

NO. 65316-4

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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I. DAVID HONG, and DEL RAY MOBILE HOME PARK, L.L.C.,

Appellants,

v.

RICHARD J. and AVA M. SCHNEIDER, LLOYD R. and TINA C. MUSSELMAN, MARTIN and JEANETTE GROGAN, R/B HOLMAN TRUST, HYUNGIN P. MOON and JANE DOE MOON, his wife, T. HEUNISCH and JANE DOE HEUNISCH, his wife, ARMAN GOLCKH, LLC, ALLEN G. STORAASLI and JANE DOE STORAASLI, his wife, MICKAEL J. and KAREN L. BERG, DAVID C. and SANDRA J. RIPPENTROP, NOTRE DAME PROPERTIES THREE, MICHAEL A. BRICE and JANE DOE BRICE, his wife, and REDONDO BAY TRANQUILITY HOMEOWNERS ASSOCIATION,

Respondents.

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RESPONDENTS' BRIEF

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## I. INTRODUCTION

Appellants, David and Kim Hong and their limited liability company Del-Ray Mobile Home Park, L.L.C. (collectively, the “Hong”), filed an amended complaint against Respondents, Redondo Bay Tranquility Homeowners Association and all of its members (collectively, “RBT”), alleging negligence by RBT in the maintenance, design, construction and management of a neighborhood surface water drainage facility. CP 1-3. The drainage facility collects water from the street in the eastern part of the thirteen lot neighborhood named Redondo Bay Tranquility, stores it in two large collection vaults and then releases it into a natural ravine that runs toward the Hong’s property. CP 91-93, 142, 172, 176, and 254-256

The Trial Court granted summary judgment<sup>1</sup> to RBT, dismissing the Hong’s claims. CP 317-318. The Trial Court denied the Hong’s motion for reconsideration, concluding that nothing in the motion changed the Court’s “determination that [the Hong] failed at summary judgment to produce admissible evidence that

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<sup>1</sup> RBT’s Motion for Summary Judgment is at CP 11-29, with supporting evidence at CP 20-265. The Hong’s Response is at CP 274-280, with supporting documents at 266-273 and 281-307. RBT’s Reply is at CP 310-315.

the negligence of [RBT] was a proximate cause of the [Hong's'] claimed damages". CP 334.

## **II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

A. Whether the Trial Court erred by entering the order for summary judgment dated April 2, 2010?

1. Whether there is no liability by RBT under the Common Enemy Doctrine?

2. Whether, in the alternative, RBT acquired the right to discharge surface water by a Prescriptive Easement?

3. Whether injunction was properly denied because it would be inequitable to RBT, impractical to enforce and would violate the interests of the public?

B. Whether the Trial Court erred by entering the order denying reconsideration dated April 20, 2010?

4. Whether an assignment of error should be considered when it is not briefed.

5. Whether RBT should be awarded its attorney fees and costs for having to respond to a frivolous appeal?

## **III. STATEMENT OF THE CASE**

The Hong's sought damages from RBT for negligence in the maintenance, design, construction and management of a

neighborhood surface water drainage facility. CP 3. The Hongs claimed that their property had been damaged, that their use had been interfered with, and that the sensibilities of their tenants had been injured by the disposal of silt, debris and water to the Hongs' property by RBT. Id. The Hongs also sought an order (i) abating continued use of RBT's drainage facilities, (ii) that RBT's drainage facilities be tightlined into a drainage system on the Hongs' property, and (iii) that RBT hold harmless the Hongs from any further expense or damage from RBT's drainage facilities or negligent maintenance thereof. Id.

The individuals named as defendants in this litigation own the 13 lots in the neighborhood of Redondo Bay Tranquility (the "RBT Neighborhood") in Federal Way, Washington, and are all the members of the Redondo Bay Tranquility Homeowners Association. The Hongs own Del Ray Mobile Home Park, LLC, which owns the property in Des Moines, Washington, immediately north of, and more importantly downhill from, the RBT Neighborhood. CP 65.

When the RBT Neighborhood was developed in 1977, two separate drainage systems were constructed: one carried surface water from the west part of the neighborhood into a storm water

system; and the other (the "RBT Drainage System") carried surface water from the east part of the neighborhood into two successive holding tanks, which eventually discharged onto a rock pad in a natural ravine. CP 91-93, 142 and 176. The ravine, sometimes identified as a stream, traverses Lots 6-8 of the RBT Neighborhood. CP 176 and 186. Lots 7 and 8 are undeveloped. CP 87. The ravine collects surface water from the eastern part of the RBT Neighborhood plus other surrounding properties uphill from the RBT Neighborhood and drains toward the Hong's property. CP 142, 172, 254-256. When there is enough surface water collecting in the RBT Drainage System to discharge into the ravine, there is usually already water in the ravine from locations above the RBT Neighborhood. CP 83. All the water in the ravine runs toward the Hong's property where some of it enters a drainage system built by the Hong's. Id.

When the Hong's purchased their property in December 1986, surface water was already flowing naturally to it from the RBT Neighborhood. CP 2, ¶ 4. In fact, the Hong's property had an ongoing flooding problem nine years before the RBT Neighborhood was even platted (1968 and 1977 respectively). CP 140 and 184. Prior to 1998, a small drain and two pipes were installed on the

Hongs' property to carry water away from the ravine to a nearby creek and catch basin. CP 152. In 1998, the Hongs installed a concrete wall and replaced the drain at the bottom of the ravine with a larger catch basin and control structure connected to the two pipes. Id. During December 2005, there were some problems with the inlet of the catch basin overflowing, but no other problems were found to have been reported by the Hongs' own geotechnical engineer. Id.

Until this matter was brought to their attention by Dr. Hong on December 15, 2006, RBT was unaware of any obligation to maintain the RBT Drainage System. CP 31, 33, 65 and 84. King County was responsible for maintenance between at least 1984 and 1991. CP 188 and 192-196<sup>2</sup>. Within two weeks of Dr. Hong's notice, RBT contacted the City of Federal Way to inquire about RBT's obligations. CP 84 and 96. By February 1, 2007, two contractors inspected the system and gave recommendations. Id. RBT then had the RBT Drainage System cleaned on August 14, 2007, inspected again on September 6, 2007, and cleaned and inspected yet again on September 18, 2007. CP 70-76.

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<sup>2</sup> The RBT Drainage System was identified by King County as D90979. CP 190. The other drainage system in the RBT Neighborhood was identified as D90980. Id.

The Hongs filed their lawsuit in King County Superior Court on March 19, 2009, amended September 14, 2009. CP 1. After conducting discovery, RBT moved for summary judgment on the following grounds:

RBT's conduct was permitted by the Common Enemy Doctrine,

The Hongs are unable to prove proximate cause,

RBT's conduct was permitted by a prescriptive easement, and

Injunctive relief would be inequitable, impractical and in violation of the public interest.

CP14-15 and 125-132.

In response to RBT's motion for summary judgment, the Hongs provided a written statement from a geotechnical engineer, William Chang, P.E. CP 257-265. Mr. Chang made the following conclusion about the absence of any cleaning of the RBT Drainage System between 1991 and 2007:

This failure is negligent and likely was the cause of damage to Del Rey.

It is not shown that the retention tank was of sufficient size to retain the quantity of water it needed to hold during heavy northwest storms. Further study is required to make this determination.

CP 259. (emphasis added)

This was consistent with an earlier conclusion of Mr. Chang:

The system, ..., may have contributed to possible damages associated with debris flows or flooding emanating from the ravine; but this subject is difficult to evaluate further because the documents we reviewed do not contain information on this matter.

CP 159, ¶ 6. (emphasis added).

The Trial Court agreed with RBT that neither the Hongts nor Mr. Chang produced any quantifiable evidence that RBT was the proximate cause of the Hongts' alleged damage. CP 334.

#### IV. ARGUMENT

##### A. Standard of review.

Appeal of a grant of summary judgment is reviewed de novo with the Court of Appeals engaging in the same inquiry as the Trial Court. Bishop v. Miche, 137 Wash.2d 518, 523, 973 P.2d 465 (1999). An appellate court may affirm a trial court's disposition of a summary judgment motion on any basis supported by the record. Redding v. Virginia Mason Med. Ctr., 75 Wash.App. 424, 426, 878 P.2d 483 (1994). Once the moving party establishes that no genuine issues of material fact exist and that it is entitled to judgment as a matter of law, the burden shifts to the non-moving party to establish specific facts giving rise to a genuine issue of material fact. Schaaf v. Highfiled, 127 Wn.2d 17, 21, 896 P.2d 665 (1995). Conclusory statements and unsupported assertions cannot

defeat a motion for summary judgment. Herron v. Tribune Publishing Co., 108 Wn.2d 162, 170, 736 P.2d 249 (1987).

**B. There is no liability under the common enemy doctrine.**

This case is all about surface water, how it was and is being handled by RBT, and how it impacted and impacts the Hong, if at all. Surface water is essentially water from rain, melting snow and springs. Currens v. Sleek, 138 Wn.2d 858, 861, 983 P.2d 626 (1999). With limited exceptions, surface water is a common enemy against which anyone can defend themselves by disposing of the unwanted surface water, even if in doing so damage is caused to others. Id. The defense is applicable to claims of negligence and nuisance. Borden v. City of Olympia, 113 Wn. App. 359, 373, 53 P.3d 1020 (2002).

Because of the hardships of such a defense, Washington has adopted three exceptions to the common enemy doctrine:

- a. The landowner may not inhibit the flow of a watercourse or natural drainway.
- b. The landowner may not collect water and channel it onto a neighbor's land.
- c. The landowner must act in good faith and with due care to avoid unnecessary damage to the property of others.

Id. at 862-863 and 865.

The Hong's argue that the common enemy doctrine should not apply because they claim the water from RBT is not surface water because they claim it includes mud, silt and sediment. Appellants' Brief, p. 15. The Hong's reliance on Snohomish County v. Postema, 95 Wn. App. 817, 918 P.2d 1101 (1998) for their argument is misplaced<sup>3</sup>. In Postema, the court ruled it was inappropriate on summary judgment to conclude that the water in question was surface water, when there was evidence that it could have been water in a natural drainway or watercourse. Id. at 821-822. The court noted that the common enemy doctrine does not apply to water in a natural drain or water course, which is consistent with the first exception to the doctrine. Id. The court did not make its ruling based on the presence of silt, mud or sediment, but rather commented that there was an abundance of evidence of trespass that would prevent summary judgment under the common enemy doctrine. Id. at 822. Although the water in Postema was filled with sediment and silt, the presence of silt and sediment was not the basis of the court's ruling regarding the character of the water. Water that includes silt should be treated as surface water

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<sup>3</sup> The Hong's reliance on the out of state case of Long v. IVC Indus. Coatings, Inc., 908 N.E.2d 697 (Ind. App. 2009) is not binding on this Court, nor do the Hong's indicate why it should be considered persuasive.

subject to the common enemy doctrine. See Hedlund v. White, 67 Wash.App. 409, 836 P.2d 250 (1992), where sand and silt was deposited with drained surface water and without liability to the defendant based on the common enemy doctrine.

Next, the Hongs argue that the common enemy doctrine should not apply because the water collected from the street drainage catch basin should not be considered surface water. Appellants' Brief. P. 16. The Hongs cite no authority for this proposition and thus the Court is not required to address this argument. Saviano v. Westport Amusements, Inc., 144 Wn. App. 72, 84, 180 P.3d 874 (2008); RAP 10.3 (a)(6). Besides, surface water remains surface water even if it is collected in catch basins and conveyed to a natural drainage area. See King County v. Boeing Co., 62 Wash.2d 545, 384 P.2d 122 (1963).

1. There is no evidence that RBT inhibited the flow of a watercourse or natural drainway.

The first exception to the common enemy doctrine is not at issue because it typically applies only when a stream or drainway has been dammed. Currens, 138 Wn.2d at 862. There is no evidence or even an allegation that RBT inhibited the flow of a watercourse or natural drainway. Rather, the allegation is that RBT created an unnatural and excessive flow of water into an existing

ravine, which then flowed onto the Hongs' property along with silt and debris. CP 2, ¶¶ 5 and 6.

2. Although surface water was channeled by RBT, it was done through a permissible existing natural drainway.

The second exception is at issue because the surface water from RBT has been collected and channeled through the RBT Drainage System. However, there is an exception to the exception:

A landowner may direct and increase surface waters into pre-existing natural drainways by artificial means, so long as the water is not ultimately diverted from its natural flow onto the property of another.

Currens, 138 Wash.2d at 862; citing Laurelon Terrace v. City of Seattle, 40 Wash.2d 883, 246 P.2d 1113 (1952).

There can be no negligence for the diversion of surface water into an existing drainway, even if the diverted surface water increases the flow of water in the natural drainway, unless the increased flow causes the drainway to exceed its natural capacity. Laurelon Terrace, 40 Wash.2d at 893.

In Laurelon Terrace, the City of Seattle was dismissed on summary judgment from claims of damage caused by a flooding stream because there was no proof that the City's paving and diversion of surface water from a ditch into a stream caused the stream to exceed its capacity. Id.

Although the Honges claim they “complained of deposits of water exceeding the amount of surface water received by RBT,” they don’t make any reference to the record to support their claim. Appellants’ Brief, p. 16. Instead, the record includes evidence that the water in the ravine above the Honges already naturally flowed onto the Honges’ property causing flooding there before RBT was even developed. CP 140 and 184. There is no evidence in the record that the water channeled into the ravine by RBT caused the water already in the ravine to exceed its natural capacity and flow onto the Honges’ property.

The Honges cite to another out of state case, this time for the proposition that the common enemy doctrine will not protect an upland owner where that owner causes an obstruction to develop in an existing drainway that causes water to flow back onto the property of another. Harbison v. City of Hillsboro, 103 O. 257, 204 P. 613 (1922). Although this case is not binding on this Court, it is not inconsistent with Washington case law, but can be distinguished from the facts in the instant case. In Harbison, the City of Hillsboro flushed its streets clean with water that was brought in for that purpose, resulting in a combination of water and street sewage flowing onto a neighboring property when the storm

drains backed up. Id. Not only was the water used in the process not surface water as it would be considered in Washington, but the court there appropriately ruled that allowing the accumulation of sewage on the neighboring property was unreasonable. Id.

3. RBT acted in good faith and with due care to avoid unnecessary damage to the property of the Hongs.

It is the third exception that is most at issue in this case: whether RBT acted in good faith and with due care to avoid unnecessary damage to the Hongs' property. The third exception is essentially a negligence standard requiring evidence of a duty of due care, a breach of that duty and that the breach, if any, proximately caused the damages complained of. Borden, 113 Wn. App. 369. Negligence requires proof of duty, breach, damage and proximate cause. Curtis v. Lein, 150 Wash.App. 96, 206 P.3d 1264 (2009). Where evidence is insufficient to document unnatural runoff caused by the channeling of surface water, summary judgment is appropriate. Price v. Seattle, 106 Wash.App. 647, 24 P.3d 1098 (2001).

In Price, the City of Seattle was dismissed from a negligence action for surface water liability because the plaintiffs failed to provide any quantifiable evidence that there was an increase in the

flow of surface water after the City removed vegetation above their property. Id. at 656-658. The court there stated:

“the nonmoving party must set forth specific facts that sufficiently rebut the moving party's contentions and disclose that a genuine issue as to a material fact exists”.

Id., at 657.

In contrast, in Currens, the court found summary judgment inappropriate and questions of fact about whether the failure to comply with mitigation measures during a clearing project was a failure to act in good faith or with such care as to avoid unnecessary damage. 138 Wn.2d at 868. Similarly, in Borden, the court found summary judgment inappropriate and questions of fact about duty, breach and causation where the city helped developers design a storm water drainage system that caused ground water levels to become saturated causing damage to the plaintiff's property. 113 Wn. App. at 362-364 and 371-372.

In their complaint, the Hongs alleged that RBT was negligent in the maintenance, design, construction and management of the RBT drainage facilities proximately causing the Hongs damage. CP 3. The record clearly established that the RBT Drainage System was not designed or constructed by or for RBT, but rather by M.J. Treftz & Assoc. for the developers of the RBT

Neighborhood, which doesn't include any members of RBT. CP 142, (¶ 3.3) and 183. Furthermore, design and construction of the RBT Drainage System was approved by King County. CP 188. Thus, there is no issue of fact that RBT was not negligent in the design and construction of the RBT Drainage System.

The Hongs cite to two landslide cases to argue that causing dirt to flow on to the property of a neighbor is actionable: Peterson v. King County, 41 Wn. 2d 907, 252 P.2d 797 (1953); and 45 Wn.2d 860, 298 P.2d 74 (1954); and Kuhr v. Seattle, 15 Wn.2d 501, 131 P.2d 168 (1942). Both cases are distinguishable because they do not involve surface water.

Similarly, the Hongs rely on three sluicing cases for the same argument. Solastic Products Co. v. City of Seattle, 144 Wash. 691, 258 P.2d 830 (1927); Curtis v. Puget Sound Bridge and Dredging Co., 133 Wash. 323, 233 P. 936 (1925); and Wolten Grocery Co. v. Puget Sound Bridge and Dredging Co., 165 Wash. 27, 4 P.2d 863 (1931). Sluicing is a process of moving dirt with water. It was used to regrade certain hills in Seattle. The process of sluicing does not involve the diversion of surface water.

Finally, the Hongs' entire section in their Appellants' Brief on negligence is nothing more than a list of rule statements from cited

cases without any analysis as to how they apply to this case.

Appellants' Brief, pp. 9-11. The Court may disregard such discussion. Amalgamated Transit Union Local 587 v. State, 142 Wn.2d 183, 203, 11 P.3d 762 (2000); RAP 10.3(a)(6).

The real issues in this case are whether RBT had a duty to maintain the RBT Drainage System, whether there was a breach of that duty, if it existed, and whether that breach, if there was one, was the proximate cause of the Hong's' alleged damage.

(a) No Duty.

In response to RBT's motion for summary judgment, the Hong's did not offer any argument as to how RBT had a duty to maintain the RBT Drainage System after King County assumed that duty in 1984, and there was no evidence in the record of RBT being advised otherwise until the Hong's did so in 2006.

King County expressly assumed responsibility for maintenance of the RBT Drainage System on March 26, 1984, pursuant to King County Ordinance 2281. CP 188, 225-232, ¶ 8. In 1992, after the City of Federal Way incorporated in 1990, the City entered into an Agreement for Transfer of Drainage Facilities with King County by which the City assumed responsibility for all the facilities identified in the agreement. CP 198 and 207. Although

the RBT Neighborhood was within the boundaries of the new city, the RBT Drainage System was not listed among those transferred. CP 204-209. Accordingly, the City of Federal Way claims the RBT Drainage System was and is not its responsibility. CP 211 - 213.

However, until the Hongs brought this to their attention, RBT was never told by either the City or the County that RBT was responsible for maintenance of the RBT Drainage System. CP 31, 65 and 84. Consistent with these facts, the last known maintenance of the RBT Drainage System by King County was in 1991. CP 192-196.

Now, on appeal, the Hongs claim for the first time that the duty of RBT to maintain the RBT Drainage System arises out of King County Code ("KCC") §§ 9.08.040 and 9.12.025, King County Ordinance 2281, Federal Way Revised Code ("FWRC") 19.165.040 and 18.60.080, RCW 65.04.050 and the RBT plat map. Appellants' Brief, p. 12. Arguments raised for the first time on appeal need not be considered. RAP 2.5 (a); Almy v. Kvamme, 63 Wash.2d 326, 329, 387 P.2d 372 (1963). Even if the Court were to consider the Hongs' new arguments that RBT had a duty to maintain the RBT Drainage System, those arguments should not survive summary judgment for the following reasons.

While KCC § 9.08.040<sup>4</sup> defines the purpose of the King County Surface Water Management Program, it does not define or establish a duty for anyone. On the other hand, KCC § 9.12.025(A)(1)(z)<sup>5</sup> clearly prohibits the discharge of silt, sediment or gravel. However, this still doesn't address the issue of who is responsible for such discharges from the RBT Drainage System since King County expressly assumed the duty to maintain the system and there is no evidence in the record of that duty ever being transferred. Moreover, there is no evidence in the record of any silt, sediment or gravel being discharged from the RBT Drainage System.

The Hong's reliance on FWRC 18.60.080 and 19.165.040 is also misplaced. FWRC 19.165.040 applies to culverts in streams, not drainage systems. CP 236. FWRC 18.60.080 requires land divisions to provide adequate storm drainage, but also provides that such drainage shall then be dedicated to the city. CP 244.

Similarly, although King County Ordinance No. 2281 requires the developer of a drainage system to maintain it for the

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<sup>4</sup> See appendix to Appellants' Brief.

<sup>5</sup> See appendix to Appellants' Brief.

first year, it specifically allows for the County to assume such maintenance thereafter, as King County did with RBT. CP 230.

Finally, RCW 65.04.050 does not establish a duty to maintain a storm drainage system, but rather describes how an index of records shall be maintained by counties. While it is true that the RBT plat map includes an easement for storm drainage, it does not establish a duty to maintain the storm drainage system in anyone, or even ownership thereof. CP 183-186.

RBT does not disagree that a restrictive covenant on the face of a plat map is constructive notice to an owner or subsequent owner of property within the plat. However, in Hollis v. Garwall, 137 Wn.2d 683, 974 P.2d 836 (1999), a mining operation within a subdivision was stopped because the defendant also had actual notice of the same covenant. While RBT's plat map provides that the road within the plat is subject to an easement for storm drainage, it does not establish that RBT owns the RBT Drainage System. CP 183-186. The owners of the lots own the road, but nothing on the plat map indicates who owns the drainage system. Id. Also distinguishing this case from Hollis is that King County assumed responsibility for the RBT Drainage System with no evidence of that responsibility being transferred to RBT. CP 188.

In SEA Farms, Inc. v. Foster and Marshall Realty, 42 Wn. App. 308, 711 P.2d 1049 (1985), cited by the Hongs for support, the defendant was accused of negligently allowing silt to be deposited on the plaintiff's property as a result of the defendant's dredging activities. In that case, the defendant was clearly responsible for the very dredging operations causing the silt. RBT was not aware of any duty to maintain its drainage system until the Hongs told them so in 2006, at which point, RBT immediately investigated and took action, including cleaning the system.

Another case cited by the Hongs, Petit v. Dwoskin, 116 Wn. App. 466, 472, 68 P.3d 1088 (2003), did not involve summary judgment. While the court there recognized that negligence per se had been modified by RCW 5.40.050 to limit its application to statutes not at issue in this case, there is nothing about the Petit case that supports the Hongs' negligence action continuing. Petit was about a claim for negligence arising out of the collapse of a private deck based on duties imposed by a building code. 116 Wn. App. at 466. There is nothing in the record that establishes a duty on RBT to maintain the RBT Drainage System.

(b) No Breach.

Even if the Court were to find a duty for RBT to maintain the RBT Drainage System, there is no evidence that a duty was breached. RBT had no prior notice from King County or the City of Federal Way. The first notice RBT had of any assertion that it was responsible for maintaining the RBT Drainage System was December 15, 2006, when Dr. Hong delivered a statement from Dr. Hong and a letter from the City of Federal Way that the City claimed the system was owned by RBT. CP 33 and 50.

Within two weeks, RBT contacted the City of Federal Way to inquire about RBT's obligations. CP 84 and 96. By February 1, 2007, two contractors inspected the system and gave their recommendations. Id. By February 9, 2007, two City inspectors reviewed the situation and gave their suggestions, including the addition of more rock to the ravine to prevent erosion. CP 85 and 100. On March 9, 2007, the owner of Lot 8, where the rock would be put, was contacted by RBT asking for permission to do so. CP 65, ¶ 7. Such permission was never given. Id.

On May 21, 2007, RBT wrote to Dr. Hong advising him of their progress, including:

- i. That the RBT Drainage System would be checked and pumped that summer.

- ii. That his requested tightline of the two systems would require permits, a biologist's confirmation that the ravine was not a stream, and improved equipment.
- iii. That a more reasonable alternative would be to simply add more rock to the ravine.
- iv. That he would need to negotiate an easement for the improvements with the owner of Lot 8.

CP 68.

As promised, RBT had the RBT Drainage System cleaned on August 14, 2007, inspected on September 6, 2007, and cleaned and inspected again on September 18, 2007. CP 70-76. There is no evidence that once RBT became aware of the Hongs' belief that RBT had a duty to maintain the RBT Drainage System, that RBT breached that duty or acted in anything less than good faith.

(c) No Proximate Cause.

Proximate causation has two elements: cause in fact and legal cause. Colbert v. Moomba Sports, Inc., 163 Wash.2d 43, 176 P.3d 497 (2008). Cause in fact is established by showing that but for the defendant's actions, the claimant would not have been injured. Fabrique v. Choice Hotels Int'l, Inc., 144 Wash.App. 675, 183 P.3d 1118 (2008). Proximate cause is a determination generally reserved to the jury. Id. at 683. However, when the facts are undisputed and

the inferences therefore are plain and incapable of reasonable doubt or difference of opinion, it may be a question of law for the court. Id.

In a surface water case, damage must be proved with quantifiable evidence, not speculation or unsubstantiated conclusions. Price, 106 Wash.App. 647. In Price, the City of Seattle was dismissed from a negligence action for allegedly causing landslides, because the Plaintiffs there failed to provide any quantifiable evidence that the instability of the slope was caused by an increase in the natural flow of surface water following the City's removal of vegetation above the slide. Id. at 656-658.

“the nonmoving party must set forth specific facts that sufficiently rebut the moving party's contentions and disclose that a genuine issue as to a material fact exists”.

Id. at 657.

The Hong's and their geotechnical engineer failed to present specific facts that any damage claimed by the Hong's was caused by the RBT Drainage System. The Hong's failed to specifically attribute to the RBT Drainage System any quantifiable increase in the volume of water that normally flows in the ravine.

In his initial report, the Hong's' engineer could only conclude:

The system, however, may have contributed to possible damages associated with debris flows or flooding emanating from the ravine; but this subject is

difficult to evaluate further because the documents we reviewed do not contain information on this matter.

CP 159, ¶ 6. (emphasis added).

In response to the motion for summary judgment, Mr. Chang submitted his conclusion that the RBT Drainage System was negligently designed, insufficient and inadequately maintained, resulting in damage to the Hong's property. CP 258. However, the only facts Mr. Chang relied on for his conclusion were that the developers assumed there was a stream in the ravine and the failure of RBT to clean the retention tanks annually. CP 258-259. Mr. Chang then clarified his conclusion by saying the failure to clean the tanks "likely was the cause of the damage" and further study is required to determine if the tanks were of sufficient size. CP 259. (emphasis added).

Such vague opinions are not sufficiently definite to defeat a motion for summary judgment in negligence cases. See Davies v. Holy Family Hospital, 144 Wash.App. 483, 496, 183 P.3d 283 (2008). Davies involved a medical negligence claim that was dismissed on summary judgment despite an expert's opinion that

"had the "probability" of internal bleeding been appropriately "suspected," this "likely would have resulted in appropriate work-up and diagnosis".” Id.

At no time does Mr. Chang claim to have taken any measurements of the capacity of the RBT Drainage System or the ravine or the volume of water that would have been present in either one to know if the capacity of the ravine was exceeded by the discharge of water from the RBT Drainage System. Absent such quantifiable evidence (specific facts), Mr. Chang's unsubstantiated conclusions are not sufficient to establish proximate cause required to support the claim of negligence.

The evidence provided by Mr. Restad and Dr. Hong is not sufficient either. Neither is qualified as an expert to determine the capacity of the RBT Drainage System or the ravine, or whether either has been exceeded by the failure to clean the RBT Drainage System. The Hong's own expert said "only an engineer could determine whether surface water was being gathered and discharged on the property in an unnatural and negligent fashion." CP 260. There is no evidence of what the capacity of the RBT Drainage System is and how that has been diminished, if at all.

Without any factual basis, Mr. Restad claims 90% of the water flowing through the ravine to the Hong's property came from RBT. CP 267. Similarly, Dr. Hong claims the flow of water and debris in the ravine increased over the last several years, but he

doesn't offer any evidence to support his conclusion that all that water and debris came from RBT. CP 271. Such unsubstantiated conclusions do not establish proximate cause or defeat a motion for summary judgment to dismiss a claim of negligence.

The Hong's claim Price is not on point because they claim it was not decided on summary judgment, because the court in Price found there was no negligence, and because the theory rejected in Price was a duty to protect from natural causes. Appellants' Brief, p. 17. Price actually was decided on summary judgment, no negligence was found because there was no evidence of proximate cause, and while one theory of a duty to protect from natural causes was rejected, another under the common enemy doctrine was applied. 106 Wn. App. 647 and 657-658.

The Hong's conclude that "the evidence establishes an increase in water flow and erosion resulting from RBT's failure to properly design and maintain their drainage facility," but the evidence they cite doesn't support their conclusion. Appellants' Brief, p. 17. While the Golder Report relied on by the Hong's says there was no active erosion as of 1987 (CP108), it is not proof as the Hong's then claim that erosion coming after 1991 could not have come from any source other than RBT. Appellants Brief, p.

17. The Hong's own expert said there was a history of debris in the ravine runoff as early as 1975, before RBT was even developed. CP 155. The Hong's ignore the alternative source of water and erosion in the ravine and conclude that it must be RBT's fault without any quantifiable analysis.

The Hong's cite Pruitt v. Douglas County, 116 Wn. App. 547, 66 P.3d 1111 (2003), to support their claim that summary judgment was improper where maintenance was inadequate, but that case is distinguishable. In Pruitt, the plaintiffs established by technical measurements the volume of the flow of water before and after road improvements by the county. Id. at 1117. There was an issue of fact because the flow of water before the improvements was only 1-2 cubic feet per second ("cfs"), but after the improvements it was 10 cfs and 90% of the increase came from outside the plaintiff's drainage basin. Id. at 1114 and 1117.

In contrast, the Hong's have not provided the Court with any measurements of the capacity of the drainage basin or the flow of water before or after the cleanings of the RBT Drainage System. The ravine drains an area that is much bigger than the RBT Neighborhood. CP 83 (¶ 7), 172 and 254-256. The Hong's admit that the water in the ravine is from RBT and "other properties

further south.” Appellants’ Brief, p. 21. Whenever there is water discharging from the RBT Drainage System, there is also water flowing in the ravine uphill from where the RBT outfall enters the ravine. CP 83 (¶ 7).

Evidence of erosion is not proof of the cause of that erosion. If erosion diminished after the Hong’s placed their pipe in the ravine, it is not proof of the cause of any previous erosion. We agree that water is erosive, but the issue in this case is whether RBT caused that erosion to occur. There simply is no such evidence.

The Hong’s pipe was placed downhill from the confluence of the natural flow of the ravine and the outfall from the RBT Drainage System. CP 84 and 91-93. If anything, all that is proved by Mr. Restad’s observation that the flow of mud reduced after the pipe was installed is that by not allowing the water in the ravine to travel on the ground, the water in the pipe was not allowed to come in contact with dirt that might be eroded. The problem with the Hong’s conclusion is that it is not based on any quantifiable evidence of which source of water contributed to the flow of mud; the water from RBT, or the water already in the ravine.

The Hong’s incorrectly claim RBT must prove RBT is not the cause of their damage (Appellants’ Brief, p. 13), and that because

of lack of evidence to the contrary, the Court must find there has not been any increase in the flow of water from the property south (uphill) of RBT, and that the silt and debris must have come from RBT (Appellants' Brief, p. 9). It is the Hong's, as the plaintiffs, who have the burden of proof. To determine what proof the Hong's had, or in this case didn't have, RBT conducted discovery which produced 918 pages of documents from the Hong's, statements from their witnesses, and their expert's report. CP 18, 85 and 126. Based on the lack of any evidence to support the Hong's' claims in those documents and statements, RBT, as the moving party, established that no genuine issues of material fact existed and that they were entitled to judgment as a matter of law. The burden then shifted to the Hong's to establish specific facts giving rise to a genuine issue of fact. Schaaf, 127 Wn.2d at 21. The Hong's cannot rely on conclusory statements and unsupported assertions. Herron, 108 Wn.2d at 170. Just because the Hong's can conclude without substantiation that there is a duty, breach and proximate cause does not mean the Court must make the same inference in light of the absence of any quantifiable evidence to support those conclusions.<sup>6</sup> Since the Hong's failed to produce any quantifiable

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<sup>6</sup> As briefed by the Hong's an inference may be drawn against a party that fails to

evidence of changes in water flow, silt or debris in their discovery responses or in response to the motion for summary judgment, it was proper for the Trial Court to dismiss their claims.

The case of Nicholson v. Deal, 52 Wn. App. 814, 764 P.2d 1007 (1988), cited by the Hongs, is distinguishable. In Nicholson, the defendant was denied summary judgment because she relied on conclusions unsupported by the record. The Hongs are similarly making and relying on conclusions without quantifiable evidence to support them.

Nothing in the record establishes any increase in the flow of water or mud onto the Hongs' property because of a failure to clean the RBT Drainage System or add more rip-rap rock to the ravine. The Hongs refer to CP 68 to support their claim that there was an increase in water and mud while the tanks were not being cleaned. Appellants' Brief, p. 13. However, that letter from RBT to the Hongs is not such evidence. Similarly, the Hongs rely on a statement from their own employee, Douglas Restad, to claim that RBT does not contest that cleaning the tanks and installing the pipe in the ravine reduced the flow of water and mud. Appellants' Brief,

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produce evidence under his control that would be natural to produce. Appellants' Brief, p. 8, citing British Columbia Breweries 1918 Ltd. V. King County, 17 Wn.2d 437, 135 P.2d 870 (1943); other citations omitted.

p. 14, and CP 268-269. In fact, RBT does contest any assertion by the Honges that there is any evidence that the failure to clean the RBT Drainage System caused any increase of water or mud to enter the Honges' property.

The Honges' additional conclusion that since there is still mudflow infers that rip-rap is needed (Appellants' Brief, p. 14) is another typical unsubstantiated conclusion. The mud could just as easily be coming from the water uphill from RBT.

Finally, the Honges rely on Borden to advise the Court that it may infer causation from the onset of harm after a negligent act and the reduction of harm after mitigation of the act. 113 Wn. App. at 372; Appellants' Brief, p. 14. In Borden, the court made the following statement:

Taken in the light most favorable to the Bordens, the record shows that flooding started the first winter after the 1995 project was completed. The flooding recurred each winter for the next several years. The flooding subsided when another drainage facility began channeling water out of the Wetlands and into the headwaters of a nearby creek. This coincidence in timing gives rise to an inference that the flooding was a proximate result of the 1995 drainage project.

113 Wn. App. at 372

However, the facts are clearly distinguishable. In Borden, the City of Olympia helped design a storm water drainage system

that discharged water into a wetland. As a result of the wetland having more water in it, the groundwater around the wetland did not drain as it normally would, thus preventing surface water from being absorbed into the ground as it normally would, resulting in flooding of private property. 113 Wn. App. at 362-366 and 372. After the City installed a new system that channeled surface water out of the wetland, the groundwater receded to more normal levels. Id.

In Borden, there was evidence that the surface water increased the volume of water in the wetland. 113 Wn. App. at 363. The Hong's have provided no evidence that the water from the RBT Drainage System increased the volume of water flowing onto the Hong's property. In addition, by placing their pipe in the ravine, it is unclear whether the alleged decrease in the flow of mud and water is because of the Hong's pipe or because of RBT cleaning its drainage system. Without quantifiable evidence it is equally impossible to tell whether the decrease was because of changes uphill from RBT or something else.

The failure to provide the Court with quantifiable evidence of changes to the surface water flow in the ravine is fatal to the Hong's claim that RBT is the cause of the damage they claim to have incurred. Absent any proof of causation, the Hong's are unable to

prove the element of proximate cause necessary to sustain their claim for negligence or defeat the affirmative defense of the common enemy doctrine. Dismissal was proper.

**C. The Hong's' claim for negligence was properly dismissed because RBT acquired the right to discharge surface water by a prescriptive easement.**

Even if the Hong's' claim for negligence could survive summary judgment, it was properly dismissed because RBT alternatively acquired the right to discharge surface water into the ravine by a prescriptive easement. An easement for the discharge of water onto the land of another may be acquired by prescription. Pedersen v. Washington State Department of Transportation, 43 Wash. App. 413, 17 P.2d 773 (1986). The elements of a prescriptive easement are:

- a. use adverse to the right of the servient owner;
- b. open, notorious, continuous, and uninterrupted use for 10 years;
- c. knowledge of such use at a time when the owner was able to assert and enforce his or her rights.

Id. at 417.

The adverse use must be such use as the owner would exercise, disregarding the claims of others, asking permission from no one, and using the property under claim of right. Id. If the

essential factual findings are not in dispute, whether use is adverse or permissive is a question of law. Lingvall v. Price, 97 Wash.App. 245, 982 P.2d 690 (1999). In Pedersen, the defendants were dismissed after the trial court found that the pumping of drainage water by them into the plaintiff's lake satisfied all the elements of a prescriptive easement. 43 Wash. App. 413.

In their response to RBT's motion for summary judgment, the Hongs argued that Lee v. Lozier, 88 Wn. App. 176 (1997) requires intent to establish adverse use or claim of right for a prescriptive easement. CP 278. Actually, an objective standard is used, i.e., "the objectively observable acts of the user and the rightful owner." Dunbar v. Heinrich, 95 Wash.2d 20 (1980); see also Gray v. McDonald, 46 Wn.2d 574, 578, 283 P.2d 135 (1955) cited by the Hongs but which actually supports RBT.

The RBT Drainage System has drained into the ravine since the development of the RBT Neighborhood in 1977. CP 142, ¶ 3.3). The drainage has been open and notorious as evidenced by the Hongs' knowledge. Although the Hongs claim they discovered the RBT outfall in the summer of 2006 (CP 2-3, ¶ 7), they claimed the RBT Drainage System to be a source of problems as early as July 14, 1988, when they initiated a lawsuit claiming the RBT

Drainage System “was contributing to landslide and hazardous conditions.” CP 217, ¶ 2.3. In that case, a declaration was submitted with a letter from a geotechnical engineering company, Golder Associates, that pointed out that the RBT Drainage System included a culvert that “extends approximately half way down the slope to discharge into the seasonal stream”. CP 108, ¶ 3. The Hongos asked the City of Federal Way about the discharge from the RBT Drainage System on May 11, 1993 and then again on April 27, 1994. CP 119 and 223. The Hongos’ survey of the area in 1996 in preparation of construction of a wall to protect their property identified the location of the 12” corrugated metal pipe (cmp) which discharges the RBT storm water into the ravine. CP 179 and 234. This evidence conclusively rebuts the Hongos’ unsupported assertion that there is “no evidence as to commencement, frequency, [and] continuity”, (Appellants’ Brief, p. 19), and provides the proof necessary to find all three elements present for a prescriptive easement.

The Hongos do not deny knowing of the discharge since 1988. Instead, in response to the motion for summary judgment, the Hongos argued that RBT could not establish when RBT’s discharge exceeded its rights (presumably under the common

enemy doctrine?) to make its use adverse. CP 278. Now on appeal, the Hongs are also arguing, without any citation to authority, that it is fatal to RBT's defense of prescriptive easement that Dr. Hong did not know why the water flow was increasing over the years; that RBT did not intend to cause excessive flow onto the Hongs' property; that there is no evidence of entry onto the Hongs' property by RBT; and that negligent inaction by RBT cannot be construed as adverse, notorious and under a claim of right when RBT assumed King County was cleaning the drainage system. Appellants' Brief, p. 19. Arguments raised for the first time on appeal need not be considered. RAP 2.5 (a); Almy, 63 Wash.2d at 329.

The fact is that the Hongs had notice of what they perceived as problems with the RBT Drainage System as early as 1988 (CP 217, ¶ 2.3), 1992 (CP 103 and 108, ¶ 3), 1993 (CP 119), 1994 (CP 223) and 1996 (CP 179 and 234), and the damages they claim in this lawsuit arise out of the same overt and visible evidence of water and debris that the Hongs perceived then and now claim are caused by the same RBT Drainage System to justify their claim for negligence in this lawsuit.

The Hong's improperly confuse RBT's claim of right to discharge surface water into the ravine with the duty to maintain the RBT Discharge System. RBT's right to discharge the surface water is a matter of public record pursuant to the recorded plat. RBT's duty to maintain the system has not been proven since King County never released the responsibility it assumed in 1984 and RBT never agreed to take on that responsibility until asked to do so by the Hong's in 2006. The Hong's seem to claim that duty was assumed by RBT on May 21, 2007, but that is a misreading of a letter from RBT to the Hong's wherein RBT advised the Hong's that after the RBT Discharge System is cleaned, surges should be minimized. Appellants' Brief, p. 20, citing CP 68.

The Hong's argue, for the first time on appeal and without any citation to authority, that the ten year period for a prescriptive easement could not start until after RBT cleaned its tanks and the Hong's installed their pipe in the ravine. Appellants' Brief, p. 19. However, the Hong's then argue, again for the first time on appeal, that the ten year period should not start until RBT proves when the flow of water from the RBT Drainage System "exceeded the quantity that would be permissible under the common enemy doctrine." Appellants' Brief, p. 20. Then the Hong's argue for the

first time on appeal that the failure of RBT to clean its drainage system and install rip rap does not necessarily give the requisite notice. Id. According to the Honges, there was no readily apparent evidence of a breach of duty until May 21, 2007, when the President of RBT advised the Honges that RBT was taking steps to clean the tanks. Id. There is no legal authority for the Honges' argument that notice of an adverse use requires breach of a duty or proximate causation of damages for a prescriptive easement period to commence. Id. These are elements of negligence, not a prescriptive easement.

Similarly, the Honges' reliance on Dunbar, 95 Wn.2d 20, that negligence does not give notice for a prescriptive easement is misplaced. In Dunbar, the court focused on the objective acts of the party claiming prescription, just as the Court must do here. Id. at 21. The Honges cite to no authority that a property owner must know of a breach of duty by the party claiming a prescriptive easement before the claiming party's use can be considered an adverse use.

The Honges accurately cite Simmons v. Perkins, 63 Wn.2d 136, 144, 118 P.2d 740 (1941), for the rule that a use is not adverse if it is justified by a legal right. Appellants' Brief, p. 20.

However, the Hongs fail to argue or cite to any evidence for when RBT had a legal right to discharge into the ravine and when that right stopped or was exceeded. The Hongs don't offer any evidence of when the RBT Drainage System started causing damage to them or, more importantly, when the drainage exceeded what would be permissible under the common enemy doctrine. The Hongs' own argument re-establishes RBT's point that there is no quantifiable evidence that RBT's discharge ever exceeded the design and/or capacity of the system that was approved by King County in the late 70s.

The Hongs make several citations to authority on page 21 of their Appellants' Brief that are not applied to any facts in the record or even argued as to their relevance. Such discussion can be ignored by the Court where the recitations of holdings appear to be the extent of their argument. Amalgamated Transit Union Local 587, 142 Wn.2d at 203; RAP 10.3(a)(6).

The evidence is contrary to the Hongs' assertion that there was no notice of an adverse use if the Hongs did not know that RBT was negligent. The Hongs had notice of what they consider a trespass and who they thought it was. Appellants' Brief, p. 22. The evidence establishes such knowledge as far back as 1988 (1988

(CP 217, ¶ 2.3), 1992 (CP 103 and 108, ¶ 3), 1993 (CP 119), 1994 (CP 223) and 1996 (CP 179 and 234)).

RBT agrees it would be impermissible to allow an easement burden to increase under the common enemy doctrine. Appellants' Brief, p. 22. The point of the affirmative defense of prescriptive easement is that if the Hong's could have established a use of the Hong's property that exceeded RBT's right to discharge surface water thereon, the date of that use would have been the starting point for the ten years required for a prescriptive easement. Absent evidence that the common enemy doctrine doesn't apply, there is no basis for a prescriptive easement. However, once the doctrine no longer provides protection, then the prescriptive period begins. Based on the evidence, unless there was no time when the common enemy doctrine did not protect RBT from liability (which is the primary argument of RBT), the prescriptive easement period could have started as early as 1988 when the Hong's first complained about the RBT Drainage System.

The Hong's also argue that RBT's discharge violates FWRC 19.165.040 and KCC 9.08.040 and 9.12.025, is a public nuisance pursuant to RCW 7.48.190 and can't be continued by prescriptive easement. While it is true that RCW 7.48.190 prohibits prescriptive

easement of a public nuisance, there is no evidence of a public nuisance. A public nuisance must affect an entire community, not just one property owner. RCW 7.48.130. A county-approved surface water discharge system is not one of the ten enumerated public nuisances identified in RCW 7.48.140. FWRC 19.165.040 applies to culverts in streams, not drainage systems that use culverts to discharge into ravines. CP 236. Although KCC 9.08.040 defines the purpose of the King County Surface Water Management Program, and KCC 9.12.025(A)(1)(z) prohibits the discharge of silt, sediment or gravel, there is no evidence of silt, sediment or gravel being discharged by RBT. The Hong's claim silt, sediment and gravel ended up in their drain at the bottom of the ravine, but there is no evidence that the silt, sediment and gravel was discharged by RBT.

Finally, although RBT disputes that permission was given to allow the Hong's to install their pipe in the ravine, such permission would not be an abandonment of the prescriptive easement. Placing a drain pipe in a drain way is not like placing a house in a road right of way and constructing an alternate road as in Barnhart v. Gold Run, Inc., 68 Wn. App. 417 (1993). Abandonment must be unequivocal. Heg v. Alldredge, 157 Wn.2d 154 (2006). The only

evidence that the Hong's identify is the letter from RBT to the Hong's on May 21, 2007, wherein RBT says cleaning the system should minimize the surges to allow the storm water to trickle out slowly and that the Hong's would have to negotiate directly with the owner of lots 7 and 8 to place the pipe the Hong's subsequently placed in the ravine. CP 68. Nothing in that letter unequivocally revokes a prescriptive easement.

**D. The Hong's' request for an injunction was properly denied because it would be inequitable to RBT, violate the interests of the public and be impractical to enforce.**

In considering whether to grant an injunction, a trial court may consider and weigh as equitable factors: the character of the interest to be protected; the adequacy of an injunction relative to other available remedies; the possible misconduct of the defendant; the relative hardship likely to result to the defendant if an injunction is granted or to the plaintiff if it is denied; the interests of third persons and of the public; and the practicability of framing and enforcing the order or judgment. Holmes Harbor Water Co., Inc. v. Page, 8 Wash.App. 600, 630-631, 508 P.2d 628 (1973). An injunction should be granted only on a clear showing of necessity. Id. at 630. In Holmes Harbor Water Co., Inc., an injunction was sought to enforce a restrictive covenant regulating the height of

homes within a neighborhood. The injunction was denied after the court found the defendants acted innocently, had attempted to comply with the covenant, their violation was unintentional, the plaintiffs delayed bringing suit until construction of the house was complete, failed to prove any injury, and the cost of removing the violation was exorbitant when compared with the slight violation (four inches to 2.6 feet over the limit, depending on the location of the measurement). 8 Wash.App. 600.

As presented in the prior sections of this brief, the Hongs have not made a clear showing of necessity for an injunction to abate or be held harmless from RBT's use of the RBT Drainage System. The system is required to remove surface water from the eastern part of the RBT Neighborhood. The system was originally approved and maintained by King County and is now being maintained by RBT despite no evidence of an obligation to do so. There is no evidence that RBT failed to perform an obligation they knowingly had regarding the RBT Drainage System. Once they were asked by the Hongs to inspect and clean the system, RBT did so. Despite no evidence of negligence by RBT, the Hongs asked the Court to order RBT to bear the entire burden of tightlining the

RBT Drainage System. CP 3. Such a disproportionate hardship supports denial of an injunction.

The Hongs' public policy argument only applies if there is a finding of a violation by RBT of one of the previously cited Federal Way ordinances or King County Codes. Absent such a finding, there is no public policy needing protection from RBT.

Similarly, an injunction should only be considered if the Court first finds the common enemy doctrine not applicable. Even then, the equitable relief sought by the Hongs should be denied because the cities of Federal Way and Des Moines are not parties and the Trial Court cannot impose a remedy that would otherwise require an administrative process. Tightlining the drainage would require approval from the cities of Federal Way and Des Moines, and possibly other state and federal agencies. CP 78-81. If the ravine is classified as a stream, tightlining would be subject to Federal Way Revised Code ("FWRC") 19.165.040, requiring:

- a. A formal application and review process,
- b. Proof that no significant habitat area will be destroyed and that it is necessary for reasonable use of the property,
- c. Design and installation to allow passage of fish inhabiting or using the stream and to accommodate a 100-year storm, and

- d. Maintenance of the culvert to keep it free of debris and sediment so as to allow free passage of water and, if applicable, fish, and a bond to ensure such maintenance.

CP 236.

If the ravine is classified as a drainage ditch, tightlining would be subject to FWRC 19.120.020, requiring:

- a. Approval of a clearing and grading plan, and
- b. Proof that the tightlining will not:
  - i. alter or adversely affect streams, lakes, wetlands, or geologically hazardous areas, either on or off the subject property,
  - ii. violate any express policy of the city, and
  - iii. is necessary to correct an erosion or drainage problem on an undeveloped site.

Whether a stream or a drainage ditch, the process for consideration of the proposal of tightlining the drainage systems would be governed by the Process III procedures set forth in Chapter 19.65 of FWRC. FWRC 19.120.020(4)(b) and 19.165.040. This process requires an application to be reviewed by the Director of the Department of Community Development, with possible appeals to a hearing examiner. FWRC 19.65.010. The State Environmental Policy Act ("SEPA") may also apply. FWRC

19.65.050. Public notice of an application to the City of Federal Way would be required. FWRC 19.65.070. Since the tightline would be connecting to a drainage system within the city limits of the City of Des Moines, Washington, that jurisdiction would likely have its own additional regulations to satisfy. Given the uncertainty of whether tightlining the systems would even be allowed by the cities of Federal Way and Des Moines, King County and the state of Washington, an injunction ordering such activity is inappropriate and Plaintiff's request for the same was properly dismissed.

An injunction abating use of the RBT Drainage System would violate FWRC 18.60.080 which requires subdivisions in Federal Way to be connected to a storm water system. CPP 244. The purpose of Title 18 of FWRC includes the protection of public interests. FWRC 18.05.020 (CP 245). The Court should not order an injunction if the Court cannot enforce the injunction because it conflicts with existing law, especially a law which has as its purpose the protection of public interests.

**E. The Hong's' request for reconsideration was properly denied and should not be considered on appeal.**

The Hong's failed to include any supporting argument in their Appellants' Brief for their second assignment of error: that the Trial Court erred by entering the order denying reconsideration. The

assignment of error should not be considered by the Court on appeal, even if the Hongs include such argument in their reply brief. State v. Dennison, 115 Wn.2d 609, 629, 801 P.2d 193 (1990); Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

**F. RBT should be awarded its attorney fees and costs on appeal.**

The Court may award attorney fees for a frivolous appeal. RAP 18.1(a), 18.9(a); RCW 4.84.185; Harrington v. Pailthorp, 67 Wash.App. 901, 841 P.2d 1258 (1992).

An appeal is frivolous (and a recovery of fees warranted) if no debatable issues are presented upon which reasonable minds might differ, and it is so devoid of merit that no reasonable possibility of reversal exists.

Id., at 913.

In Harrington, attorney fees were awarded for a frivolous appeal after the appellant persisted in his action despite the lack of any facts or law to support such a claim, and the appeal presented no debatable issues. Id., at 914.

In determining whether an appeal is frivolous the Court is guided by the following considerations:

(1) A civil appellant has a right to appeal under RAP 2.2; (2) all doubts as to whether the appeal is frivolous

should be resolved in favor of the appellant; (3) the record should be considered as a whole; (4) an appeal that is affirmed simply because the arguments are rejected is not frivolous; (5) an appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal.

Millers Cas. Ins. Co., of Texas v. Briggs, 100 Wash.2d 9, 665 P.2d 887 (1983).

In Millers, an insurer prevailed on a subrogation claim against a primary insurer after the primary insurer lost on summary judgment. Id., at 888. The law was clear, the primary insurer failed to cite any authority to the contrary and the primary insurer's circuitous arguments ignored the facts in the record. Id., at 890.

The appeal of Hongs is likewise frivolous. They lost on summary judgment because they failed to provide any quantifiable evidence that the damage they alleged was proximately caused by RBT. CP 334. On appeal they haven't provided any new revelations of evidence in the record that would support their claims. The case law is very clear that a non-moving party on summary judgment cannot rely on unsubstantiated conclusions and, in the case of claims of damage allegedly caused by diverted surface water, must prove with quantifiable evidence that such damage was caused by the diverted surface water. The Hongs

have never had such evidence to support their claims and had no debatable issues to appeal. The Hong's' appeal is without merit. It should be denied and RBT should be awarded its attorney fees for having to respond to the Hong's' frivolous appeal.

## **V. CONCLUSION**

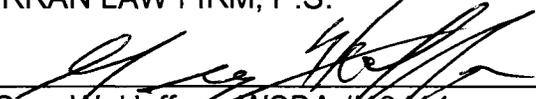
RBT is not liable for their discharge of surface water into the ravine that runs to the Hong's' property because there is no quantifiable evidence that such discharge was improper or caused the Hong's any damage. RBT's collection and discharge of surface water is protected by the common enemy doctrine. In the alternative, if the common enemy doctrine is not applicable, RBT acquired a prescriptive easement for such discharge because RBT has been continuing the discharge openly and notoriously for more than ten years before the Hong's filed their complaint.

Injunctive relief is inappropriate because there is no evidence of misconduct by RBT, the hardship on RBT if granted would be greater than that proven to be suffered by the Hong's if denied, framing and enforcing such relief would be impractical given all the procedural requirements, and abatement would not be in the public interest or consistent with applicable ordinances.

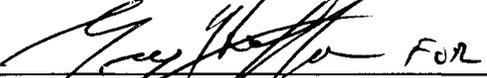
RBT provided the Court with sworn statements, discovery responses and pleadings that establish the Hong's are unable to provide the Court with any specific evidence of material facts to support their claims of negligence and damage. Since the Hong's were unable to produce any such specific evidence of material facts, the Hong's' claims were properly dismissed on summary judgment and RBT should be awarded its attorney fees and costs for having to respond to a frivolous appeal.

DATED this 24<sup>th</sup> of September, 2010.

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By  FOR  
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Attorney for Respondent Rippentropp

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IN THE COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

DAVID HONG, and DEL RAY MOBILE HOME  
PARK, L.L.C.,

Appellants,

vs.

RICHARD J. and AVA M. SCHNEIDER, LLOYD R.  
and TINA C. MUSSELMAN, MARTIN and  
JEANETTE GROGAN, R/B HOLMAN TRUST,  
HYUNGIN P. MOON and JANE DOE MOON, his  
wife, T. HEUNISCH and JANE DOE HEUNISCH, his  
wife, ARMAN GOLCKH, LLC, ALLEN G.  
STORAASLI and JANE DOE STORAASLI, his wife,  
MICKAEL J. and KAREN L. BERG, DAVID C. and  
SANDRA J. RIPPEENTROP, NOTRE DAME  
PROPERTIES THREE, MICHAEL A. BRICE and  
JANE DOE BRICE, his wife, and REDONDO BAY  
TRANQUILITY HOMEOWNERS ASSOCIATION,,

Respondents.

NO. 65316-4

DECLARATION OF SERVICE

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2010 SEP 24 PM 1:13

I hereby declare as follows:

I am a legal assistant with Curran Law Firm, P.S., attorneys for **Redondo Bay**

**Tranquility Homeowners Association** herein. On the date indicated below and in the manner  
indicated below, I caused (1) *Respondents Brief*, to be sent for service on:

<p>J. Stephen Funk THE FUNK LAW FIRM, P.S., INC. 2000 112<sup>th</sup> Ave. NE Bellevue, WA 98004</p>	<p>Christopher D. Anderson LAW OFFICES OF SHARON J. BITCON 200 W. Mercer Street, Ste. 111 Seattle, WA 98119-3958</p>
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(T) 253 852 2345 / (F) 253 852 2030

- 1  By United States Mail
- 2  By Legal Messenger
- 3  By Facsimile to \_\_\_\_\_
- 4  By Express Mail

5 I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE  
6 OF WASHINGTON THAT THE FOREGOING STATEMENT IS TRUE AND  
7 CORRECT.

8 Signed at Kent, Washington, this 24th day of September, 2010.

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10 \_\_\_\_\_  
11 Nancy J. Fuller

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