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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

Docket No. 322092

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

MAUREEN M. ERICKSON,

Appellant,

v.

WILLIAM BETHMANN & ROSSLYN BETHMANN, husband & wife; KAREN S. CARSON (WALKER), an individual; SHAWNA K. MILLER & JEFFREY S. MILLER, wife & husband; THOMAS C. JONES & XANDREA M. JONES, husband & wife; MICHAEL A. TEDESCO & CHERIE E. TEDESCO, husband & wife; CLYDE DARRAH, an individual; SEDCO PROPERTIES, LLC, a Washington limited liability; PATRICK O'CALLAGHAN & MIRANDA O'CALLAGHAN, husband & wife; E. DAWES EDDY & MARY KAY EDDY, husband & wife; FRANKLIN V. JOHNSTON, III, an individual; and KWONG HWA & SEONG JUN LEE, husband & wife,

Respondents.

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I. INTRODUCTION

Petitioner, whose family has been a downhill lot owner in a large hillside subdivision for 13 years, appeals summary judgment dismissal of her Intentional Water Trespass claims against fellow subdivision lot owners. These Respondents respectfully contend, that while other entities may have trespassed, they did not.

Instead, these Respondents assert that all subdivision homeowners, including all parties to this appeal, purchased their lots subject to a municipally required and approved subdivision Storm Drainage System (an engineered and man-made series of ditches, culverts, pipes, swales and ponds), and homeowners had nothing to do with that system's design, construction, operation, maintenance, or control, and were indeed forbidden to interfere with its workings. This Drainage System was as much a part of the Subdivision's infrastructure as its roads, sidewalks, and street lights, and for years Petitioner's family had no complaints of flooding of their downhill premises.

Then on September 24, 2009, Petitioner claimed her homeowners association, Defendant Qualchan Hills HOA, and its contractors, specifically constructed a rechanneling of the Subdivision Drainage System "directly" onto her property, thereby initiating periodic flooding of her home – an act with which Respondents took no part. Respondents'

passive use of their small lots did not change before or after the HOA's intentional re-direction of the Storm Drainage System, over which it had exclusive control.

These homeowners respectfully seek affirmation of their dismissal, and state that Petitioner's recourse for Intentional Water Trespass lies squarely with those she claims intentionally created this condition and not with her fellow subdivision homeowners, whose only fault was to have purchased lots uphill of hers.

II. STATEMENT OF THE CASE

A. Petitioner's Entire Complaint Is That Her Homeowners Association Created a "Concrete Trough" Which After September 2009 Re-Channeled the Subdivision's Storm Drainage System Onto Her Property – Over Which Her Neighboring Respondents Had No Control.

1. The entire basis of Petitioner's Complaint of Intentional Trespass is the act of re-channeling the Qualchan Hills Subdivision's Storm Drainage System onto her property at the direction of her homeowners association, defendant Qualchan Hills HOA, through its contractors, shortly after September 11, 2009. (CP 205).

2. Petitioner and her family had no problems of water intrusion whatsoever for years prior to this re-channeling at her lot and home located near the base of that hillside subdivision. (CP 205).

3. Petitioner testified that in late September 2009, defendant Qualchan Hills HOA and its contractors created a "concrete trough" which re-directed the Subdivision's storm water system directly onto her property. She specifically alleged that this act:

... began to cause water that previously infiltrated into the ground above my property, to be channeled downhill and into my property. That water actually started running and began accumulating and pooling on my property during the winter of 2009 and 2010.

(CP 205).

4. As a result, she sued her Homeowners Association and its contractors and blamed the storm water drainage system for the flooding. She claimed she first learned on April 7, 2013, the drainage system was "inadequate" and "puts my property at risk of even more damage." (CP 208)

5. Petitioner admitted she had no proof that Respondents had anything to do with the alleged trespassory acts:

While it appears true that the concrete trough was poured by or under direction of the Qualchan Hills Homeowners Association, it is unclear what, if any, involvement or knowledge any of the individual lot owners had."

(CP 425).

. . . but nevertheless, she included these Respondents in her Complaint for Intentional Trespass of constructing the shotcrete channel and cutting trees on her property. (CP 629-630)

6. Like all subdivision homeowners, Petitioner's and Respondents' lots and homes came with the preordained, municipally required and approved, Storm Water Drainage Plan. This element of the infrastructure was meant to control the surface water runoff of the entire subdivision and every lot contained therein. The Qualchan Hills Subdivision's very existence was predicated upon the condition precedent of the developer first having submitted a comprehensive storm drainage plan to the City of Spokane Engineer for review and approval. There had to be an entity responsible for its perpetual operation, maintenance, and construction. Further through plats, easements, Homeowner Association Covenants and drainage plans, homeowners, like Petitioner and Respondents, were forbidden to interfere, alter or re-direct the drainage system, which other entities including Qualchan Hills HOA had control. (CP 76, 82, 84, 94-95, 248, 330).

B. Respondents Are Merely Subdivision Homeowners Who Had Nothing To Do With Petitioner's Complaints Of Intentional Trespass.

1. Respondents are all merely individually targeted lot and homeowners in the Qualchan Hills Subdivision – who happen to be among

those who own lots "uphill" from Petitioner. They had nothing to do with the alleged acts of Intentional Trespass. (CP 30, 36, 41, 47, 52, 58, 63, 67, 71).

2. All Respondents' homes were in existence before September 2009, when Petitioner had no complaints of water intrusion. (CP 29; 35; 40; 45; 51; 56; 61; 66; 70). Some Respondents owned their lots/homes for several years, while one did not become an owner until after the alleged trespass (O'Callahan). (CP 66). Some Respondents were members of the Defendant Qualchan Hills HOA along with Petitioner (CP 62; 71); while others were members of a separate association in the same subdivision – Overlook HOA. (CP 30; 36; 39; 46; 50, 67) Petitioner made no claim of Intentional Trespass against Overlook HOA.

3. These Respondents were not the "Defendants" who trespassed on Petitioner's land. (CP 30; 36; 40; 40-41; 46-47; 51-52; 57-58; 62-63; 67; 71). They had no participation or control of the Drainage System – and specifically did not participate in any way in alterations identified by Petitioner as the direct cause of water intrusion. *Id.* Two Respondents were not even lot owners when the alteration work was going on (O'Callahan and Sedco). (CP 62; 66). Specifically, these Respondents did not design, construct, maintain, operate or own the subdivision's storm drainage system – nor its September 2009 "re-channeling" of flow by

Qualchan HOA. (CP 30; 36; 40; 40-41; 46-47; 51-52; 57-58; 62-63; 67; 71)

4. All parties, including Respondents, purchased their lots and homes with the Drainage Plan and System already in place to remove surface water as an explicit component of the subdivision itself and in which no lot owner had control, responsibility or ownership. All Subdivision homeowners purchased their lots subject to drainage easements across their property. (CP 76; 82; 94; 248; 331). **Petitioner has said she makes no claim against the easements of any Respondent.** (CP 401). Petitioner did not file a Quiet Title action, and specifically no Quiet Title action involving any of Respondents' properties. (CP 624-631).

5. Respondents have not in any way modified their use of their lots since their respective purchases. (CP 29-30; 35-36; 40-41; 45-47; 51-52; 56-57; 62-63; 66-67; 70-71). Some Respondents had drainage depressions at the base of their properties when they purchased their homes, which depressions were part of the existing Subdivision Storm Drainage System. *Id.* They did not create these depressions. *Id.* They did not alter or change them at anytime. *Id.* Respondents use of their lots was ordinary and expected and did not include any ponds or swimming pools. *Id.*

6. Respondents acted quickly in response to Petitioner's complaints. Respondents filed their Motion for Summary Judgment on April 17, 2013. (CP 1). Petitioner first responded on May 8, 2013. (CP 259). Respondents then challenged the sufficiency of Petitioner's proof by filing a motion to exclude portions of her proof as not being compliant with CR 56 and the Rules of Evidence. (CP 312-323) The trial court heard oral argument on June 7, 2013. (CP 462). The trial court issued its Memorandum Opinion on July 23, 2013 in favor of summary judgment. (CP 460). Formal dismissal pleadings were filed on September 4, 2013. (CP 475-481).

7. Petitioner has failed to prove that any water from any or all of the targeted Respondents' lots passively flowed through the entire course of the Subdivision's drainage system and actually came onto Petitioner's property. Prior to initiation of suit against these Respondents, there is no specific allegation of individually identified occurrences of water intrusion events other than "the winter of 2009-2010." (CP 205) There is no proof of any specifically identified water intrusion occurrences (date, quantity) after Respondents were named in the lawsuit and until their dismissal on July 2013.

8. Respondent Franklin V. Johnston will file an additional brief regarding facts relating to his own property.

III. ARGUMENT

A. Standard of Review.

While the de novo standard of review is used in an appeal of a summary judgment motion, the requirements of CR 56 still apply. *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301, 305 (1998). Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c).

Once the moving party meets its burden of showing there is no genuine issue of material fact, the nonmoving party must set forth specific facts rebutting the moving party's contentions and may not rely on mere allegations, speculation, denials, opinions, or conclusory statements. Rather that party must set forth specific material facts. *Elcon Const., Inc. v. E. Washington Univ.*, 174 Wn.2d 157, 169, 273 P.3d 965 (2012). *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 359-60, 753 P.2d 517 (1988).

Plaintiff has the burden of proof of each element of her tort claim against each defendant. *Mohr v. Grant*, 153 Wn.2d 812, 108 P.3d 768 (2005); WPI 21.02.01. A complete failure of proof concerning an essential

element of the nonmoving party's case necessarily renders all other facts immaterial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

B. The Petitioner Has Failed to Raise a Genuine Issue of Material Fact on the Elements of Intentional Trespass.

Respondents respectfully submit that Petitioner's allegations and purported facts do not establish the essential elements of intentional trespass, and Petitioner's claims are contrary to the efforts of Washington law to protect the public's interest in promoting and requiring regulated community drainage systems.

1. Washington State's Law of Intentional Trespass Focuses on Overt Acts of Water Diversion.

Intentional trespass occurs only 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. *Wallace v. Lewis Cnty.*, 134 Wn. App. 1, 15, 137 P.3d 101 (2006).

Respondents respectfully assert that in every Washington case of intentional water trespass, there has been an intentional and wrongful act of water diversion or channeling by the liable party. In cases such as this, involving man-made drainage systems servicing multiple properties or subdivisions, even the ownership of the system does not engender responsibility without proof of a culpable act which proximately causes

the water trespass, and there is no liability for those who have no right to control or direct those acts.

To Respondents' knowledge, no subdivision lot owners, such as the Respondents, have been found liable for mere passive use of a community drainage system that they did not plan, design, approve, construct, maintain, or alter.

2. While Washington State Has Historically Supported the Right to Shed Surface Water – Intentional Trespass Can Occur When There Has Been an Overt Act.

a. *The Common Enemy Doctrine.*

The "common enemy doctrine" protects the right of traditional landowners, who were autonomous from the governance of Homeowner Associations and Subdivision developments, to repel surface water from their properties: "Surface water, caused by the falling of rain or melting of snow, and the escaping from running streams and rivers, is regarded as an outlaw and a common enemy against which anyone may defend himself, even though by so doing injury may result to others." *Cass v. Dicks*, 14 Wash. 75, 78, 44 P. 113 (1896). These rights are limited by three exceptions to the common enemy doctrine, all of which deal with defendants who have undertaken intentional acts to control water. The first exception provides that, although landowners may block the flow or diffuse surface water onto their land, they may not inhibit the flow of a

watercourse or natural drainway. *Currens v. Sleek*, 138 Wn.2d 858, 862, 983 P.2d 626 (1999) *amended*, 993 P.2d 900 (Wash. 1999). The second exception prevents landowners from collecting water and channeling it onto their neighbors' land. *Id.* The third exception requires landowners who alter the flow of surface water on their properties to act with due care by acting in good faith and by avoiding unnecessary damage to the property of others. *Currens*, 138 Wn.2d at 865, 983 P.2d 626.

- b. *Many Intentional Water Trespass Cases Involve the Water Diversion Act of One Individual Landowner and its Direct Effect on an Adjoining Property Owner.*

Washington intentional water intrusion cases examining the common enemy doctrine defense often involve the active water channeling acts of one individual landowner to the alleged detriment of an adjoining property owner.

An example comes from *Hedlund v. White*, 67 Wn. App. 409, 836 P.2d 250 (1992) where the named parties owned contiguous farms along the Puyallup River. Farmer White first created an east-west drainage ditch which caused water from two slopes to flow into a swale which had previously served only one slope. Then, he installed a dam across the ditch which he could open and close. He did open and close this dam – according to favorable or unfavorable trial court rulings. *Id.* at 411-412.

The appellate court found these acts to be an intentional trespass. *Id.* at 417-18.

3. In Matters of Large Developments of Man-Made Water Projects Which Serve Multiple Properties or Users, Washington State has Endorsed a Required and Regulated Approach to Comprehensive Drainage Schemes and has Placed Responsibility for Intentional Water Trespass on Those Whose Act in the Design, Construction, Operation or Alteration of the System Actually Causes the Harm.

Washington law has considered Intentional Trespass in the context of large scale water systems designed, constructed, owned or operated by entities other than its users. This body of law sponsors such systems, and if that system causes a water trespass, provides redress against the entity which acted to cause the system to fail.

- a. *In the Public's Interest, Washington State and Municipal Legislative Regulations Promote and Require Comprehensive Plans for Developments Which Manage the Flow of Water.*

The State of Washington has established many laws promoting cohesive and unified schemes for water drainage issues. *See* RCW 86.08.010 improvement districts, RCW 85.05.010 diking districts, RCW 86.09.001 flood control districts, RCW 85.06.010 drainage districts. "Almost any development of land is likely to alter the flow of water draining from it." ". . . Many aspects of drainage are now regulated through institutional bodies created by the state legislature and

municipalities . . ." *Toward a Unified Reasonable Use Approach to Water Drainage in Washington*, 59 Wash. L. Rev. 61 (1983).

Washington courts have recognized that whenever there is "development within a city," the area for natural percolation of water is diminished, and the flow of surface water is modified. *Patterson v. City of Bellevue*, 37 Wn. App. 535, 537-538, 681 P.2d 266 (1984), citing *Baldwin v. Overland Park*, 205 Kan. 1, 468 P.2d 168, 173 (1970). "When the growth is rapid," the resultant problem has its solution in "concerted political action rather than in the courts." *Id.* Municipalities have responded by requiring developers to create storm drainage designs acceptable to City Engineers as a condition precedent to the creation of the subdivision, the ability to sell lots, or build homes. Lot homeowners, like Petitioner and Respondents here, are only able to purchase homes in the subdivision because its Storm Drainage System has first been approved by municipal engineers and subject to public approval. Their purchase of lots and homes is subject to these systems which are owned and operated by entities other than themselves.

The City of Spokane, which exercised authority over the Subdivision Drainage System in question, has specifically declared such systems to be within the public interest it must protect through regulation. It stated that "property developments" can generate additional "stormwater

runoff" which can increase water flows, raise groundwater levels and cause flooding and erosion. For these reasons:

A regulatory program to address problems created by these circumstances including the cumulative impact of multiple development is in the public interest.

SMC 17D.060.010(B)(5) (2010).

The City and County of Spokane require Subdivision developers to provide comprehensive storm drainage plans through the preliminary "plat" process. The responsibility rests with the developer or other acceptable entity to provide designs to the municipality whose engineers review them for approval. The vital issuance of building permits for residences is a condition of this process – and is the reason for these requirements. The developer is responsible for providing the perpetual maintenance of the system or such can be assumed by a Homeowners Association. *Spokane Municipal Code*, 17D.060.140(E), 17D.060.150(G).

This regulatory model regarding creation of subdivisions containing numerous residences, which may have an impact on the direction, flow and disposition of surface water, has been in existence for decades – including the early 1990s when Qualchan Hills began its development process. *SMC Chapter 11.18 Subdivision Code*, 1983, 1993. A developer proposing a subdivision within the City had to prepare a "preliminary plat" identifying potential lots, drainage and utility

easements, streets, etc., file it with the County Auditor, and copy various city departments (including city engineer, public works). The City Division Director of Engineering Services had the right to require the developer to provide a plan for "adequate and proper drainage of surface water, by means of an approved storm sewer system . . ." SMC 11.18.150 (1983, 1993). The Public Works Director was charged with responsibility for approval of "surface water drainage." SMC 11.18.230(8) (1983, 1993). Only after review and approval by various City agencies could proposed subdivision "Preliminary Plats" proceed to the public approval process involving a Hearings Officer and the City Council. SMC 11.18.060, 11.18.070 (1983, 1993). The City Council had the "authority of final approval or disapproval of subdivisions." SMC 11.18.190 (1983, 1993). No City of Spokane Subdivision could come into existence without a required storm drainage plan being approved by the City Engineer. (SMC 11.18.150)

This element of any subdivision's infrastructure necessarily preceded the ability of any person or entity to purchase such a city lot.

- b. *As Applied to Large Scale Drainage Systems, Washington's Intentional Water Trespass Cases Remain Consistent – Only Actors Who Intentionally Divert Water Which Proximately Cause Harm Can Be Responsible.*

Washington intentional water trespass cases have examined the responsibilities of entities which designed, constructed or operated man-made drainage systems which allegedly cause “water trespass.”

- i. Where the Actor is Responsible.

In *Buxel v. King County*, 60 Wn.2d 404, 405, 374 P.2d 250 (1962), the plaintiffs lived near Des Moines Way in King County. The County had constructed artificial channels, drains, culverts and ditches which served to drain water from many county property owners in that area. From 1921, when Buxels purchased their lower elevation property, to the late 1950’s, they only experienced “inconvenient” “seepage” caused by drainage from higher elevation properties, but suffered “no appreciable damage.” *Buxel*, 60 Wn.2d at 405-06, 374 P.2d 250. When King County improved Des Moines Way in 1959, it caused water drainage problems for county property owners on the **east side** of Des Moines Way. *Id.* The county took action “to alleviate the drainage problem of those property owners” by purposefully directing this water through construction of “a culvert beneath Des Moines Way . . .” *Id.* at 405. This re-direction of water **from the east side** of Des Moines Way **to the west side** followed “a channeled

course” directly onto respondent’s (Buxel) property which “changed respondent’s relatively minor seepage problem to an inundation problem.” *Id.* at 405.

The court found that King County, as designer, constructor, and operator of the extension of the drainage system in 1959, was liable because the “acts of the county caused the flow of waters across her property to increase to the extent that substantial damage resulted.” The court stated that the county is liable “if, in the course of an authorized construction, it collects surface water by an artificial channel, or in large quantities, and pours it, in a body, upon the land of a private person to his injury.” *Buxel*, 60 Wn.2d at 409, 374 P.2d 250.

In *Buxel*, the source of the drainage would have been the many residents whose homes and businesses were serviced by the system. There was no evidence of any change in their passive reliance on the system before or after 1959. Indeed, the Court found that the injured property owner could seek full recourse against the County for its act of rechanneling its system in 1959. It was the County's overt intentional construction of the culvert which constituted trespass.

An act is intentional either if the actor subjectively desires the resulting outcome or is substantially certain that the outcome will occur. *Bradley v. Am. Smelting & Refining Co.*, 104 Wn.2d 677, 682, 709 P.2d

782 (1985) (quoting Restatement (Second) of Torts § 8A (1965)). The Restatement of Torts 2d § 158 “Liability for Intentional Intrusion on Land” has been adopted by Washington trespass cases. *Bradley*, 104 Wn.2d at 681-82, 709 P.2d 782. Comment f appropriately states that “tort liability is never imposed upon one who has neither done an act nor failed to perform a duty.” Restatement of Torts 2d § 158, comment f (1965).

The alleged intentional act must also have been the direct or proximate cause of the landowner’s loss. *See, Phillips v. King Cnty.*, 136 Wn.2d 946, 966, 968 P.2d 871 (1988). The proximate cause is the original wrong in diverting the water so as to cause the harm. *Tope v. King Cnty.*, 189 Wash. 463, 471, 65 P.2d 1283 (1937).

ii. Mere Operation or Ownership of a Drainage System Does not Engender Liability – There Must Be an Overt Act of Wrongful Water Channeling.

In *Jackass Mt. Ranch, Inc. v. S. Columbia Basin Irr. Dist.*, 175 Wn. App. 374, 402, 305 P.2d 1108 (2013), plaintiff (JMR) owned property at the base of the “White Bluffs” on the Columbia River. For decades, farmers above JMR had irrigated their properties through man-made canals of the Columbia Basin Projects designed and constructed by the “United States Bureau of Reclamation” (USBR). The “South Columbia Basin Irrigation District” (SCBID) was one of the three entities

which operated and maintained this irrigation system on “1,029,000” acres of farm land. These farmers received irrigation water transported through canals from a storage facility at Banks Lake. *Id.* at 379. The system’s “Drainage Works” then removed the farms’ injurious excess surface and ground water through “wasteways.” The “Ringold Wasteway” carried farmers’ drainage water to the edge of the White Bluffs where a 350 foot box flume returned it down slope to the Columbia River. *Id.* at 382. Problems occurred with this portion of the drainage for over 40 years. In 1960, a landslide destroyed the flume. In response, USBR “redesigned the wasteway” and constructed a system of underground drains. The SCBID continued to operate and maintain the wasteway and uphill farmers continued to receive and discharge the system’s irrigation waters. Despite the “redesign and modification of the system” by USBR three “slumps” occurred in the hillside above JMR between 1981 and 1986 and another major landslide occurred in 1996. In the “1970s,” USBR “recognized” the danger of “more landslides along the steep cliffs.” SCBID continued operation and maintenance of the wastewater. *Id.* at 382-383.

In 2006, a major landslide deposited 100,000 cubic yards “of material from the top of the slope onto JMR’s property” who then sued SCBID for trespass and other theories. *Id.* at 383-384.

SCBID, responsible for the wasteway's operation and maintenance, admitted that water seepage had occurred, but filed a motion for summary judgment stating that the landslide trespass due to "seepage" from the irrigation system "was due to the design and construction by USBR." *Id.* at 384. It also stated that because of its contract, it did not own the wasteway nor have the ability to alter it. *Id.* at 384. The trial court granted SCBID's Motion for Summary Judgment explaining that it could not be held responsible for the landslide because that occurred as a result of USBR's design and construction and not SCBID's operation and maintenance.

The Court of Appeals agreed, upholding dismissal of trespass claims. In reciting the four elements of intentional trespass, it noted that only "(2) an intentional doing of the act" and "(3) reasonable foreseeability that the act done could result in an invasion of plaintiff's possessory interest" were disputed. It cited the reasoning of *Seal v. Naches-Selah Irrigation Dist.*, 51 Wn. App. 1, 5, 751 P.2d 873 (1988) in which plaintiff contended that ongoing seepage from defendant's water canal damaged their cherry orchard. It too cited all elements of intentional trespass and concluded that the owner "of an irrigation conduit is not an insurer against damage which may result from its operation . . ." Instead, there is culpability only for ". . . a negligent act in the construction,

maintenance or operation of his irrigation works.” *Seal*, 51 Wn. App. at 6, 751 P.2d 873; *See also, Jackass*, at 401.

As in *Seal*, the *JMR* court found that “no question of material fact exists as to whether SCBID intended to trespass on JMR’s property.” *Jackass*, at 402. Prior knowledge of the landslides did not raise a question of material fact whether SCBID “acted intentionally” to cause the landslide. *Id.* Nor was SCBID’s failure to take preventative measures enough to support a claim of intentional trespass. *Id.* at 402.

This Court stated:

Ultimately, legal responsibility cannot be assigned to SCBID simply because it operated the wasteway as instructed. The damages arose from the design and construction of the wasteway. SCBID lacked the responsibility for determining whether additional drainage works were necessary and lacked the authority to construct the additional works.

Jackass Mt., 175 Wn. App. at 397, 305 P.3d 1108.

In *Hughes v. King Cnty.*, 42 Wn. App. 776, 782, 714 P.2d 316 (1986), the Court ruled that an entity, which deposited water into a drainage system which failed, was not responsible for water damage as it did not cause the failure. King County owned and operated a storm water drainage system servicing city properties. King County’s stormwater system ran under plaintiff’s “auto showroom” with manholes in the lot. Downstream it connected with a private storm drainage system.

Obviously, both systems collected storm water from Seattle property owners. During a severe weather event, storm water backed up from a “bottleneck” in the private section of the system and burst out in the King County section through a manhole in plaintiff’s car lot – flooding the showroom and causing subsidence of the parking lot. The “bottleneck” existed due to an “undersized pipe” in the private storm system. *Id.* at 781. King County was not liable for trespass because the plaintiff did not show that an intentional action by King County actually caused the flooding of its property or that King County was at fault for designing, constructing, or maintaining that system. The entity that “caused” the bottleneck, which “caused” the flooding – i.e. the private system owner – was not part of that trespass suit. While King County’s system collected water which flooded plaintiff’s land, it was exonerated because “trespass exists only when there is an intentional or negligent intrusion or some abnormally dangerous activity on the part of the defendant.” *Id.* at 780 (*citing* Restatement of Torts 2d § 158, 165). There was “no finding” which suggested “that King County had any control over the private drainage system that was located downstream . . . that contained the ‘bottleneck’ causing the flooding.” *Id.* at 784. The trial court had “. . . implied that the County had no legal right or duty to maintain this (private) pipe.” *Id.* at 784. Nevertheless, the car lot contended that “. . . King County is liable for trespass even absent any

intentional act or negligence, arguing, in effect, that the County is strictly liable for the flooding.” *Id.* at 781. The appellate court disagreed stating:

Appellants have failed to sustain their burden of showing that an intentional or negligent action by the County caused the flooding of their property or that the County was negligent in designing, constructing, or maintaining the system.

Id. at 782.

iii. Washington Drainage System Cases Cannot Be Interpreted to Impose Liability on Individuals Whose Properties Are Merely Serviced by Large Scale Drainage Systems.

Buxel v. King, 60 Wn.2d 404, 405, 374 P.2d 250 (1962), *Jackass Mt. Ranch, Inc. v. S. Columbia Basin Irr. Dist.*, 175 Wn. App. 374, 402, 305 P.2d 1108 (2013) and *Hughes v. King Cnty.*, 42 Wn. App. 776, 782, 714 P.2d 316 (1986) are illustrative of this state's approach to allocation of responsibility and application of the requirements of the elements of Intentional Trespass in large scale drainage system cases. Those who actually commit a wrongful diversion of drainage water can be held responsible for their actions. These cases do not find fault with owners or operators of such systems who did not cause the wrongful water diversion.

Neither the logic nor language of these cases (nor any other Washington drainage system case known to these Respondents) could ever stand for the proposition that individuals, whose land is served by the

system and did not in any way participate in an act of wrongful diversion of water, could be held liable. In fact, only the opposite conclusion can be reached. In *Buxel*, when King County acted to collect surface water – obviously from individual landowner customers – and thereafter wrongfully diverted such drainage and "poured" it onto plaintiff's property, King County was fully responsible for all damages. There was no basis for an extrapolation of Intentional Tort liability to the County's municipal customers who had nothing to do with the County's installation of a culvert from one side of Des Moines Avenue to another.

Similarly, in *Jackass*, farmers of SCBID's many thousands of acres of irrigated farm land produced – not just surface water – but "injurious" "wastewater" from their operations. SCBID operated drainage systems which transported the farmers' wastewater toward the Columbia River. But, even when that system failed on multiple occasions over many years and severely damaged plaintiff's down slope land, the operator SCBID was not responsible as it had not done anything wrong. There was no whisper of responsibility for farmers whose drainage waters had to comprise the "seepage" which admittedly caused the successive landslides and "slumps." *Jackass* holds that only the actor whose fault cause the drainage system to fail and actually causes the harm can be held responsible.

Similarly, in *Hughes*, the upstream drainage system "owner-operator" (King County), which did not cause the obstruction in the interconnected, privately owned downstream system and which ultimately flooded King County's customer's car lot (Hughes), was not liable because it was not the actor which caused the wrongful water diversion. Indeed, King County obviously supplied drainage water into the downstream system – but that act alone engendered no liability. This logically dictates that King County's many customers – whose surface water may have burst onto Hughes' car lot – could never be held responsible for another entity's downstream obstruction. The conclusion is respectfully inescapable and obvious – the one who wrongfully created the drainage system failure bears full and complete responsibility.

4. Reasonable Foreseeability.

Duty and foreseeability are linked in the law. If an actor creates a “risk of harm to others, the defendant is charged with a duty to use reasonable care to see that injury to others does not occur.” 16 Washington Practice 2006, § 1.13, p. 23-24. Duty is further limited by “whether the risk of harm is foreseeable.” 16 Washington Practice 2006, § 1.14, p. 25-26. The Respondents assert that they had no duty at law to prevent the extension of the drainage system by the Defendant Association to Petitioner’s property.

5. Proof of Damages.

The Petitioner has the burden of proof of each element of her tort claim against each Respondent. See, *Mohr v. Grant*, 153 Wn.2d 812, 108 P.3d 768 (2005); WPI 21.02.01. This includes the intentional trespass element of "actual harm." Uncertainty as to the fact of damage is ground for denying liability. *Sigman v. Stevens-Norton, Inc.*, 70 Wn.2d 915, 922, 425 P.2d 891 (1967). The channel and discharge exception to the common enemy doctrine requires that the finder of fact compare the amount of surface water that would naturally reach the claimant's property with the amount that reaches the property after the changes. *Ripley v. Grays Harbor Cnty.*, 107 Wn. App. 575, 582, 27 P.3d 1197 (2001).

It is axiomatic that plaintiff bears the burden of proving "proximate cause" against each defendant (a cause which in direct sequence produces the injury complained of and without which such injury would not have happened). WPI 15.01. This requires "the physical connection between an act and an injury." 6 Washington Practice, Chap. 15, p. 192 (2012), *Hartley v. State*, 103 Wn.2d 768, 778, 698 P.2d 77 (1985).

This is not a *res ipsa loquitur* case. *Pacheco v. Ames*, 149 Wn.2d 431, 69 P.3d 324 (2003). It cannot be assumed that water, in excess of natural accumulations, came onto her property from each of these individual Respondents.

6. Respondents' Analysis of Petitioner's Failure to Raise Issues of Fact to Support All Legal Elements of Intentional Trespass.

The instant case is entirely about the 2009 Qualchan Subdivision drainage system alteration which allegedly caused flooding. Most of the homeowner Respondents owned their homes before September 2009 and there was no problem of flooding on Petitioner's property. These Respondents' homes, their roofs, gutters and driveways existed before that date and caused no problem for Petitioner. (CP 30; 36; 41; 47; 52; 58; 63; 67; 71) The flooding occurred after that date strictly because of the Defendant Association's construction of the drainage system alterations in which the Respondents did not participate or control, were powerless to prevent, and for which they bear no legal responsibility. (CP 30; 36; 40-41; 46-47; 51-52; 57-58; 62-63; 67; 71; 205). It is the testimony and Petitioner's allegations elucidating her claims which prove these points:

1. Defendant Qualchan Hills Homeowners Association came onto her property and poured a "concrete" "shot" "trough." (CP 425, ¶ 8).
2. The trough "began to cause water that previously infiltrated into the ground above my property, to be channeled downhill and into my property." (CP 205, ¶ 16)
3. Petitioner initiated suit alleging intentional trespass against her HOA (defendant Qualchan HOA), which her expert states was responsible "in perpetuity" to operate and maintain the Subdivision Storm Drainage System, and those she believed to be contractors (e.g. John Runyan Homes) acting on its behalf. (CP 625 ¶¶ 3-4; CP 177, ¶ 4)

4. Respondents never altered, participated, interfered or changed any portion of the Subdivision Drainage System – particularly not the 2009 "concrete shot trough" onto Petitioner's property. (CP 30; 36;; 40-41; 46-47; 51-52; 57-58; 62-63; 67; 71). Petitioner acknowledges she has no proof to the contrary. (CP 425, ¶ 8)

There is no evidence that the Petitioner, Respondents, or any other individual lot or homeowner had anything to do with the design, construction, operation or maintenance of the Subdivision Storm Drainage System at any time. This system was a municipally required condition precedent to the very existence of the subdivision itself. All homeowners had homes on these subdivision lots subject to the pre-existent approval of that surface water drainage system, which was proposed by the developer through its engineer and "perpetually" "maintained" and "operated" by entities other than these Respondents.

Respondents assert that Petitioner has not fulfilled proof of all elements of intentional water trespass claims against her fellow subdivision lot owners.

Under Washington law, an intentional trespass claim cannot be based on a failure to act, particularly whereas here the Respondents have no legal duty or right to change the intrusive condition (concrete trough) which directly caused the trespass. *Jackass*, 175 Wn. App. at 402, 305 P.3d 1108.

Regarding the required element of "foreseeability", the fallacy of the Petitioner's assertions against these homeowner Respondents – beyond the fact that no duty existed – is that they would have been charged with foreseeing that the Defendant Homeowner Association would create the extension of its system **and do it wrong**.

There is no evidence that these individual Respondent homeowners knew or should have known that their passive ownership of lots, which are subject to the Subdivision's drainage system, would allegedly cause flooding on the Petitioner's property. Petitioner admits she has no proof these Respondents knew or should have known that the Defendant Association was going to extend the drainage system or that the extension might cause flooding on the Petitioner's property. (CP 425, ¶ 8).

The crux of her foreseeability argument embodies the essential legal failing of her Intentional Tort claims against these Respondents. She seeks to impute the direct and intentional acts of her defendant HOA to these innocent Respondents:

At a minimum, it was always reasonably foreseeable that all of the Defendants' collective actions in collecting and channeling storm water downhill and continuing to extend the drainage system would eventually disturb Ms. Erickson's possessory interest.

(Pet'r's Br. p. 21).

This misrepresents the truth that Petitioner has admitted – there is no evidence that these Respondents acted in concert with her defendant Homeowners Association, or the developers, Adams-Clark engineers, contractors, City of Spokane Plan Review, the Hearing Officer or Spokane City Council. (CP 425, ¶ 8).

Petitioner additionally asserts "continuing trespass" claims against Respondents on the notion that once she joined these homeowners in her lawsuit, they had knowledge of her HOA's trespass and failed to stop using the subdivision drainage system at that time. (Pet'r's Br. p. 22-24).

The elements of continuing trespass require the same proof as intentional trespass. *Wallace*, 134 Wn. App. at 15-16, 137 P.3d 101. Only the trespasser has the responsibility and duty to remove the intrusive condition, which in this case is the concrete extension of the Subdivision's drainage system. *See, Fradkin v. Northshore Util. Dist.*, 96 Wn. App. 118, 126, 977 P.2d 1265 (1999)

The primary characteristic that distinguishes a continuing trespass from a permanent trespass is successive intrusions from a condition which the trespasser intentionally caused and could reasonably abate. *Fradkin*, 96 Wn. App. at 125, 977 P.2d 1265. A trespass is abatable, irrespective of the permanency of any structure involved, so long as the defendant can take curative action to stop the continuing damages. *Fradkin*, 96 Wn. App.

118, 125-26, 977 P.2d 1265. The condition must be one that can be removed “without unreasonable hardship and expense.” *Fradkin*, 96 Wn. App. at 126, 977 P.2d 1265.

Fradkin requires that, for continuing trespass, there be proof that a defendant has actually caused each successive intrusive event. It noted that this could include flooding from "defective construction of a drainage system." *Id.* 125-126. Because of the intermittent nature of intrusion due to an actor's "defective construction" the three year statute of limitations for Intentional Trespass accrues from "each" successive event. *Id.* at 125.

The intrusive condition is the subdivision drainage system itself, not the water. *See, Buxel; Hughes; Jackass.* These Respondents have no duty to abate the subdivision drainage system, particularly the concrete trough, because they are not the trespassers who designed, constructed, operated, or maintained the system.

Also, these Respondents have no right or ability to alter the drainage system. The plats, CC&Rs, and drainage agreements forbid homeowners from altering the system and impose the responsibility and duty to operate and maintain the system on other entities, including the defendant HOA. (CP 76; 82; 94; 95; 248; 330; 331).

Article 4.13 of the Defendant Association’s CC&Rs forbids “interference with the established drainage pattern over any lot.” (CP 95).

The Overlook Homeowners Association CC&Rs state that the right to utilize and obligation to maintain drainage easement areas are held by the Overlook Homeowners Association. (CP 331). In addition, the “Qualchan Hills Final Planned Unit Development Plat” provides that the Defendant Association will be responsible for maintenance of drainage facilities located in common areas and on the drainage easements shown on the plat. (CP 76). The Defendant Association’s CC&Rs, Article 2.05(c), reiterate this duty by stating that it has “the power and the duty to maintain the private sewer systems and storm drains or drainage facilities within the properties.” (CP 94).

Subsequently, the duty to maintain and operate the system was outlined in the “Joint Drainage Agreement for Qualchan Subdivisions.” (CP 102). The Agreement established drainage districts and a Drainage District Board comprised of subdivision Homeowners Association members. (CP 103). The Board “shall be responsible for all decisions concerning the Drainage Districts established.” (CP 248). The maintenance and repair decisions of each Drainage District “shall be delegated to the Board Members representing lot owners within that Drainage District.” (CP 248) Each respective Homeowner Association “shall hold the title or an easement to the drainage area lands and facilities thereon, which fall within that association’s plat.” (CP 248).

Furthermore, there is no proof of any specific intrusions after March 17, 2013, when the Third Amended Complaint was filed, through July 25, 2013, when the case was dismissed on summary judgment. The Petitioner admits in her affidavit dated May 7, 2013, that the week prior (i.e. April 30, 2013) was “the first time anyone has suggested that the (drainage) system is inadequate or that it puts my property at risk of even more damage.” (CP 208, ¶ 22). **How can Respondents be held to knowledge that Petitioner only learned in late April 2013!**

The burden is on the Petitioner to show that the Respondents committed an intentional act that caused a significant net increase in the amount of surface water reaching her property compared with that which would naturally reach her property. *See, Price v. City of Seattle*, 106 Wn. App. 647, 657, 24 P.3d 1098 (2001). Her declarations and John Deleo’s declarations do not establish the amount of natural water flow. In fact, they show that the drainage system actually kept water off her property until it was altered in 2009 by the Association. (CP 205).

Her proof shows the negative consequence of the Association's act. Petitioner suggests her remedy is to require Respondent homeowners to individually abandon the community drainage system that was working well until September 2009 – rather than target the entity which allegedly caused the system to fail.

C. Easements.

1. Although the Petitioner Attacks Various Easements Relating to the Drainage Plan, Her Real Attack is on the Drainage Plan Itself, Which Was Indisputably Not Created by the Respondents.

At the trial court level, Petitioner argued that she was not attempting to terminate the drainage easements that burden these Respondents' respective properties pursuant to the plats. (CP 401). However, in her appellate brief, the Petitioner immediately argues that the drainage easements on the Respondents' respective properties are invalid. (Pet'r's Br. p. 16). Arguments not raised in the trial court generally are not considered on appeal. *Wingert v. Yellow Freight Sys., Inc.*, 146 Wn.2d 841, 853, 50 P.3d 256 (2002). Thus, the Petitioner cannot attack these easements on appeal.

All homeowners in the subdivision, including the Petitioner and every Respondent, unquestionably purchased their lots subject to the overriding plan for a drainage system pursuant to the plats, CC&Rs, and drainage agreements. (CP 76; 82; 94; 248; 331). The Petitioner strains mightily to invalidate and undermine the various plats, easements, CCR's, and Drainage Agreements, which are the Real Estate underpinnings of the drainage system, and affect Petitioner, all of the Respondents, and every other homeowner in the various associations of the Qualchan Hills Development. In order to appropriately attack these real estate rights, a

party must do so through the legal means of a quiet title action per RCW 7.28.010, which would enable all interested parties to appropriately respond. Petitioner has not done so. (CP 624-31).

The standing requirement of RCW 7.28.010 is a claim for “ownership” and a “right to possession.” In *Kobza v. Tripp*, 105 Wn. App. 90, 95, 18 P.3d 621 (2001), a Spokane easement case, it was stated that the quiet title claimant must be “. . . in peaceable possession or claiming the right to possession of real property” The Petitioner makes no claim of right of ownership of the drainage easements across Respondents’ individual lots.

In order to change easement restrictions in deeds of lot owners, “vendees” are “necessary parties” who must have participation in a bona-fide quiet title action. Any judgment regarding title has no effect on necessary non-parties. *Sophie v. Kane*, 32 Wn. App. 889, 896-897, 650 P.2d 1124 (1982). If, in this case, Petitioner actually seeks a “crazy-quilt” judgment of vacated drainage easements against some, but not all of the Qualchan lot owners subject to those easements, then Washington’s quiet title law should be applied to stop such an effort.

2. If the Court Was to Actually Use This Intentional Trespass Case Rule on the Validity of the Entire Subdivision's Real Estate Rights It Will Find that the Respondents' Properties are Burdened by Drainage Easements With Which They Cannot Interfere.

A party may create a private easement by including the grant in a plat. *Rainier View Court Homeowners Ass'n, Inc. v. Zenker*, 157 Wn. App. 710, 719, 238 P.3d 1217 (2010). No particular words are necessary to create an easement so long as the language used shows an intent to grant with terms that are certain and definite. *Rainier View Court*, 157 Wn. App. at 720, 238 P.3d 1217.

The interpretation of an easement is a mixed question of law and fact. *Rainier View Court*, 157 Wn. App. at 719, 238 P.3d 1217. What the original parties intended is a question of fact and the legal consequence of that intent is a question of law. *Id.* Where the facts are undisputed and reasonable minds could not differ, the issue may be determined as a matter of law. *State v. Clark*, 129 Wn.2d 211, 225, 916 P.2d 384 (1996).

The Petitioner's argument that the plats intended to grant drainage easements to a non-existent entity is directly contrary to the undisputed evidence. The "Qualchan Hills Planned Unit Development Homeowners Association" referenced in the Final Planned Unit Plat and the Phase Two Plat was the same entity as the already existing nonprofit corporation Qualchan Hills Homeowners Association.

The Qualchan Hills Planned Unit Development Homeowners Association CC&Rs were recorded on November 19, 1991 and required the establishment of a homeowners association which was defined as "QUALCHAN HILLS HOMEOWNERS ASSOCIATION, a corporation formed under the General Nonprofit Corporation Law of the State of Washington, its successors and assigns." (CP 232-33). The Qualchan Hills Homeowners Association was then formed as a nonprofit corporation on November 21, 1991. (CP 169).

Both the Qualchan Hills Final Planned Unit Development Plat, recorded on May 19, 1992, and the Qualchan Hills First Addition Phase Two Final Planned Unit Development Plat, recorded on August 24, 1994, granted drainage easements (including the drainage depressions) as shown on those respective plats to the Qualchan Hills Planned Unit Development Homeowners Association (i.e. Qualchan Hills HOA).(CP 76; 82). Both plats also stated that the plats "shall be a covenant to run with the land." (CP 76; 82).

The Overlook HOA CC&Rs recorded on February 28, 2001 reaffirmed the existence of the drainage easements: "Easements for installation and maintenance of . . . drainage facilities are reserved as shown on the recorded plat." (CP 330).

On or around July 30, 2001, Defendant Qualchan Hills HOA and Overlook HOA entered into a “Joint Drainage Agreement for Qualchan Subdivisions” establishing Drainage Districts across both Associations to unify the maintenance and repair of the drainage system that serviced the development. (CP 102-103). The Agreement established perpetual, non-exclusive, reciprocal, and blanket easements to all applicable lots within each Drainage District . . . "so that the use of the drainage areas and facilities in each Drainage District is available to all applicable lots within the Drainage District perpetually." (CP 103). The Respondents and Petitioner are in the same drainage district, along with other lot owners who are not parties to this lawsuit. (CP 104).

The Agreement further established an incorporated Drainage District Board to be responsible “for all decisions concerning the Drainage Districts,” including maintenance and repair decisions. (CP 248). The Agreement established that each homeowner association “shall hold the title or an easement to the drainage area lands and facilities thereon, which fall within that association’s plat.” (CP 248).

The drainage system in the drainage district at issue here is and has been entirely owned, maintained, and controlled by entities other than these Respondents. The system serves and burdens the lots of the Petitioner, the Respondents, and of others who are not even parties to this

lawsuit. Such lot owners do not have the ability, duty, or right to alter those easements. (CP 76; 82; 94; 95; 248; 330; 331).

D. Appellant Also Fails to Establish a Genuine Issue of Material Fact Regarding Her Intentional Trespass Claims Against the “Bolan Avenue Respondents” Lee and Sedco for their Alleged “Black Pipes.”

The legal authority and arguments set forth above apply equally to Petitioner’s claims against Respondents Lee and Sedco. Like all other lot owners in the subdivision, both purchased their lots subject to the pre-existing, required, and approved subdivision drainage system. The Petitioner’s proof against all the Bolan Avenue Respondents is undifferentiated. She claims that in 2009, black pipes were installed by the Bolan Avenue Defendants and that those pipes run to a point very close to Pender Lane and sometimes cause water to accumulate on a different area of her property: the driveway and garage. (CP 206-07, ¶ 20).

There is no evidence that Respondents Lee or Sedco installed those alleged black pipes. In fact, neither Lee nor Sedco installed any black pipes on their properties in 2009. (CP 325-26; 337). The Petitioner claims that Respondents Lee have had “black pipes” on their property since at least 2006. (Pet’r’s Br. p. 13). However, the Petitioner does not allege any damage occurred until 2009. (Pet’r’s Br. p. 14). It is undisputed that the Lees have never installed or altered any “black pipes.” (CP 325-26). Thus,

the Lees' alleged "black pipes" could not be responsible for any of the Petitioner's claimed damages.

In addition, Petitioner's purported expert testified regarding the alleged black pipes:

In some cases these drain pipes extend down slope above ground to *common land*; in some cases the black pipes were buried as they exit the roof downspouts, and the final disposal of the outfall is *uncertain*.

(CP 177-78))

There are no specific facts in evidence that water from alleged black pipes on Respondents Lee and Sedco's properties reaches the Petitioner's property. In addition, they do not have a duty or the ability to alter the drainage system based on the plats, CC&Rs, and Joint Drainage Agreement. (CP 76; 82; 94; 102-04; 248). Further, as stated above, the Petitioner has not established the natural water flow that occurred prior to the installation of the alleged black pipes or that the current flow is substantially greater.

There is no evidence that Respondents Lee or Sedco have committed an intentional act. There is no evidence of foreseeability, and there is no evidence of substantial damage. Therefore, Respondents Lee and Sedco were also entitled to summary judgment dismissing the Petitioner's claims against them with prejudice.

E. The Respondents Are Not Liable For The Acts of their Incorporated Homeowners Associations.

A corporation is treated as a separate legal entity and its liabilities are not attributable to its owners and officers. *Rapid Settlements, Ltd. v. Symetra Life Ins. Co.*, 166 Wn. App. 683, 692, 271 P.3d 925, 930 (2012). Qualchan Hills HOA is a nonprofit corporation UBI # 601352866. (CP 169). Overlook HOA is not even a party to this lawsuit. (CP 624). These respondents are merely individual lot owners and are not individually liable for the actions of their respective homeowners associations. They are not officers or directors of their respective homeowners associations. (CP 30; 36; 39; 46; 50; 57; 62; 67; 71).

IV. RESPONDENTS' MOTION TO STRIKE THE AFFIDAVITS OF MAUREEN ERICKSON AND JOHN DELEO.

At the trial court level, Respondents objected to the admissibility of the Affidavits of Maureen Erickson and John Deleo. (CP 312-13). Respondents re-assert those objections and incorporate them into this brief.

Declarations must be made on personal knowledge, set forth facts that would be admissible in evidence, and show the affiant is competent to testify on the matter. CR 56(e); *Ebel v. Fairwood Park II Homeowners' Ass'n*, 136 Wn. App. 787, 790, 150 P.3d 1163 (2007).

In the context of a summary judgment motion, an expert must support his opinions with specific facts. *Rothweiler v. Clark County*, 108 Wn. App. 91, 101, 29 P.3d 758 (2001); *See also, Price v. Seattle*, 106 Wn. App. 647, 656–58, 24 P.3d 1098 (2001). A court will disregard expert opinions where the factual basis for the opinion is found to be inadequate. *Id.* An opinion of an expert which is simply a conclusion or is based on an assumption or speculation is not evidence which will take a case to the jury. *Melville v. State*, 115 Wn.2d 34, 41, 793 P.2d 952 (1990). The source documents from which the witness draws his “facts” that are not in the record constitute hearsay and do not meet the requirement of CR 56(e). *Melville*, 115 Wn.2d at 36, 793 P.2d 952.

A fact is an event, an occurrence, or something that exists in reality. *Grimwood*, 110 Wn.2d at 359-60, 753 P.2d 517 (citing *Webster's Third New Int'l Dictionary* 813 (1976)). It is not supposition or opinion. *Id.* (citing 35 C.J.S. *Fact* 489 (1960)). The “facts” required by CR 56(e) to defeat a summary judgment motion are evidentiary in nature. *Id.* Ultimate facts or conclusions of fact are insufficient. *Id.* The court may not consider inadmissible evidence when ruling on a summary judgment motion. *Ebel*, 136 Wn. App. at 790, 150 P.3d 1163.

The Affidavit of Maureen Erickson references public documents obtained from Freedom of Information Act requests, but it does not

identify those records nor indicate whether they are in the record. (CP 204; 205-06, ¶¶ 11, 18-19). Those references are hearsay and should be excluded. The Affidavit of Maureen Erickson also contains the following conclusory statements lacking foundation that should be excluded:

- . . . “it was also planned and intended that storm water drainage would eventually be channeled into the drainage easement on my property . . .” (CP 206, ¶ 19).
- “The storm system above my property that was completed in 2010 is anything (sic) a natural condition.” (CP 208, ¶ 21).
- “It is obvious there (sic) were all designed to accumulate and channel water from the lots owned by the Bolan Avenue Defendants.” (CP 208, ¶ 21).

The Affidavit of John Deleo references:

- “Review of drainage plans made available by the City and Developer’s Consultant, (not all documents published by the Consultant are available) indicates that direct connection of roof drains to downslope areas was not anticipated by the design engineer to transport storm water from the residential lots.” (CP 178, ¶ 6)
- “Based on a review of the drainage plans made available, it does not appear that the design engineers anticipated direct connection of roof drains and driveways to downstream common areas.” (CP 176-77, ¶ 6)

Those “drainage plans” are not identified and there is no indication that they are in the record. Those references are hearsay and should be excluded. Mr. Deleo cannot testify as to what was anticipated by the design engineer.

In addition, the Supplemental Declaration of Mr. Deleo contains the following conclusory statements lacking foundation that should be excluded:

- “. . . each of those lot owners (Bolan Avenue Defendants) has been included as a defendant because their lots are located in the ‘drainage basin’ referred to above and each contributes excess drainage to the Erickson Property at a higher rate than would occur naturally . . .” (CP 416, ¶ 7)
- “. . . it is my opinion that the Bolan Avenue Defendants have been properly identified as water from all of their properties is accumulated from their roofs, other impervious surfaces, and yards in a manner that would not naturally occur. . . “ (CP 415, ¶ 5).

There is no evidence of the natural accumulation on or drainage rate to the Petitioner’s property. Thus, there is no foundation for Mr. Deleo’s testimony regarding an increase in the natural accumulation or drainage rate. Mr. Deleo may not conclude, without factual basis, mere conclusory statements that "Defendants" contributed drainage water onto Petitioner's property. Additionally, these conclusory opinions make no attempt to identify the date and quantity of each water intrusion – nor the amount which came from each of Defendants' properties as required by Washington law.

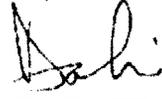
Mr. Deleo also improperly attempts to introduce the opinions of the City and Developer into evidence. (CP 184, ¶ 13). His testimony regarding the opinions of the City and Developer are inadmissible hearsay.

V. CONCLUSION

Based on the above and the record on appeal, the trial court did not err in granting Summary Judgment to the Respondents. The trial court did not err in entering a final judgment of dismissal with prejudice in favor of the Respondents. The trial court did not err in denying the Petitioner's Motion for Partial Summary Judgment. The Respondents request that the trial court's decision be affirmed.

DATED this 17th day of September, 2014.

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CERTIFICATE OF SERVICE

I hereby declare under penalty of perjury according to the laws of the State of Washington that the following statements are true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

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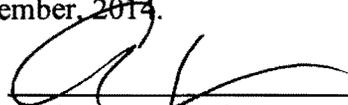
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