

STATE OF WASHINGTON
COURT OF APPEALS

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No. 41105-9-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

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TOM P. McCOY and KATHLEEN A. McCOY,

Plaintiffs/Respondents

v.

KENT NURSERY, INC.; STEVE MAURITSEN and "JANE DOE"
MAURITSEN; RICHARD MAURITSEN and PHYLLIS MAURITSEN;
MICHAEL S. FENIMORE and GAYLA A. FENIMORE; FIR RUN
NURSERY; and PIERCE COUNTY PUBLIC WORKS AND UTILITIES,

Defendants/Appellants.

**BRIEF OF RESPONDENTS MCCOYS
REGARDING NURSERIES' COUNTERCLAIMS**

David Gross, WSBA #11073
HELSELL FETTERMAN LLP
1001 Fourth Avenue, Suite 4200
Seattle, Washington 98154
(206) 292-1144
Attorneys for Respondents McCoys

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I. INTRODUCTION

At its core, this case presents the question of who is responsible for damage caused by the drainage of water from appellants' property. The jury returned a verdict below that found respondents Tom and Kathleen McCoy ("McCoys") were solely responsible for damage caused by water flowing onto the property of appellants Kent Nursery, Inc.; Steve, Richard and Phyllis Mauritsen; Michael and Gayla Fenimore; and Fir Run Nursery, LLC (collectively "Nurseries").

On the special verdict form, the jury found that the McCoys' negligence was the proximate cause of the damage to the Nurseries' property, despite the complete lack of evidence establishing that claim. Further, the jury found that the McCoys had trespassed on the Nurseries' property and that the trespass was the proximate cause of the Nurseries' damage, despite the same absence of evidence establishing that claim.

The trial court subsequently granted the McCoys' motion for a new trial, based on juror misconduct and the failure of the evidence to support the jury's verdict on the parties' claims. It denied the Nurseries' motion for reconsideration of that order. The Nurseries have appealed those decisions. The undersigned attorneys represent the McCoys on the counterclaims against them by the Nurseries, and will address the issues

relating to those claims in this brief.¹ The juror misconduct issue and all other issues will be addressed in a separate brief by separate counsel.

The Nurseries' opening briefs barely address their counterclaims and cite little or no factual or legal support for the jury's verdict on the counterclaims. As explained below, this is because the jury's verdict was not supported by the evidence or the law. Accordingly, the trial court did not abuse its discretion in granting a new trial on the Nurseries' counterclaims, and the court's decision should be upheld.

**II. COUNTERSTATEMENT OF ISSUES
PERTAINING TO ASSIGNMENTS OF
ERROR ON THE NURSERIES' APPEALS**

1. Did the trial court properly exercise its discretion in setting aside the jury verdict and granting the McCoys' motion for a new trial pursuant to CR 59, where the evidence and the law did not support the jury's verdict that Tom McCoy trespassed on the Nurseries' property and that trespass was the proximate cause of damage to the Nurseries' property?

2. Did the trial court properly exercise its discretion in setting aside the jury verdict and granting the McCoys' motion for a new trial pursuant to CR 59, where the evidence and the law did not support the

¹ Nathaniel B. Green, Jr. represented the McCoys against the Nurseries' counterclaims in the trial court. Helsell Fetterman, LLP was retained after the conclusion of the trial to represent the McCoys on the counterclaims against them.

jury's verdict that the McCoys were negligent and that negligence was a proximate cause of damage to the Nurseries' property?

III. STATEMENT OF THE CASE

A. Factual Background

1. The Properties

The parcels of real property at issue here are located in Orting, Pierce County, Washington.² Kent Nursery purchased its 56 acres in 1990.³ The McCoys purchased 1.25 acres in 1995⁴ and an adjacent one-acre parcel in 1998.⁵ Kent Nursery's property is located directly across a County road, 150th Avenue, from the McCoys' property.⁶ Fir Run Nursery acquired 20 acres from Kent Nursery in 2006.⁷

2. The Drainage System

In the 1960s, the prior owner of the Nurseries' property, installed drain-tile pipes to dewater the land.⁸ The drainage system starts on the Nurseries' property, connects to a catchbasin in the adjacent road, 150th Avenue, extends over what is now the McCoys' property, and finally

² A map of the properties at issue can be found at Ex. 73. A copy of Ex. 73 is attached hereto for the Court's convenience.

³ RP 1026, 1034 (R. Mauritsen); RP 1499, 1501 – 02 (S. Mauritsen).

⁴ RP 262, 264 (T. McCoy).

⁵ RP 266 (T. McCoy).

⁶ RP 437 (T. McCoy); RP 617 (DeRosa).

⁷ RP 1612 (M. Fenimore).

⁸ RP 900 - 03 (Louderback).

drains to Horse Haven Creek, which is south of the McCoys' property.⁹

In 2006, the McCoys' property began to flood and develop sinkholes due to a break in the drainage system.¹⁰ The Nurseries were aware of the problem, but did not take any action.¹¹ The McCoys subsequently obtained dirt from the City of Orting and filled in the sinkholes and built dirt berms on their property.¹² They filled in the sinkholes in large part because they were concerned that neighborhood kids who played in the area would fall into the holes and get hurt.¹³ The McCoys also installed sandbags (at one point with the assistance of defendant Mike Fenimore of Fir Run Nursery) to redirect the water away from the McCoys' driveway.¹⁴

The drainage system continues to have a break in it.¹⁵ Every time there is a significant period of rain, water from the Nurseries floods the McCoys' property.¹⁶ The Nurseries' water flows into the catchbasin, which, due to the break in the system, fills up, overflows onto the Nurseries' property, crosses the County road and flows onto the McCoys'

⁹ RP 573 (Ex. 101 (photo)).

¹⁰ RP 271 (T. McCoy).

¹¹ RP 276 - 77 (T. McCoy).

¹² RP 272, 274, 501 - 02, 505 - 06 (T. McCoy).

¹³ RP 276, 309 - 10 (T. McCoy).

¹⁴ RP 274 - 75, 507 - 08, 520 - 21 (T. McCoy).

¹⁵ RP 275, 520 - 24 (T. McCoy).

¹⁶ *Id.*; RP 297 - 98 (T. McCoy); Exs. 54D, 54F (photos, identified at RP 287 - 290).

property.¹⁷

Water overflowing from the catchbasin onto the Nurseries' property has allegedly damaged trees they had in stock.¹⁸ This flooding started before the McCoys filled in the sinkholes on their property.¹⁹ None of the water that has flooded the Nurseries came from the McCoys' property; it all came originally from the Nurseries' property or from the County's runoff from 150th Avenue.²⁰

B. Procedural History

The McCoys filed a complaint against the Nurseries in 2008 for continuing intentional trespass by water, continuing nuisance, negligence, waste, and collection, concentration, channeling and casting of surface and storm water, which they amended in 2009.²¹ In response, the Nurseries filed counterclaims against the McCoys for:

1. Intentional trespass by water and waste pursuant to RCW 4.24.630; and
2. Prescriptive easement of the "natural drainage

¹⁷ RP 310 – 11, 314 – 16, 339 (T. McCoy); Exs. 54D, 54F (photos, identified at RP 287-90); Exs. 56B, 56I, 56J (photos, identified at RP 327 - 37); Exs. 59B, 59C (videos, identified at RP 320 – 22 & RP 399 - 401).

¹⁸ Ex. 56J.

¹⁹ RP 468 - 69 (T. McCoy).

²⁰ RP 341, 343, 371, 377, 613 – 14.

²¹ CP 1 – 9 (first amended complaint). The McCoys later joined Pierce County Public Works & Utilities as a defendant and raised a claim against the County for inverse condemnation.

course” across the McCoys’ property.²²

The case proceeded to trial in March 2010. In Jury Instruction No. 16, the jury was instructed that the Nurseries claimed the McCoys were “negligent in blocking a natural watercourse” that crosses through the McCoys’ property.²³ The following instructions were given regarding “trespass” and “negligent intrusion” by either the McCoys or the Nurseries:

Instruction No. 21. An intentional or negligent intrusion onto the property of another that interferes with the other’s right to exclusive possession is a trespass.²⁴

Instruction No. 22. You are instructed that an intentional trespass occurs where there is “(1) an invasion of property affecting an interest in exclusive possession, (2) an intentional act, (3) reasonable foreseeability that the act would disturb the plaintiff’s possessory interest, and (4) actual and substantial damages.”²⁵

Instruction No. 24. You are instructed that a negligent intrusion occurs “where the actor does not use reasonable care to prevent the exercise of his privilege from involving an unreasonable risk of harm to the legally protected interests of others.”²⁶

The jury was also instructed as follows with regard to the common enemy doctrine:

²² CP 892 - 94 (Fir Run’s counterclaims); CP 1097 - 99 (Kent’s counterclaims (estimated page numbers, as the court clerk has not yet numbered this document)).

²³ CP 561.

²⁴ CP 567.

²⁵ CP 568. Instruction No. 23 sets forth the McCoys’ burden of proving each of the listed elements of trespass.

²⁶ CP 570.

Instruction No. 26. The common enemy doctrine allows landowners to dispose of unwanted surface and ground water in any way they see fit, without liability for resulting damage to one's neighbor, except where a landowner has:

- (1) blocked a natural watercourse or natural drain and/or;
- (2) artificially collected surface or ground waters in quantities greater than or in a manner different than the natural flow and discharged on neighboring property and/or;
- (3) failed to use due care when altering the flow of surface or groundwater.²⁷

The jury returned a verdict finding that the McCoys were negligent and that their negligence was the proximate cause of injury or damage to the McCoys, as well as to the Nurseries.²⁸ It found the Nurseries were not negligent.²⁹ The jury also found that the Nurseries did not trespass on the McCoys' property, but that Tom McCoy did trespass on the Nurseries' property and that his alleged trespass was the proximate cause of injury and/or damage to the Nurseries.³⁰ Finally, the jury found that none of the parties had created a nuisance and that the McCoys did not "wrongfully cause injury" to the Nurseries' land.³¹ The jury was not asked to make a finding as to whether the Nurseries have a prescriptive easement over the

²⁷ CP 572.

²⁸ CP 118.

²⁹ CP 117.

³⁰ CP 118 – 20.

³¹ CP 120 – 22.

McCoys' property for drainage.³²

Within 10 days of the jury verdict, the McCoys moved for judgment as a matter of law under CR 50 or, alternatively, a new trial under CR 59(a)(1) , (2), (3), (5), (6), (7), (8) and (9).³³ The basis for the motion was juror misconduct and that the verdict was contrary to the clear weight of the evidence.³⁴

The trial court denied the McCoys' motion for judgment as a matter of law, but granted their motion for a new trial.³⁵ In support of its decision, the court stated:

Aside from the briefs, my notes indicate Mauritsens' admissions regarding water going on the property of McCoy, and that the pipes failed, there was no permission that the water go there. . . . I think anybody listening to this trial for the 16 days was stunned, including the defense, when this came back the way it did. In looking at the totality of the circumstances, and the evidence in this case, I think it cries out for a new trial, and that will be the order of the court.³⁶

On May 14, 2010, the trial court entered its written order granting the McCoys a new trial.³⁷ The court's order included detailed findings of fact and conclusions of law in support of its decision.³⁸ The Nurseries and

³² CP 116 - 24.

³³ CP 125 -- 52.

³⁴ *Id.*

³⁵ CP 251.

³⁶ CP 256 (emphasis added).

³⁷ CP 245 - 52.

³⁸ CP 247 -- 51.

Pierce County subsequently submitted numerous additional declarations and moved for reconsideration of the trial court's decision, which the court denied.³⁹

In August 2010, the Nurseries filed an appeal of the trial court's orders granting the McCoys a new trial and denying the Nurseries' motion for reconsideration.⁴⁰ In their opening briefs, the Nurseries do not specify any assignments of error with regard to the trial court's grant of a new trial on their counterclaims,⁴¹ other than the general claim that the trial court abused its discretion in concluding that the jury's verdict was contrary to the clear weight of the evidence.⁴²

IV. ARGUMENT REGARDING NURSERIES' COUNTERCLAIMS

A. Appellants Must Show the Trial Court's Decision Was an Abuse of Discretion.

Superior Court Civil Rule 59 provides in relevant part:

- (a) Grounds for New Trial or Reconsideration. On the motion of the party aggrieved, a verdict may be vacated and a new trial granted to all or any of the parties, and on all issues, or on some of the issues when such issues are clearly and fairly separable and distinct, or any other decision or order may be vacated and reconsideration granted. Such motion may be granted for any one of the following causes

³⁹ CP 262 – 99, 303 – 17, 326 – 29 (motions & declarations); CP 421 - 24 (order).

⁴⁰ CP 912 – 13 (Fir Run's notice of appeal). Kent's notice of appeal is not currently part of the record on appeal.

⁴¹ Kent's opening brief at 1 – 3; Fir Run's opening brief at 2 - 3.

⁴² Kent's opening brief at 3, ¶ 8; Fir Run's opening brief at 3 ¶ 8.

materially affecting the substantial rights of such parties:

- (1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial;
- (2) Misconduct of prevailing party or jury; and whenever any one or more of the jurors shall have been induced to assent to any general or special verdict or to a finding on any question or questions submitted to the jury by the court, other and different from his own conclusions, and arrived at by a resort to the determination of chance or lot, such misconduct may be proved by the affidavits of one or more of the jurors;
- (3) Accident or surprise which ordinary prudence could not have guarded against;
.....
- (5) Damages so excessive or inadequate as unmistakably to indicate that the verdict must have been the result of passion or prejudice;
- (6) Error in the assessment of the amount of recovery whether too large or too small, when the action is upon a contract, or for the injury or detention of property;
- (7) That there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law;
- (8) Error in law occurring at the trial and objected to at the time by the party making the application; or

(9) That substantial justice has not been done.

....

Decisions on CR 59 motions for a new trial are reviewed for abuse of discretion. *Ma'ele v. Arrington*, 111 Wn. App. 557, 561, 45 P.3d 557 (2002); *see also Palmer v. Jensen*, 132 Wn.2d 193, 203, 937 P.2d 597 (1997) (trial court abused its discretion in denying plaintiffs' motion for new trial where jury's verdict denying general damages to plaintiffs was contrary to evidence); *State v. Hall*, 74 Wn.2d 726, 727-28, 446 P.2d 323 (1968) (order granting new trial upheld where verdict in defendant's favor was incompatible with impartial jury consideration of evidence); *Cyrus v. Martin*, 64 Wn.2d 810, 812, 394 P.2d 369 (1964) (trial court did not abuse its discretion where it granted new trial after finding jury unreasonably rejected all evidence concerning one element of damages).

Washington courts have frequently noted that a much stronger showing of an abuse of discretion is required to reverse an order granting a new trial, than one denying a new trial. *See, e.g., Edwards v. LeDuc*, 157 Wn. App. 455, 238 P.3d 1187 (2010); *Gardner v. Malone*, 60 Wn.2d 836, 846, 376 P.2d 651, 379 P.2d 918 (1962).

"A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons." *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997).

A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.

Id. (internal citation omitted); *see also Moreman v. Butcher*, 126 Wn.2d 36, 40, 891 P.2d 725 (1995). In the instant case, the trial court did not abuse its discretion in granting a new trial on the Nurseries' counterclaims against the McCoys, where it found that the evidence did not support the jury's verdict.⁴³

B. The Trial Court's Conclusion that the McCoys Are Entitled to a New Trial Was Sound.

1. The Jury's Verdict that the McCoys Negligently Damaged the Nurseries' Property Is Not Supported by the Evidence or the Law.

The trial court's order granting a new trial should be affirmed, because there was no evidence presented at trial to justify the verdict that the McCoys acted negligently, the verdict is contrary to law and, as a result, substantial justice was not done. CR 59(a)(7) & (9). In order to prove negligence, the Nurseries were required to prove that the McCoys owed them a duty, that they breached that duty, and that the breach was the proximate cause of the Nurseries' injury. *Boguch v. Landover Corp.*, 153 Wn. App. 595, 609 - 10, 224 P.3d 795 (2009). The Nurseries failed to

⁴³ CP 245 – 52, 256.

produce evidence to satisfy the elements of their negligence claim.

The McCoys owed no duty to the Nurseries to repair the Nurseries' drainage system or to allow the Nurseries' uncontrolled water to flow across the surface of their property, and no duty was established below or in the Nurseries' opening briefs. Even if the Nurseries' use of the McCoys' property had ripened into a prescriptive easement (no verdict was reached on that question),⁴⁴ the duty to maintain an easement is on the owner of the dominant estate, in this case the Nurseries. *See* 25 Am.Jur.2d *Easements and Licenses* § 86 (2004) *see also Forbus v. Knight*, 24 Wn.2d 297, 313, 163 P.2d 822 (1945) (“It is not the law that the owner of premises is to be charged with negligence if he fails to take steps to make his property secure against invasion or injury by an adjoining landowner. It is the duty of the one who is the owner of the offending agency to restrain its encroachment upon the property of another, not the duty of the victim to defend or protect himself against such encroachment and its consequent injury.”).

Jury Instruction No. 31 was consistent with this rule: “It is the duty of the owner of an easement to keep it in repair; the owner of the servient tenement is under no duty to maintain or repair it, in the absence

⁴⁴ *See* CP 116 – 24 (special verdict form).

of an agreement therefore [sic] or servient negligent or intentional acts.”⁴⁵

Once Kent Nursery became aware in 1995 of the broken pipe causing water to bubble out of the ground on Lot 3 (now owned by McCoy, but then owned by Roland Hartstrom), they had a duty to restrain that water. Even if the Nurseries use of the McCoy property had ripened into a prescriptive easement for the drainline across the McCoy’s property, they were improperly compelling a change in that easement by not fixing the pipe and allowing the water to flow unrestrained, as vagrant and diffuse surface water, over the McCoy’s property. *See Lowe v. Double L Properties, Inc.*, 105 Wn. App. 888, 894, 20 P.3d 500 (2001) (dominant estate holder may increase existing intended or imposed use, but may not compel change in use on servient estate holder).

The Nurseries also did not prove that the McCoy’s breached any duty by filling in the sinkholes on their property and building a berm to prevent surface water from flowing over their property. The trial court’s grant of a new trial is consistent with the evidence presented by the McCoy’s that, since the sinkholes were proof that the pipe was already broken, filling in the sinkholes had no effect on the ability of the Nurseries’ water to be transported across the McCoy’s property.⁴⁶ The

⁴⁵ CP 577.

⁴⁶ RP 735 - 36 (Creveling, forensic geologist expert).

Nurseries did not present any evidence to the contrary.⁴⁷ Kent Nursery alleges in its opening brief that its civil engineering expert testified that the filling in of the sink holes caused damage to the nursery property.⁴⁸ However, the citation to the record provided by Kent Nursery (covering pages RP 1360-1364) does not support that statement. Instead, the testimony cited simply provides the engineer's background and qualifications.

Since the pipe was inoperative, the Nurseries' water backed up and flowed out of the catchbasin on the Nurseries' side (east side) of 150th Avenue. The evidence at trial was that water ponded on that side of the road and onto the Nurseries' property before it reached a height allowing it to overtop the road. The berm on the McCoys' property had no effect until the water flowed across the road, by which time the Nurseries' property was already flooded.⁴⁹ It is undisputed that all of the water on the Nurseries' property came from either the Nurseries' property (collected by their underground drainage system) or the County's runoff from the road.

The only evidence presented by the Nurseries on the subject of damages was some photos of trees being flooded as a result of water

⁴⁷ The Nurseries were represented by David Hammermaster on their counterclaims against the McCoys. Mr. Hammermaster only presented two witnesses for the Nurseries on those claims: Steve Mauritsen of Kent Nursery (RP 1524 - 36, 1558 - 59, 1576) and Michael Fenimore of Fir Run Nursery (RP 1668 - 79, 1727 - 30).

⁴⁸ Kent's opening brief at 20.

⁴⁹ RP 152 - 28 (S. Mauritsen); RP 1718 - 19 (M. Fenimore).

backing up out of the catchbasin. The Nurseries did not prove that they could not have reasonably moved those trees or that those trees were killed as a result of periodic flooding. Even if the Nurseries could have proven those losses, they did not, nor could they, show that the loss was due to the McCoys' filling in sinkholes or building the berm. Again, since the pipe was already broken (thus causing the sinkholes in the first place), filling the sinkholes had no impact on the amount of water backing up out of the catchbasin. Until the Nurseries repair their pipe across the McCoys' property, their water will have nowhere to go but up and out of the catchbasin. Once it does that, it floods all of the low-lying areas on the east side of the road, including the Nurseries' property, before it ever crosses the road and reaches the McCoys' berm.⁵⁰

New evidence acquired after the trial court's ruling granting the McCoys a new trial bolsters that decision.⁵¹ A CR 34 camera inspection performed of the pipes leading to and from the catchbasin showed the culvert under 150th Avenue to be broken, with heavy debris and roots, and showed the pipes upstream (*i.e.*, on the Nurseries' side) of the catchbasin to also be in very poor condition. This inspection provides further evidence that the cause of flooding of the Nurseries' property from water

⁵⁰ RP 481 (T. McCoy); RP 613 (DeRosa).

⁵¹ CP 1080-88.

coming out of the catchbasin was the result of conditions over which the McCoys had no responsibility or control.

2. **The Jury's Verdict that the McCoys Trespassed on the Nurseries' Property Is Not Supported by the Evidence or the Law.**

The trial court's order granting a new trial should also be affirmed because there was no evidence presented at trial to justify the verdict that the McCoys trespassed on the Nurseries' property, the verdict is contrary to law, and substantial justice was not done. CR 59(a)(7) & (9).

The Nurseries failed to introduce any admissible evidence at trial that the McCoys trespassed on the Nurseries' property, nor could they meet their burden of proof as a matter of law. In order to prove negligent trespass,⁵² the Nurseries were required to prove all of the elements of negligence described in the previous section. *Pruitt v. Douglas County*, 116 Wn. App. 547, 554, 66 P.3d 1111 (2003) ("Negligent trespass requires proof of negligence (duty, breach, injury, and proximate cause.)").

Washington courts treat claims for trespass and negligence arising from a single set of facts as a single negligence claim. *Pruitt*, 116 Wn.

⁵² The Nurseries each asserted a counterclaim against the McCoys for "intentional trespass." CP 893 at ¶ 3.5; CP 1098 at ¶ 6.5. The jury found the McCoys negligent and that the McCoys trespassed, but also found that the McCoys did not act "wrongfully." CP 122. The McCoys therefore assume that the jury's trespass verdict was for "negligent trespass" as opposed to "intentional trespass," which requires proof that the actor "intentionally or wrongfully direct[] the water onto his neighbor's property." *Grundy v. Brack Family Trust*, 151 Wn. App. 557, 570, 213 P.3d 619 (2009).

App. at 554. For the same reasons that the grant of a new trial should be affirmed based on lack of evidence of negligence, the Court should affirm the trial court's decision on the basis of negligent trespass.

3. **The Common Enemy Doctrine Shields the McCoys from Liability for Trespass by Water, and Thus the Trial Court's Decision to Grant the McCoys a New Trial Should Be Affirmed.**

Even if the Nurseries had been able to prove all of the elements of negligence or negligent trespass by water, Washington has recognized the common enemy doctrine since at least 1896 and that doctrine creates a shield from liability for a claim of trespass by water. *See Cass v. Dicks*, 14 Wash. 75, 78, 44 P.113 (1896). Under this doctrine, vagrant and diffuse surface waters⁵³ are regarded as a common enemy against which a landowner may defend himself, regardless of injury to others. *Id.* at 78. “In its strictest form, the common enemy doctrine allows homeowners to dispose of unwanted surface water in any way they see fit, without liability for resulting damage to one’s neighbor.” *Currens v. Sleek*, 138 Wn.2d 858, 861, 983 P.2d 626, 993 P.2d 900 (1999).

Under the common enemy rule, the McCoys are protected from

⁵³ The common enemy rule applies to groundwater as well as surface water. *See, e.g., Wilkening v. State*, 54 Wn.2d 692, 344 P.2d 204 (1959) (because a landowner may protect his land from surface waters without liability, he should not be liable for lawful acts that impede the flow of underground percolating waters); *Borden v. City of Olympia*, 113 Wn. App. 359, 53 P.3d 1020 (2002) (recognizing that *Wilkening* extended the common enemy doctrine and its exceptions from surface water to groundwater).

liability for trespass by water and any damage to the Nurseries caused by the McCoys' efforts to keep the water, which undisputedly originated from the Nurseries' properties, off the McCoys' property. Accordingly, the trial court's grant of a new trial was proper because the jury's verdict on the counterclaims (*i.e.*, that the McCoys were liable for negligence and trespass) was inconsistent with the shield of the common enemy doctrine, which allows the McCoys to protect their property "regardless of injury to others."

Three exceptions have been recognized by Washington courts to mitigate the potential harshness from a strict application of the common enemy rule. These are (a) the channel and discharge exception; (b) due care exception; and (c) natural watercourse exception. None of these exceptions apply in the instant case and there was no jury verdict on any of these exceptions.

(a) **The channel and discharge exception does not apply.**

Under the channel and discharge exception, landowners are prohibited from channeling and discharging surface water onto their neighbors' land in quantities greater than or in a manner different from its natural flow. The Nurseries presented absolutely no evidence at trial to show that the McCoys channeled the water entering their property and discharged it onto the Nurseries' property. To the contrary, the natural

(i.e., pre-drainage system) flow was diffuse groundwater, which would not have manifested as a concentrated discharge on the McCoys' property. Once the drain pipe that carried the concentrated groundwater from the Nurseries' property to and through the McCoys' property broke, it was the Nurseries who were channeling and discharging their water onto the McCoys' property.

Due to the Nurseries' failure to repair the broken pipe, water flowed up and out of the catchbasin. The water then pooled in the lowest elevations on the Nurseries' side of the road, and eventually crossed the road to flow onto the McCoys' property. By building a berm along their property line, the McCoys neither channeled nor discharged water onto the Nurseries' property. Instead, they simply took appropriate action to prevent the Nurseries' water from entering their property -- an action entirely consistent with the common enemy doctrine.

(b) **The due care exception does not apply.**

Another exception to the common enemy doctrine requires landowners to exercise their rights under that doctrine with due care by acting in good faith and by avoiding unnecessary damage to the property of others. *Ripley v. Grays Harbor County*, 107 Wn. App. 575, 580, 27 P.3d 1197 (2001). This exception to the common enemy doctrine was adopted by the Washington Supreme Court in *Currens v. Sleek*, 138

Wn.2d 858, 861, 983 P.2d 626, 993 P.2d 900 (1999) .

In *Currens*, the Currenses and Sleek were neighbors and water from a portion of the Sleek property flowed naturally to a low-lying area on the Currenses' property. Sleek applied for permission to clear-cut her property and develop four home sites. In her State Environmental Policy Act (SEPA) checklist, Sleek indicated that she would plant trees to enhance vegetation on the property and would install dry wells to mitigate stormwater impacts. She did clear-cut and graded the property, but she never revegetated the land or installed drywells. As a result, the Currenses experienced more surface water flow onto their property and they lost a number of trees due to saturation of the ground. The Currenses sued Sleek, and the trial court granted summary judgment to Sleek on the grounds that Sleek was shielded from liability under the common enemy doctrine. The court of appeals affirmed. The issue on appeal to the Supreme Court was whether, and to what extent, the Court should consider the reasonableness of a landowner's actions in determining liability for damage caused by excess surface water. The Court rejected the argument that the common enemy doctrine should be abandoned in favor of a "reasonable use" rule. The Court found instead that the reasonableness rule, which requires parties to litigate the importance of a particular project in order to apportion liability, is inconsistent with Washington's historic

deference to property rights. The Court upheld the common enemy doctrine but clarified that:

. . . landowners may improve their land with impunity (subject to local land use and permitting requirements) and are not liable for damage caused by the change in the flow of surface water onto their neighbors' land, so long as the landowners act in good faith and do not damage adjacent property in excess of that called for by the particular project.

Currens, 138 Wn.2d at 864.

In *Pruitt v. Douglas County*, 116 Wn. App. 547, 66 P.3d 1111 (2003), homeowners sued the county for negligent trespass after the county's road improvements diverted surface water which flooded landowners' property. In analyzing the due care exception of the common enemy doctrine, the court noted:

The question is whether the county minimized any unnecessary impacts upon adjacent properties. The homeowners must show that the county either acted in bad faith or unnecessarily caused surface water damage. And to prove bad faith, one must show actual or constructive fraud or a neglect or refusal to fulfill some duty ... not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive. Here, there is no showing of such a motive or intent.

Id. at 557-58 (internal quotations and citations omitted, emphasis added).

In the instant case, the Nurseries did not introduce any evidence that the McCoys acted in bad faith (*i.e.*, that the McCoys were prompted by an “interested or sinister motive”) by constructing berms and filling in

sinkholes. To the contrary, the record shows that the McCoy's were simply trying to do what they could to (1) protect their property from the groundwater collected on the nursery property that was now flowing as surface water onto the McCoy property, and (2) mitigate the hazard caused by sinkholes produced as a result of the Nurseries' failure to repair their pipe across the McCoy property.

(c) **The obstructions of natural watercourses exception does not apply.**

The common enemy rule does not apply to obstruction of waters flowing through natural watercourses or natural drains. *Island County v. Mackie*, 36 Wn. App. 385, 390-91, 675 P.2d 607 (1984). Since the pipe under the McCoy's property was man-made and no natural watercourse or natural drain existed across his property prior to those pipes being installed, this exception to the common enemy doctrine does not apply. Even if the buried pipe across the McCoy's property could be considered a "natural watercourse or drain," the Nurseries did not present any evidence to show that the McCoy's actions obstructed that drain.

(i) **The buried pipe across the McCoy's property is not a "natural watercourse."**

"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. A natural drain is that course, formed by nature, which waters naturally and normally follow in draining from higher to lower lands.” *King County v. Boeing Co.*, 62 Wn.2d 545, 550, 384 P.2d 122 (1963).

A closely analogous case to the instant case is *Halverson v. Skagit County*, 139 Wn.2d 1, 983 P.2d 643 (1999). The plaintiffs in *Halverson* were landowners lying in the Skagit River floodplain whose property was not protected from floodwaters by dikes, as were neighboring properties. As a result, when the river flooded, the dikes preferentially caused more of the floodwaters to be directed onto plaintiffs’ property. Defendant Skagit County argued that the common enemy rule provided “a complete defense to its liability” and the court agreed. *Id.* at 14. Plaintiffs argued that the doctrine did not apply because the floodwaters repelled by the levees remain in a defined channel. *Id.* at 16. The court agreed that in a prior case (*Sund v. Keating*, 43 Wn.2d 36, 259 P.2d 1113 (1953)), it held that floodwaters still flowing within a defined “flood channel” cannot be diverted out of the channel without incurring liability for resulting damages, thus partially limiting those earlier cases which classified *any* floodwaters as surface waters. However, after first pointing out that plaintiffs offered no proof as to the Skagit River’s “defined flood channel” the court noted that plaintiffs’ argument “completely misses the point of

the common enemy doctrine.” *Id.*

The common enemy doctrine’s purpose is to provide landowners with the ability to *prevent* damage to their property caused by flooding water. The resulting illogic of Plaintiffs’ argument is that a landowner who is damaged by surface waters loses the common enemy defense as soon as they build levees which repel those surface waters back into the river channel.

Id. (emphasis in original).

The Nurseries provided no evidence that there was a pre-existing natural watercourse across the McCoys’ property. The only evidence presented on that subject was by the County’s witness, Dennis Dixon, who presented aerial photos from 1931 and 1940.⁵⁴ Plaintiffs’ expert disputed Mr. Dixon’s interpretation of those photos as indicating a swale across the McCoy property.⁵⁵ Regardless, there is no dispute that as of 1961 (just prior to the drainage pipes being installed), there was no identifiable drainage course across the McCoy property.⁵⁶ Kent Nursery states that “since at least 1931 ground water has also been draining in part through clay tile pipes across the properties west of 150th Avenue East.”⁵⁷ Kent Nursery does not provide any cite to the record to support that statement, nor could it because there is absolutely no evidence to that effect. Even if

⁵⁴ RP 1163 – 66 (Dixon).

⁵⁵ RP 1249 - 55 (Creveling).

⁵⁶ RP 567 - 70 (DeRosa discussing Exs. 98, 99); RP 737 - 38 (Creveling).

⁵⁷ Kent’s opening brief at 39.

it could support that statement, that would still not prove a preexisting natural watercourse. During trial, Mr. Reese, a witness for the Nurseries, identified what he believed to be a swale across the McCoy property based on a 2009 topographic survey.⁵⁸ Not surprisingly, his so-called swale followed the exact alignment of the buried pipe across the McCoy's property, which was known to be collapsing and causing sinkholes. The 2009 survey does not provide any support for an argument that a pre-existing natural watercourse was present.

The natural drainage condition at this site was a diffuse groundwater regime. By collecting and concentrating that groundwater and transporting it across McCoy's property in pipes, the Nurseries actually converted the natural system into an engineered system.

The Nurseries have relied on *Wilber v. Western Properties*, 14 Wn. App. 169, 173, 540 P.2d 470 (1975) for the proposition that the clay tile de-watering system became over time a natural drainage course across the McCoy's property which the McCoy's had a duty not to block.⁵⁹ In *Wilber*, the court held that a ditch that had existed for over 30 years was a natural waterway and that defendant was liable for flooding on Mr. Wilber's property as a result of replacing the ditch with an undersized pipe which

⁵⁸ RP 1379 - 82 (Ex. 74).

⁵⁹ Kent's opening brief at 40; Fir Run's opening brief at 22 - 23.

was not capable of handling all the water flow (essentially causing an obstruction in a “natural waterway”).

Unlike the man-made ditch in *Wilber*, which could over time transform into a natural waterway (*i.e.*, stream), a piped system cannot convert into a natural system and therefore *Wilber* is distinguishable. Since no natural watercourse existed prior to the drainage pipe installation, this exception to the common enemy doctrine is inapplicable and the McCoys had the right under that doctrine to divert water away from their property.

(ii) **The McCoys did not obstruct a watercourse.**

Even if the Nurseries’ pipe across the McCoys’ property could be considered a “natural” waterway simply by virtue of its age, the Nurseries did not present any evidence showing that the McCoys obstructed it. It is undisputed that the pipe on Lot 3 was broken in 1995 when Rolland Hartstrom (the prior owner of the property) noticed water bubbling out of the ground.⁶⁰ Mr. Hartstrom also testified that water was bubbling out of the catchbasin at that time.⁶¹ At that point, it is clear that the pipe was not functioning as originally intended. Since no one ever took any action to repair the pipe, it was unsurprising that Pierce County’s witness testified

⁶⁰ RP 229 - 30 (Hartstrom).

⁶¹ RP 249 - 50 (Hartstrom).

that as of 2007 the pipe was (still) blocked on the west side of the culvert crossing 150th Avenue.⁶²

The trial testimony confirmed that the McCoys' filling in of the sinkholes, which the McCoys considered a safety hazard, had no effect on the flow of water because the pipes were already broken at that point.⁶³

None of the recognized exceptions to the common enemy doctrine apply to bar the McCoys from relying on that doctrine to shield themselves from liability for their actions taken to protect their property and the safety of people on their property from the effects of the Nurseries' uncontrolled water.

V. CONCLUSION

For all of the foregoing reasons, and for the additional reasons that were articulated by the trial court in its oral ruling of April 30, 2010, the judgment below should be affirmed at a minimum insofar as it held that the McCoys are entitled to a new trial on the Nurseries' counterclaims.

⁶² RP 1292 - 93 (Greatwood).

⁶³ RP 735 - 36 (Creveling, describing video showing continuing discharge despite filling of sinkhole).

Respectfully submitted this 4th day of April, 2011.

HELSELL FETTERMAN LLP

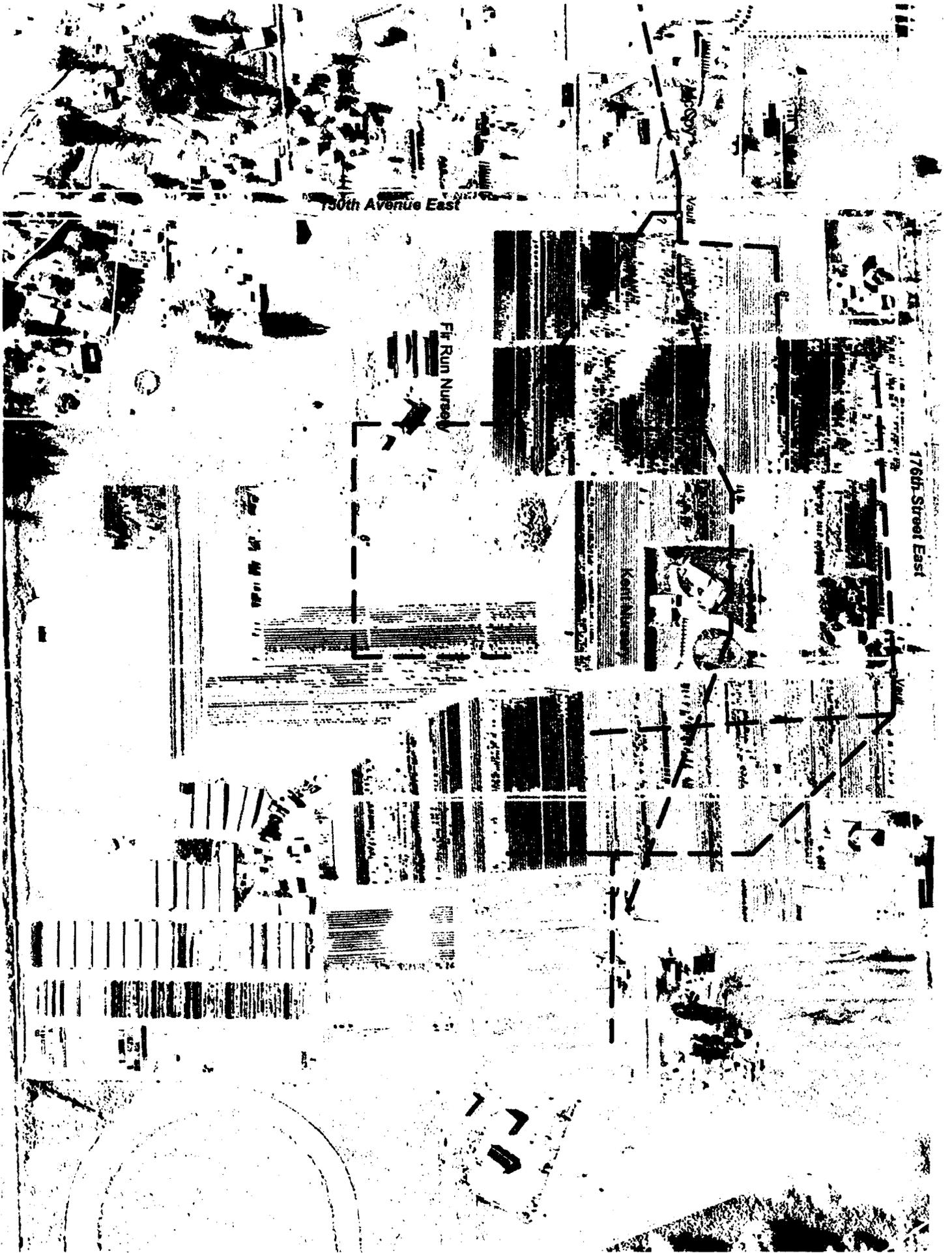
By  (WSBA #18053)
for David Gross, WSBA #11053
Attorneys for Respondents McCoys

APPENDIX

150th Avenue East

Fit Run Nursery

176th Street East



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PROOF OF SERVICE

I, Melissa Glazier, on April 4, 2011, caused to be served copies of Brief of Respondents McCoys Regarding Nurseries' Counterclaims and this Proof of Service on counsel as follows:

Attorney for Plaintiff
Sarah L. Lee
Goodstein Law Group, PLLC
501 So. G Street
Tacoma, WA 98402

- Via first class U. S. Mail
- Via Legal Messenger
- Via Electronic Mail

**Attorneys for Kent Nursery, Inc.,
Mauritsens, Fir Run Nursery &
Fenimores**
A. Eugene Hammermaster
David C. Hammermaster
1207 Main Street
Sumner, WA 98390

- Via first class U. S. Mail
- Via Legal Messenger
- Via Electronic Mail

**Attorneys for Kent Nursery &
Mauritsens**
Joseph M. Diaz
Davies Pearson, P.C.
920 Fawcett Avenue
P.O. Box 1657
Tacoma, WA 98401

- Via first class U. S. Mail
- Via Legal Messenger
- Via Electronic Mail

**Attorneys for Fir Run Nursery &
Fenimores**
James E. Macpherson
Kopta & Macpherson
365 Ericksen Ave., Suite 323
Bainbridge Island, WA 98110

- Via first class U. S. Mail
- Via Legal Messenger
- Via Electronic Mail

Attorneys for Pierce County
Public Works & Utilities

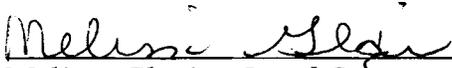
Ronald L. Williams
John F. Salmon III
Pierce County Prosecuting Attorney
955 Tacoma Avenue S., Suite 201
Tacoma, WA 98402

- Via first class U. S. Mail
- Via Legal Messenger
- Via Electronic Mail

I declare under penalty of perjury under the laws of the
State of Washington that the foregoing is true and correct to the
best of my knowledge.

EXECUTED at Seattle, Washington this 4th day of
April, 2011.

HELSELL FETTERMAN LLP


Melissa Glazier, Legal Secretary