the landowners' consent, the county had no legal right to artificially collect and discharge surface waters upon or into the slip in quantities greater

than, or in a manner different from, the natural flow of the surface waters. The court held in pertinent part:

“A natural watercourse, insofar as riparian rights be concerned, and as related in appropriate instances to drainage rights, is defined as a channel, having a bed, banks or sides, and a current in which waters, with some regularity, run in a certain direction. *Geddis v. Parrish*, 1 Wash. 587, 21 Pac. 314; *Tierney v. Yakima Cy.*, 136 Wash. 481, 239 Pac. 248; *In re Johnson Creek*, 159 Wash. 629, 294 Pac. 566; *DeRuwe v. Morrison*, 28 Wn. (2d) 797, 184 P. (2d) 273. A natural drain is that course, formed by nature, which waters naturally and normally follow in draining from higher to lower lands. *Thorpe v. Spokane*, 78 Wash. 488, 139 Pac. 221; *Trigg v. Timmerman*, 90 Wash. 678, 156 Pac. 846; *D'Ambrosia v. Acme Packing & Provision Co.*, 179 Wash. 405, 37 P. (2d) 887.

***Surface waters may not be artificially collected and discharged upon adjoining lands in quantities greater than, or in a manner different from, the natural flow thereof.*** *Noyes v. Cosselman*, 29 Wash. 635, 70 Pac. 61; *Sullivan v. Johnson*, 30 Wash. 72, 70 Pac. 246; *Peters v. Lewis*, 33 Wash. 617, 74 Pac. 815; *Holloway v. Geck*, 92 Wash. 153, 158 Pac. 989; *Whiteside v. Benton Cy.*, 114 Wash. 463, 195 Pac. 519; *D'Ambrosia v. Acme Packing & Provision Co.*, *supra*; *Ulery v. Kitsap Cy.*, 188 Wash. 519, 63 P. (2d) 352; *Tope v. King Cy.*, 189 Wash. 463; 65 P.

(2d) 1283; *Laurelon Terrace, Inc. v. Seattle*, 40 Wn. (2d) 883, 246 P. (2d) 1113; *Feeley v. E. R. Butterworth & Sons*, 42 Wn. (2d) 837, 259 P. (2d) 393; *Buxel v. King Cy.*, 60 Wn. (2d) 404, 374 P. (2d) 250. (emphasis supplied) *Id.* at 550 -51.

Plaintiffs' reliance on *Island County v. Mackie*, 36 Wn. App. 385, 675 P.2d 607 (1984) is misplaced. In that case, the court determined that a downstream owner cannot block a *natural* drainway. As the court determined:

#### “The Common Enemy Rule

The Mackies first contend that they were entitled to block the culvert pursuant to the common enemy rule. Under this rule, vagrant and diffuse surface waters are regarded as a common enemy against which a landowner may defend himself, regardless of injury to others. See *Cass v. Dicks*, 14 Wash. 75, 78, 44 P. 113 (1896). The common enemy rule does not apply, however, to waters flowing through natural watercourses, such as rivers and lakes. See *Wilber v. Western Properties*, 14 Wn. App. 169, 173-74, 540 P.2d 470 (1975). In the Mackies' view, the waters flowing through the culvert under Humphrey Road were surface waters subject to the common enemy rule.

The trial court ruled that the Mackie property, the upland property and the culvert are all located within a "natural drainway" extending from the northwest

across the Mackie property. The court also held that the common enemy rule is inapplicable to both natural watercourses and natural drains. *A natural drain has been defined as "that course, formed by nature, which waters naturally and normally follow in draining from higher to lower lands."* *King Cy. v. Boeing Co.*, 62 Wn.2d 545, 550, 384 P.2d 122 (1963). The Mackies do not challenge this definition nor do they dispute that their property is located in a natural drain. Rather, they argue that natural drains do not fall within the watercourse exception to the common enemy rule. Washington case law does not support this view." *Id.* at 388; emphasis supplied.

In the present case, the Plaintiffs have fully failed to prove that the four inch and six inch trespassing pipes were a "natural drainway." All Plaintiffs offered proof for at trial was altered terrain, artificial collection of surface and ground waters in subterranean and arbitrarily chosen pipes with arbitrary apertures at collection points that were not located at the point of the previous above-ground ravine location. Under Plaintiffs' logic, anything that Plaintiffs arbitrarily decide to place on their property, whether it be twenty 5 inch pipes, one 10 inch pipe, four 6 inch pipes, or a 4 inch or 6 inch pipe, as in the present case, is something which Defendants must accept, merely because Plaintiffs decided to install these artificial pipes.

In fact, Washington law clearly supports the view that the diverting landowner is liable for the channeling of water where the landowner alters the flow of naturally occurring water. *Borden v. City of Olympia*, 113 Wn. App. 359, 53 P.3d 1020 (2002).

In *Wilber v. Western Properties*, 14 Wn. App. 169, 540 P.2d 470 (1975), the court determined (unlike the present case) that the drainage onto defendant's property was considered a natural drainway:

“We must first determine the nature of the waters that flowed through the open ditch on March 6 just before they reached Western's pipe. They were obviously flood waters, but in no sense of the word can they be categorized as diffuse surface waters. Indeed, they remained within the confines of the flood channel which was designed to accommodate overflow from Ward's Lake. **Accordingly, we must consider that both *Wilber and Western were riparian owners along a drainway.*** *Marshland Flood Control Dist. v. Great Northern Ry.*, 71 Wn.2d 365, 428 P.2d 531 (1967); *Ronkosky v. Tacoma*, 71 Wash. 148, 128 P. 2 (1912). *Id.* at 171; emphasis supplied.

The court found the waterway to be a natural drainway under the following analysis:

“Western challenges the naturalness of the ditch only because it is obviously an artificially altered drainway. Land along an altered way may not have become burdened to the same extent as land along the natural way. ***Whether an artificially altered watercourse has become the "natural" channel because of its antiquity or the longtime acquiescence of riparian owners is a question to be decided by the court as a matter of law.*** *Matheson v. Ward*, 24 Wash. 407, 64 P. 520 (1901). *Id.* at 172; emphasis supplied.

In the present case, the artificial pipes placed underground by Plaintiffs are not a “natural” channel due to “antiquity.” The court then proceeded to determine that with respect to the ***riparian rights of the parties***, the downhill owner had an obligation to accommodate floodwaters in ***a common natural drainway***. The defendant’s ***restriction*** of those floodwaters was actionable. In the present case, there is no ***natural drainway*** established by Plaintiffs that is in any manner being “blocked” by Defendants:

“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 & P.S. 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. *Johnson v. Sultan Ry. & Timber Co.*, 145 Wash. 106, 258 P. 1033, 54 A.L.R. 356 (1927). Violation of one's duty to provide adequate drainage is unreasonable use of one's property.

*Western's land has been burdened with maintaining a drainage system adequate to prevent flooding of Wilber's land except in the case of flooding caused solely by an unprecedentedly high flood.* The issues of proximate cause, unprecedented flood, and damages were presented to the jury. Opinions expressed by others as to expectations of future activity within the ditch were simply not relevant to the essential jury issues. *Id.* at 173; emphasis supplied.

The present case does not present a case as in *Wilber v. Western Properties*, where a pipe was merely placed in the pre-existing drainway. Rather, the present case involves the construction of a wholly new drainage system with wholly different sources of water,

located on a new location from the old ravine at a point arbitrarily placed by Plaintiffs' predecessors in interest.

In *Dahlgren v. Chicago Milwaukee & Puget Sound Ry. Co.*, 85 Wash. 395, 148 Pac. 567 (1915), the court merely addressed the sufficiency of a jury instruction and an award of damages, and decided no issues germane to the present case. In *Dahlgren*, the railroad built an embankment next to the owners' land. It also built a corresponding approach with the permission of the town. The owners' complaint alleged that the embankment and approach damaged their land by blocking the natural flow of surface waters. The railroad argued that because it adjusted the grade of the approach at the town's request, it had acted as the town's agent and was not liable. The trial court's instructions referred to "surface and other waters." On appeal, the court affirmed the judgment on the verdict for the owners. The court noted that the complaint referred to "surface waters" and described waters that flowed through a natural creek on the owners' land. An instruction that the railroad was liable if the approach damaged the owners' land was proper because the approach was for the railroad's benefit and the town did not contract for it.

**D. Plaintiffs Improperly Seek to Condemn Defendants' Property Without Paying for an Easement. Plaintiffs Deliberately Ignored A Remedy At Law**

Plaintiffs are seeking to create a remarkable and unprecedented extension of law. Plaintiffs contend that they may collect any water they wish, from whichever source they wish, with whatever flow they may thereby created, concentrated that flow at any point they so desire and channel into wherever they want onto defendants land and *regardless* of the consequences to defendants or their property rights, or how this may embroil Defendants in disputes with downhill neighbors, not even a party to this suit. In essence, Plaintiffs are seeking to inversely condemn Defendants' property.

In fact, Plaintiffs did not seek such a remedy because they would have to pay not only for the right to condemn Defendants' property, but would also be assessed attorneys' fees for that claim, as follows:

“8.24.030 Procedure for condemnation --  
Fees and costs.

The procedure for the condemnation of land for a private way of necessity or for drains, flumes or ditches under the provisions of this chapter shall be the same as that provided for the condemnation of

private property by railroad companies, but no private property shall be taken or damaged until the compensation to be made therefor shall have been ascertained and paid as provided in the case of condemnation by railroad companies.

In any action brought under the provisions of this chapter for the condemnation of land for a private way of necessity, reasonable attorneys' fees and expert witness costs may be allowed by the court to reimburse the condemnee.”

Plaintiffs should not be allowed to advance these claims through the back door of a court of equity where, as here, they could have an adequate remedy at law to pursue and they have failed in their burden of proof.

**E. Burden of Proof**

Clearly, Plaintiffs had the burden of proof in this case. Plaintiffs allege that they were merely channeling the “same” surface water as existed prior to the developments of the lots. This claim was entirely their burden of proof. Defendants do not have to accept unnaturally channeled water and may protect themselves against the common enemy. Indeed, the only “protection” that the defendants have engaged in is to simply not accept artificially channeled water at a point on their property chosen by Plaintiffs, through an artificial piping system

mixing both ground and surface water and brought to Defendants' property line at a point arbitrarily chosen by the developer of Plaintiffs' property, Mr. Scalesse.

**F. Response to Assignments of Errors 5 and 6**

The Court did not err and appropriately found that prior to the development of the Lots, water flowed in the front of the Lots and then into the ravine. The ravine was not at the same location as the artificial subterranean drainway established by Mr. Sessions. Mr. Session admitted in his testimony that he did not place it at the same location. (In fact, the specific location of this ravine is forever lost due to Mr. Sessions destroying the natural drainway and then in altering the terrain of the property and re-establishing his own collection of underground waters and surface waters from different terrain and after the development of manmade structures, roofs, gutters, sidewalks, and driveways.) Mr. Sessions did not testify that all of the drains he installed put water "into the ravine." Mr. Sessions, in fact, testified to exactly the opposite:

“Q: Yes. So it’s clear that this drainage system does not follow the course of the ravine?”

A [Mr. Sessions]: No.

Q: So you’ve got – and the answer to that was actually yes. It does not follow – okay, is that correct?

A: Yes. (RP 227)

Mr. Sessions simply routed underground drains, curtain drains, French drains, drywells, perforated pipe, perforated drain tile and six inch and four inch PVC pipe in locations that he unilaterally chose that flowed in and around both sides of the house on Lot 2 and also collected water off of his property from various locations, including his roof, and subterranean sources, finally terminating onto trespassing pipes on the Defendants’ property. It is obvious and clear that the ravine, which was toward the *front* of the Lots, and approximately “forty feet back from the street” (assuming this is even an approximately close location for the natural drainway that no longer exists) in no fashion mirrors, constitutes a substitute for, or collects the same velocity, flow or quantity of water from the same source, as before the development. It is disingenuous for the Plaintiffs to attempt to assert that Mr. Sessions testified that he was putting water into a

“ravine” that no longer exists when the artificially channeled waters that he chose did not even *follow* the ravine, and did not have the same source of water as the ravine.

**G. Response to Assignments of Errors 13 and 15**

The Court appropriately ordered the trespassing pipes off the Defendants’ properties. Mr. Sessions admitted that he “accidentally” placed those pipes onto Defendants’ property. Mr. Sessions also testified that he intended to bring those pipes to the property line, *but did not intend to put those pipes over the property line*. Mr. Sessions has no claim, nor do Plaintiffs have any “tacking” claim for adverse possession or any authority for an encroachment. Indeed, throughout this case, the Plaintiffs have been attempting to establish, without the economic burden of making and then proving the allegations, a claim for a private condemnation of the Defendants’ property. There is simply no evidence that Plaintiffs have acquired any prescriptive right in Defendants’ property and, in fact, they admit that they have none. Plaintiffs’ remedy at law should they have chosen it would be to attempt to condemn property. Plaintiffs, of course, did not choose that course of action because they did not want to carry the burden of proof or shoulder the expense of doing what they are attempting to make the

Defendants do – accept their unnaturally channeled water, and then potentially flood their next neighbor downstream. Rather than accepting the engineering costs, and proving what it would take to actually accommodate a private easement and working for inverse condemnation, Plaintiffs are asking this Court now to shoulder *their* burden of proof and to enforce and potentially supervise the construction and distribution of an underground piping system. Plaintiffs have no right or have an expectation to create such an extraordinary remedy. Plaintiffs understand they have no right of way for access across Defendants Davis’ lot. As Plaintiff admitted:

“Q: Mr. Scalesse let me talk about your understanding of rights of way and not rights of way. You know, sir, that you have no written right of way across Mr. Davis’ lot.

A: I understand that. (RP 68)

Q: Let me go back to the question of, you know, agreements. You certainly do acknowledge now and in this case, sir, that you have absolutely no agreements of any kind with Mr. Davis, correct?

A: That’s correct. (RP 70)

Mr. Scalesse never had any “flooding” in his basement when he first purchased the property in 1994. The Davis property was built next

to his in approximately 1995. (RP 62) He had no flooding in 1995, 1996, 1997, or 1998. The first time he experienced any “flooding” was in 1999. *Id.*

Mr. Scalesse, in fact, does not have any flooding problem at this time. He installed a fully functional pump system in January, 2005. After that time, he has no had any water in his basement. Mr. Scalesse admitted that his pumps have taken care of Plaintiffs’ problem. As he testified:

“Q: The next pump you installed in January of 2005, correct sir?

A: That’s correct.

Q: Now after that time after January of 2005, you didn’t have any water in your basement. Correct, sir?

A: That is correct.

Q: And that’s because these two pumps have taken care of the problem, correct sir?

A: They have.” (RP 59)

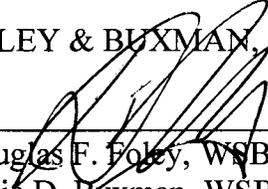
## CONCLUSION

Plaintiffs have failed to establish any right to create, in effect, an easement through Court action alleging that Defendants need to accept an artificial drain system that is not in a natural drainway or water course. Plaintiffs have no injury or damage as the pump system they have installed has resolved their alleged problem. Plaintiffs cannot misuse the judicial system by requiring the Court to establish an easement through the equitable power of a Court and without taking advantage of the statutory procedure by which that is required through RCW 8.24.010, et seq.

The Judgment of the Trial Court should be affirmed.

Dated this 5<sup>th</sup> day of March, 2008.

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