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No. 64478-5

COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

REBECCA FENSKE,

Appellant,

v.

STEVE TEGMAN and DEYONNE TEGMAN,
husband and wife, and the marital community thereof,

Respondents.

BRIEF OF RESPONDENT

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I. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

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- B. Did the Trial Court Base its Decision to Deny Diminution of Value Damages On Substantial Evidence?
- C. Did the Trial Court Apply the Correct Measure of Damages in Relation to Appellant's Diminution of Value Claim?

II. RE-STATEMENT OF THE CASE

A. Factual Background.

Rebecca Fenske, a licensed landscape architect with experience in drainage systems, bought and developed her Kirkland residential property in 1985. CP 4; RP III 44:23-51:2. At that time, the land abutting the western border was undeveloped. CP 4. The Fenskes' drainage system collected the rainwater and groundwater that landed on her property, combined it with water that flowed onto her property from uphill and adjacent properties, and discharged it through two underground pipes onto the property to the west. CP 4.

A home was built on what became the Tegman property in 1988 by Markland Properties. CP 4. Ms. Fenske observed the developer constructing the drainage system which tied her system into the drainage

system for the new development. RP II, 56:17-59:4. She noted at that time that the drainage system was defective in that low quality pipe was used and there were numerous right angles, with no provision for cleanouts. RP II, 58:2-58:20. Ms. Fenske took pictures of the system for future reference. *Id.* Later that year, a bulldozer crushed one of the pipes which resulted in water backing up into Ms. Fenske's basement, causing flooding. RP III, 31:1-31:18. She reported the problem to the contractor and repairs were made. RP II, 58:18-59:7. However, no changes were made to correct the defects in the existing system. *Id.*

The Tegmans bought the western property in 1989. The problematic drainage mechanism did not appear on any plans or records in relation to the Tegman property, other than those in Ms. Fenske's possession. RP III, 44:22-45:16. The Tegmans had no knowledge that this system existed. RP III, 75:17-76:16.

It was seventeen years later, during the record-setting rains of the winter of 2005-2006, that Ms. Fenske's basement became flooded. Ms. Fenske called her neighbor, Bruce Tegman, to help. RP III, 60:20-63:5. He brought a pump and helped the Fenskes try to alleviate the flooding. *Id.*

At a later date, Ms. Fenske and the Tegmans agreed to allow a drainage company to try to determine the source of the drainage problem.

After the company performed some initial testing, Ms. Fenske reported that she believed the inadequate drainage mechanism installed by Markland was the cause. RP III, 77:2-78:16.

The Tegmans tried to negotiate with Ms. Fenske to address the flooding issue in a way that was least impacting on both properties. The nature of the properties was such that repair on the Tegmans' side would be much more expensive and would impact their property to a greater degree. However, after some time Ms. Fenske would not agree to any proposal that involved the use of her land. Negotiations reached a standstill and Ms. Fenske filed suit against the Tegmans. The issue of liability was disputed.

B. Fenske Demanded Damages and Injunctive Relief.

Ms. Fenske brought suit against the Tegmans on December 19, 2007, alleging strict liability, negligence, and requesting injunctive relief. CP 1-8. Ms. Fenske did not allege nuisance or trespass. *Id.* Ms. Fenske alleged that the periodic negligent flooding of her basement damaged her personal property, including travel photographs, she and her ex-husband's art, and used clothing which had been planned for donation to charity. *Id.* These personal items were stored in cardboard apple boxes or bags on her basement floor. RP II, 59:8-59:25. In addition, Ms. Fenske alleged that she had suffered loss of use of the basement during any heavy rains since

2005. CP 1-8. Ms. Fenske also alleged that the value of her property was permanently diminished because of water periodically entering the basement during heavy rains. *Id.* Ms. Fenske also requested injunctive relief. CP 4-5. Ms. Fenske's complaint made clear that she believed full remediation of the problem was possible. *Id.* There can be no serious dispute that Ms. Fenske envisioned a full repair and improvement of the existing system between the two properties from the beginning of the litigation.

After the complaint was filed, the Tegmans provided multiple proposals to have the repairs done on the Fenske property. There was never any dispute that the system between the two properties would be repaired, only as to where the repair would take place, and who would pay for the repairs. Unfortunately, no agreement could be reached and litigation continued.

C. Partial Summary Judgment.

On May 22, 2009, the trial court granted partial summary judgment in favor of plaintiff. CP 14-15. The court's decision turned on whether or not the path of water from the Fenske property to the Tegmans' was a "natural drainway," under Washington riparian law. *Id.* The court ruled that the path of water to the central-west portion of the property line was the "natural drainway" and that the Tegmans owed a duty to provide

adequate drainage. *Id.* The court also found that the Tegmans had breached that duty under a theory akin to strict liability. *Id.* The court did not rule on whether Ms. Fenske was comparatively negligent. *Id.* The court did not order injunctive relief at that time. *Id.* In addition, the issue of damages was to be decided at trial. *Id.*

D. Trial.

A bench trial was held beginning August 25, 2009, before the Honorable Charles Mertel. RP I at 1. After testimony from Ms. Fenske and her expert witness, Richard Hagar, the trial court awarded Ms. Fenske \$1,500 for personal property damage, \$3,596 for clean up expenses, \$2,000 for labor costs, and \$3,000 for restoration of the property. CP 179. Judge Mertel found no evidence supporting loss of use of the property or diminished value of the property. *Id.* These two items of damages are the sole decisions on appeal.

E. The Trial Court Imposed Injunctive Relief That Led to Full Remediation of the Flooding Problem.

The trial court ruled that Ms. Fenske had no duty to allow repairs on her side of the property line and ordered the Tegmans to repair the problem on their side with the work to comply with existent code requirements. CP 180. The Tegmans immediately hired a contractor to perform the work. The work was approved and completed in a timely manner, pursuant to the court's order, by October 31, 2009. Since the

repair of the drainage system, there have been no reported flooding problems. Ms. Fenske makes no claim before this Court that flooding problems have continued. In fact, Ms. Fenske's counsel stated in closing argument that "we can trust that it [the property] will be put back into its pre-December 2005 condition." RP IV, 11:18-12:6.

F. Ms. Fenske Testified That the House Had a History of Flooding Prior to 2005-2006.

On cross-examination, Ms. Fenske admitted that her basement flooded in 1988, when a pipe was damaged during construction on the neighboring property. RP III, 31:1-31:7. She also admitted that in 2004, Roto-Rooter was called to her home to address a leaking basement, caused by an obstruction in a drain on Ms. Fenske's property. This was despite having also testified that there were no prior issues of flooding between 1988 and 2005. RP III, 31:19-32:24; RP II, 59:5-59:8.

G. Evidence Presented in Support of Ms. Fenske's Loss of Use Claim.

Ms. Fenske testified that she had continually used her basement for storage since the purchase of the home in 1985. In contrast, her counsel claimed that she was unable to use the basement for storage since December 2005. RP II, 30:12-30:18. Ms. Fenske also claimed that her family had "about three long term plans" for the basement, including using it as storage of tools as one would do in a garage. RP II, 51:3-52:3. Ms.

Fenske testified that the basement was eventually to be finished and used as additional living space. *Id.*; RP III, 17:7-18:7. However, between 1985 and 2009, no action was taken to finish the basement. There was no evidence that she would have finished the basement but for the flooding incidents. Ms. Fenske testified that the basement space had never been rented. RP III, 29:8-29:17. Ms. Fenske testified that she had no plans to rent the basement. *Id.*

Ms. Fenske testified that typical items were stored in the basement: “building materials and things we just used down there. Some sports equipment...whenever kids grow out of clothes and you put them in a bag and get ready to go for donation...then there were some apple boxes of just stuff that were ours. [sic]. Just memorabilia and what not.” [sic] RP II, 59:12-59:18. These items were stored on the floor and on shelving. RP II, 59:19-59:22.

Ms. Fenske alleged, with no evidentiary support, that the loss of use of the basement equated to \$800 per month. RP III, 28:22-29:24. Such loss was alleged to total \$35,200 by the time of trial. *Id.* She alleged that the amount should be calculated monthly, despite that she continued to use the basement for storage and that the water incursions were not continuous. She also provided no information as to the cost of a similar storage space. The figure was Ms. Fenske’s own estimate as to the rental

value of the unfinished basement. Ms. Fenske did not provide any evidence supporting this figure through her expert, Richard Hagar.

Moreover, Ms. Fenske testified that the use of a sump pump, installed in late 2008, had eliminated most of the effects of flooding in the basement. RP III, 16:3-16:9. Thus, Ms. Fenske had the ability to mitigate the effects periodic flooding before installation of the pump.

On August 26, 2009, Judge Mertel, counsel for both parties, Ms. Fenske, and the Tegmans visited the subject properties. CP 179:2 to 179:4. It was apparent from the visit that the basement was still being used as storage, albeit with items up on racks rather than on the concrete floor. Ms. Fenske's claims that the basement was used for living space, a workshop, or the like were not supported by the evidence on display at the subject property. RP III, 17:7-18:6. The trial court found that the basement had been historically used for nothing but storage, so there was no basis that Ms. Fenske was unable to use it as such. RP V, 30:15-30:24; CP 179.

H. Evidence Presented in Support of Ms. Fenske's Diminution of Value Claim.

Ms. Fenske alleged that the flooding problem caused a diminution in the value of her property, presuming a value of the home as of May 2009. RP IV, 40:19-42:3. The court allowed testimony "as to whether or not there will be continuing diminution of value, stigma

damages...assuming that this matter is corrected.” RP II, 18:18-18:24. Ms. Fenske’s expert witness, Mr. Richard Hagar, presented testimony that the value was reduced by 17-25%, assuming no repairs would take place. RP IV, 41:11-42:3. In monetary terms that was claimed to equal \$74,800 - \$110,000. *Id.* However, Mr. Hagar provided no opinion on diminution of value under the assumption that the property’s flooding issue could be remediated.¹ However, Mr. Hagar agreed that detrimental conditions “may or may not cause a material impact on value” and that they frequently do not. RP IV, 61:15-61:22.

Mr. Hagar first arrived at a base value for the property assuming the hypothetical situation that no flooding issue had ever happened. RP IV, 15:8-16:2. Mr. Hagar stated that such an appraisal “is based upon the hypothetical that the property is not impacted by any drainage issues...our appraisal is based upon it not being there. So hypothetically speaking, if you will, a non-impacted property.” RP IV, 7:18-8:3. Mr. Hagar described the analytical process in rendering his opinion:

[w]e said, we understand that there’s some degree of standing water inside. We’re valuing this property as if there were no

¹ It should be noted that Mr. Hagar’s report was never admitted into evidence. The only portion of Mr. Hagar’s opinion considered by the court is thus his testimony at trial. Fenske has inserted Mr. Hagar’s report into the record here as an attachment to her Declaration in Opposition to Defendant’s Motion to Limit Expert Testimony. CP 115-148. However, the report was never admitted and should not be considered in relation to the record on appeal.

drainage issues. That there was no standing water or anything like that in the basement. [sic]. Hypothetical. [sic]. And we state as such within the appraisal several times. We want to make sure everybody understands that.

RP IV, 15:13-15:21.

Mr. Hagar then attempted to find comparable properties in the area which he believed had similar value, with no flooding problems. RP IV, 15:8-16:7. Mr. Hagar found that the home was valued at \$440,000, "...under the hypothetical that there was no issues or flooding or problems with it." [sic]. RP IV, 16:14-16:18. Thus, Mr. Hagar's opinion involved valuing the property under the assumption that a flooding issue was absent.

The second step of this appraisal involved measuring the market's response to homes of a similar base value, in the same area, that have "some sort of physical damage or something less than perfect" RP IV, 17:1-18:17. The diminution of value was then stated in terms of a percentage of loss. RP IV, 18:21-19:22. Mr. Hagar reported that he could find no comparable homes with periodic flooding issues. RP IV, 18:1-18:4. Thus, the examples of homes with diminished value were based on hypothetical "fixer-upper" properties, not those with intermittent flooding issues. RP IV, 18:5-18:17.

Importantly, Mr. Hagar never analyzed the value of the home

under the assumption that the periodic flooding would be repaired. RP IV, 42:12-42:20; RP IV, 57:11-57:21; RP IV, 60:5-60:14. Mr. Hagar stated that it “can be” important to consider such repairs in looking at the effects of a detrimental condition. RP IV, 42:21-43:6. Mr. Hagar stated that “assuming that repairs were successfully completed and that there was a new improved system in place...” could lead to a “different market study.” *Id.* Mr. Hagar was not asked to analyze that scenario. *Id.* However, Ms. Fenske had always presumed that a full remediation of the flooding was needed and possible. CP 5-6. She testified at trial that she knew of a way to “easily” repair the flooding problem that would reflect the “best of all possible worlds.” RP III, 82:17-83:17. In addition, there is no dispute that the current system has resulted in a full remediation of the flooding issue and an improvement of the drainage system over and above its pre-2005 status.

Mr. Hagar also testified that the requirement to disclose flooding problems at the time of sale, regardless of the passage of time, causes ongoing impact on the home’s price. RP IV, 20:7-21:9.² He also stated that the flooding in 1988 would require disclosure of flooding. RP IV, 48:5-48:11. Moreover, Mr. Hagar testified that *any* flooding event would

² Fenske asserts that her expert testified that her “mold” problems were required to be disclosed. Appellant’s brief at 28. However, there was no evidence of the presence of mold after cleanup, and Hagar did not state that mold was a condition of the house that was to be disclosed. RP II, 85:17-86:4; RP IV, e.g., 20:6-21:2.

lead to the same impact on value, whether it happened once or on multiple occasions. RP IV, 49:13-49:22. There was no evidence showing that such disclosure must indicate the frequency or nature of such flooding. RP IV, 20:6-21:10. In fact, Mr. Hagar testified that an answer on a disclosure form “just says has the property ever flooded or had issues. So that has to be answered that way.” [sic]. Mr. Hagar was not told of the prior history of flooding in 1988 and 2004. RP IV, 48:9-48:14. However, Ms. Fenske testified that the home had been subject to flooding problems in both 1988 and in 2004, so such disclosure would be necessary regardless of the events of 2005-2006. RP III, 31:1-31:7; RP III, 31:19-32:24.

Mr. Hagar opined that after a full remediation, a property’s value might be detrimentally affected only if it sold within five years, at the outside, after it was restored. RP IV, 45:16-45:25. However, Ms. Fenske testified that she did not intend to sell the home “for the foreseeable future,” stating that her family was “quite settled in.” RP III, 87:7-87:11. In fact, she testified that “I’ve been instructed by one of my children that if I ever plan to sell that she would do me bodily harm because she wants the house, so we’ll be keeping it.” RP III, 25:23-26:3. Thus, there was no evidence that the house would be sold within five years of remediation.

III. SUMMARY OF ARGUMENT

Ms. Fenske failed to meet her burden of proof at trial that she

suffered a loss of use of her basement beyond the trial court's award. She also failed to meet her burden of proof that there was any permanent reduction in the value of her property after the court-ordered repairs.

Ms. Fenske could have asked her expert to provide that evidence at trial, but she chose not to do so for tactical reasons. Instead, Ms. Fenske chose to claim the maximum possible damages to the value of the property by ignoring the fact that the property would be restored. On her instructions, Mr. Hagar created a hypothetical scenario in which the property was never restored and would have been sold within a few months of appraisal. His opinion was not in accord with the facts of the case or related to the proper measure of damages. At the same time, Ms. Fenske asked the trial court to order the Tegmans to perform a complete restoration of the property, and testified that she would not sell the house in the foreseeable future. Based on overwhelming evidence at trial, the proper measure of damages was applied by the trial court and Ms. Fenske's recovery was limited to the costs of restoration.

IV. ARGUMENT

A. Standard of Review.

When findings of fact and conclusions of law are entered following a bench trial, appellate review is limited to determining whether the findings are supported by substantial evidence, and if so, whether the

findings support the trial court's conclusions of law and judgment. *Holland v. Boeing Co.*, 90 Wash.2d 384, 390-91, 583 P.2d 621 (1978). Evidence is substantial if it is sufficient to persuade a fair-minded or reasonable person that the declared premise is true. *Nguyen v. Dep't of Health, Med. Quality Assurance Comm'n*, 144 Wash.2d 516, 536, 29 P.3d 689 (2001); *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wash.2d 873, 879-80, 73 P.3d 369 (2003). As the challenging party, Ms. Fenske bears the burden of showing that the findings are not supported by the record. *Standing Rock Homeowner's Ass'n v. Misich*, 106 Wash.App. 231, 243, 23 P.3d 520 (2001).

Here, findings of fact and conclusions of law were entered following a bench trial before the Honorable Charles Mertel. Thus, review is limited to a substantial evidence analysis. As will be discussed *infra*, the evidence was sufficient to persuade a fair-minded or reasonable person that neither loss of use nor diminution damages were supported by the evidence. Ms. Fenske has not provided any evidence showing that the findings were not supported by the record, beyond unsupported assertions. Instead, Ms. Fenske argues that because evidence exists on her side of the argument as well, judgment should have been entered according to her findings. This approach is the opposite of the appropriate standard of review. Ms. Fenske merely asks the Court of Appeals to replace the trial

court's findings with her own. This argument does not meet the required burden to overturn the trial court's decision.

B. Ms. Fenske's Appeal Presents a Mere Dispute of Fact with the Trial Court.

RCW 4.44.060 provides, in relevant part,

The order of proceedings on a trial by the court shall be the same as provided in trials by jury. The finding of the court upon the facts shall be deemed a verdict...

It is well-settled that if an appellate court "were of the opinion that the trial court should have resolved the factual dispute the other way, the constitution does not authorize this court to substitute its finding for that of the trial court." *Thorndike v. Hesperian Orchards, Inc.*, 54 Wash.2d 570, 575, 343 P.2d 183 (1959). In *Colella v. King County*, 72 Wash.2d 386, 433 P.2d 154 (1967), cited favorably by Ms. Fenske, an appellant assigned error to the trial court on the basis that its factual findings did not provide the proper weight to the appellant's evidence. The *Colella* court found that phrases such as " '[i]n determining,' 'in finding,' and 'in awarding' fall far short of meeting the requirements [citation omitted] by which a finding of the trial court may be questioned on appeal. The phrases are only invitations to us to read the record and second-guess the trial court."

Here, Ms. Fenske assigns error in relation to the Court's "not

awarding,” damages in relation to loss of use and diminution of value claims. Appellant’s Brief at 13. Ms. Fenske assigns error because the “trial court’s finding lacks any support in the record.” Appellant’s Brief at 13. Ms. Fenske claims that “the trial court determined that Ms. Fenske could not recover the diminution in value of her residential property....” *Id.* All of these terms indicate that Ms. Fenske’s appeal is a dispute of the factual findings by the trial court. Moreover, substantial evidence was presented at trial that supported the trial court’s findings.

C. Substantial Evidence Supported a Denial of Damages for Loss of Use.

Loss of use damages were awarded to Ms. Fenske in the form of compensation for storage of her mother’s furniture. CP 179; RP V, 29:29-30:2. Compensation for loss of other alleged uses (living space, workshop) was not awarded, as the facts before the trial court plainly showed that Ms. Fenske used the basement only for storage before December 2005, and had continued to do so since that time. The trial court heard testimony from Ms. Fenske that she used or intended to use the basement for other purposes outside of storage. The site visit disproved her other loss of use claims, as it was clear that the basement was only being used for storage. She never claimed that but for the flooding, she could have finished the basement. Additionally, she provided no support for her claim that the basement’s rental value was

\$800, particularly since it had never been rented. Her expert did not provide an opinion as to rental value. Thus, the evidence substantially supported a denial of a loss of use claim, because a reasonable person could find that such evidence did not support a loss of use claim. Ms. Fenske's allegations to the contrary are mere factual disputes with the trial court.

D. The Trial Court Applied the Correct Measure of Damages With Respect to Diminution of Value and Substantial Evidence Supported a Denial of Ms. Fenske's Claim For Such Damages.

Even under a *de novo* review, the correct measure of damages was applied at trial. Ms. Fenske contends that diminution of the value of her property should have been awarded because the Tegmans' negligence under strict liability had not been remediated until a short time after the trial. However, Ms. Fenske misreads case law, which provides a bright-line rule for the measure of damages in similar cases.

Under Washington law,

In determining what is the applicable rule for measuring damages in cases like the one before us [negligent flooding], one of the first questions is whether the damage to the property is permanent, or whether the property may be restored to its original condition. If the injury is permanent, the general rule applicable is the difference between the market value of the property immediately before the damage and its market value immediately thereafter. **If, however, the property may be restored to**

its original condition the measure of damages is the reasonable expense of such restoration, and in a proper case the loss of use or of income therefrom for a reasonable time pending such restoration.

Harkoff v. Whatcom County, 40 Wash.2d 147, 152, 241 P.2d 932, 934 (1952). The word “may” in the rule as stated in *Harkoff* indicates that where there is a possibility of restoration, it must be considered in calculating damages. Where both parties agree that a property may be restored, as is the case here, damages are limited to restoration costs. There was no evidence at trial that the damage was permanent. Here, the trial court correctly considered damages assuming that the property could be restored. RP II, 18:18-18:24.

Washington cases uniformly hold that a plaintiff is entitled to “stigma damages” in addition to the costs for restoration or repair only where damage to real property is permanent. See *Pugel v. Monheimer*, 83 Wash.App. 688, 692, 922 P.2d 1377 (1996) (determining that withdrawal of building's lateral support permanently damaged marketability, even after repairs); see also *Grant v. Leith*, 67 Wash.2d 234, 237, 407 P.2d 157 (1965) (sustaining an award for restoration and permanent depreciation after repair was insufficient to make plaintiff whole). In *Mayer v. Sto Industries, Inc.* 123 Wash.App. 443, 98 P.3d 116 (2004) partially overruled on other grounds, *Mayer v. Sto Industries, Inc.*, 156 Wash.2d

677, 132 P.3d 115 (2006), the plaintiff-homeowners sued a siding manufacturer, and others, for violations of Consumer Protection Act (CPA) and Product Liability Act (WPLA), after water penetrated exterior of home causing dry rot. The court found that a stigma damages instruction was proper only where the effect of repair was considered: “[t]he Mayers' expert opined that **even after repair**, prospective buyers will pay less than the value because of the required disclosures.” *Id.* at 464 (emphasis added). Similarly, in *Pugel v. Monheimer*, where a plaintiff sued for damage to supporting structures on his property, the plaintiff “presented the testimony of an expert witness that the property, **even after the repair of the physical damage**, had lost market value because of the effect that the damages and repairs would have on the perceptions of potential buyers in earthquake-conscious Seattle.” *Pugel* at 690 (emphasis added).

The Restatement of Torts echoes the rule that property must be valued with consideration of repairs. Restatement 2d, Torts § 928 (1979), states that:

When one is entitled to a judgment for harm to chattels not amounting to a total destruction in value, the damages include compensation for (a) the difference between the value of the chattel before the harm and the value after the harm or, at his election in an appropriate case, the reasonable cost of repair or restoration, **with due allowance**

**for any difference between the original
value and the value after repairs....**

(emphasis added). Cases in other states confirm the standard that stigma damages are only available after repair or restoration costs are considered. *Aas v. Superior Court*, 24 Cal.4th 627, 12 P.3d 1125 (Cal. 2000) (recognizing that “stigma damages” represent the residual loss of market value after repairs have been made); *Pflanz v. Foster*, 888 N.E.2d 756 (Ind. 2008) (Stigma damages were warranted where claimant demonstrated that an imperfect market rendered her property less valuable after remediation of environmental contamination, despite complete restoration).

Ms. Fenske argues that “determination that the property can be restored does not absolutely dictate what damages can be recovered,” relying on *Brickler v. Myers Const., Inc.*, 92 Wash.App. 269, 273, 966 P.2d 335, 337 (1998); Appellant’s Brief at 25. In *Brickler*, the plaintiff’s septic system was faulty, and the family lived with the defective system for some time before bringing suit. The *Brickler* court noted in dicta that the family might be entitled to diminished value damages of 10% of the value of the home at trial, as noted by Ms. Fenske. Appellant’s Brief at 25. However, Ms. Fenske omits the court’s full comment, which supports the need to consider repair before assessing diminution damages:

Viewed in the light most favorable to the

Bricklers, the evidence shows that they (a) lost the use of major parts of the home for 26 months; (b) repaired part of the problem, using \$13,187 of their own money; and (c) **were left, after repairs, with a home that had only 90 percent of its value.** They would not be made whole unless they received *all three* of these damage items, and thus damages for loss of use did not duplicate the other items.

Brickler, 92 Wash. App. at 273 (emphasis added). Thus, “the determination that the property can be restored” does “absolutely dictate” that restoration and repair *must* be considered before awarding diminution of value damages. *Id.* Ms. Fenske ignores this bright-line rule.

Here, there is no dispute that Ms. Fenske’s property has been completely restored, and even improved, after repairs were made on the Tegmans’ property. However, Ms. Fenske’s expert witness, Richard Hagar, provided no opinion as to the value of the property after repairs had been completed. The trial court heard this testimony and found it insufficient to support a diminution in value claim. Restoration costs were the proper measure of damages. Because the majority of the restoration costs were borne by the Tegmans, Ms. Fenske’s restoration costs were limited to those incurred in the damage to the property’s French drain and other cleanup costs. CP 179. The trial court’s decision was proper.

E. Diminution of Value Damages Must be Analyzed in Consideration of Prospective Restoration.

Ms. Fenske relies heavily on *Colella*, 72 Wash.2d at 393-94, for the contention that “awarding plaintiff restoration damages would be worthless” and that permanency *may* be found if there is a delay in repair. Appellant’s Brief at 24. The facts of that case are similar to those here: a landowner sued the county for negligently creating a diversion of water on to his property, over which he had no control, as the source of the water was not on the landowner’s property. Ms. Fenske ignores that the *Colella* court confirmed the well-settled rule that where “the property may be restored to its original condition the measure of damages is the reasonable expense of such restoration...” and not the difference in market value before and after the tort. *Id.* at 393. In addition, the *Colella* court did not award diminution of value damages in the absence of permanent damage. Here, Ms. Fenske provided no evidence of permanent damage and in fact “trusted” that the property would be returned to its pre-flood state. RP IV, 11:18-12:6. Thus, a diminution of value award was inappropriate under well-settled Washington law.

Moreover, the *Colella* court fashioned a remedy similar to that ordered by the trial court here. The court ordered that the County would restore the property to its original condition in 45 days, and loss of use damages would be awarded at a later trial. The court ruled that diminution of value damages would not be available if the property were restored. *If*

the County failed to restore the property in the court's timeframe, then the plaintiff would be entitled to a trial on loss of use and diminished value. *Id.* at 395-96. Moreover, as discussed in section IV. D., *supra*, the plain language of the rule on real property damages allows for prospective or possible repairs to be included in calculating damages. Thus, Washington courts hold that "stigma damages" are unavailable where prospective repairs will result in full restoration of a property.

Ms. Fenske argues under *Woldson v. Woodhead*, 159 Wash.2d 215, 219, 149 P.3d 361, 363 (2006) that the time for measuring damages to real property, regardless of the possibility of restoration, should be at the time of trial. In *Woldson*, the plaintiff complained that fill dirt on an adjacent property cracked his retaining wall over a period of decades. *Id.* First, that case involved a distinct claim of trespass, where a rock wall was said to have been damaged in a continuous manner by the presence of fill dirt on an adjacent property. Here, Ms. Fenske did not allege nuisance or trespass, as the torts alleged here were distinct events of negligent flooding, not the ongoing presence of water. CP 9-12. Second, *Woldson* held only that the plaintiff was entitled to the *cost of restoration* of the damage caused by fill dirt pressing against the plaintiff's wall during the applicable limitations period. *Id.* at 363. No diminution of value during that period was claimed or awarded. Thus, the case is inapposite here. In

fact, the trial court here followed a similar rule as in *Woldson*, and awarded damages for restoration of the Ms. Fenske property for damages incurred up to the time of trial.

F. Fenske’s Expert Could Have Opined on Diminution in Consideration of a Full Restoration.

Ms. Fenske argues that her expert could not opine on diminution of value based on “some sort of” restoration of the drainage system. Appellant’s Brief at 28. Expert witnesses may provide opinions based on hypothetical assumptions, provided they are based on facts in the record. *Helman v. Sacred Heart Hospital*, 62 Wash.2d 136, 150, 381 P.2d 605, 613 (1963). Ms. Fenske cites no authority that an expert may not opine on a hypothetical assumption. ER 703. Moreover, Mr. Hagar’s opinion was based on several sets of hypothetical facts. First, Mr. Hagar analyzed the value of the Fenske property as of May 2009, under the hypothetical assumption that it had not suffered any flooding. Then, Mr. Hagar analyzed homes that were hypothetically similar to Ms. Fenske’s property, including those with no similar flooding events. Finally, Mr. Hagar opined on diminished value based on a hypothetical sale of an unrepaired home in May 2009. Mr. Hagar was clearly able to opine based on hypothetical scenarios.

Here, there is no dispute that the drainage problem was to be repaired in full. Since the beginning of the lawsuit, Ms. Fenske presumed

that such repair would take place. The trial court ordered the repair to take place on the Tegmans' property. There is no question that the restoration was performed and that the property was restored. Mr. Hagar could have easily extended his analysis of the Fenske property to include consideration of the property after restoration, but he was not asked to do so and was not provided with the relevant information. A reasonable person could find that the absence of an analysis that considered restoration did not support an award for diminution of value. Thus, the court's findings were based on substantial evidence.

G. Any Diminution of Damages Claim Related to A Future Sale Is Unsupported by the Record.

Experts may not base opinions on facts that are not supported by the record. *Helman v. Sacred Heart Hospital*, 62 Wash.2d 136, 150, 381 P.2d 605 (1963). Here, Mr. Hagar provided an opinion that diminution of damages might linger on for several years even after repair. However, Ms. Fenske stated that she did not intend to sell the house at any time in the "foreseeable future." RP III, 87:7-87:11. Moreover, Mr. Hagar provided no actual figures in relation to such a "residual" loss of value. Thus, a reasonable person could find that there was no competent evidence supporting a post-restoration diminution of value claim.

H. Ms. Fenske Must Disclose Flooding Independent of Her Claims Against the Tegmans.

Ms. Fenske admitted that flooding incidents occurred on her property in 1988 and 2004 that were unrelated to any of the Tegmans' acts. Her expert testified that such events would require disclosure regardless of when they occurred. It follows that disclosure of flooding at the time of sale is required regardless of the 2005-2006 flood incidents. A reasonable person could have found that damages for the requirement to disclose additional flooding were not supported. Thus, substantial evidence supported a denial of a claim for such damages.

I. Ms. Fenske's Request for Diminution Damages is a Request for Double Recovery.

The doctrine of election of remedies, designed to prevent double recovery for a single loss, provides that if two or more inconsistent remedies exist, a party choosing one will be bound to the one remedy and precluded from asserting the others. *Bank of the West v. Wes-Con Development Co., Inc.* 15 Wash.App. 238, 243, 548 P.2d 563, 567 (1976). This is the rare case in which the doctrine applies. Plaintiff has argued that she is entitled to full remediation of her property and full compensation for damages to her property assuming no remediation was possible. These remedies are inconsistent. Ms. Fenske could have chosen to seek only damages and repaired the property herself. However, she

asked that the Tegmans be ordered to fix the problem. They were ordered to restore the property, which they did. Ms. Fenske now has a property in better condition than before the 2005-2006 flooding, and she has been compensated for her losses to the extent that they were supported by the evidence at trial.

If Washington courts followed Ms. Fenske's formulation of the law, a defendant in the Tegmans' position would be required to pay for full diminution of value whether or not a plaintiff's property is capable of being restored. This would allow plaintiffs to achieve a double recovery in any negligent flooding case in which there is a dispute about liability for repair or restoration. The length of time until resolution of liability could always be cited as a basis for the full recovery of diminution of value based on a hypothetical sale of the home before the restoration occurred. Plaintiffs could always recover both restoration and diminution damages even if full restoration was achieved. Such a result is contrary to common sense and Washington law.

V. CONCLUSION

For the reasons stated above, Ms. Fenske's appeal should be

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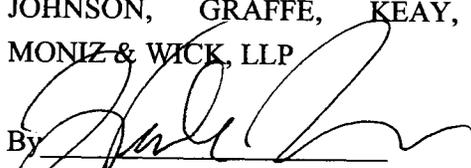
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denied in its entirety.

Dated this 29 day of April, 2010.

Respectfully submitted,

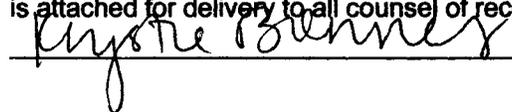
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By 

A. Clarke Johnson, WSBA #8280
Wade Neal, WSBA #37873

CERTIFICATION

I hereby certify that on 4-29-2010, I served electronically, deposited in the U.S. Mail, placed with ~~ABC Legal Messengers~~, and/or faxed a copy of the document to which this certificate is attached for delivery to all counsel of record.


Kyrste Bunnell