

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

LEE HAYNES, an adult individual,)	NO. 66542-1-I
)	
Appellant,)	DIVISION ONE
)	
v.)	UNPUBLISHED OPINION
)	
SNOHOMISH COUNTY, and)	
SNOHOMISH COUNTY PUBLIC)	
WORKS; SURFACE WATER)	
MANAGEMENT DIVISION,)	
)	
Respondents.)	FILED: September 17, 2012
)	

Leach, C.J. — Lee Haynes appeals the summary dismissal of his claims against Snohomish County (County) for intentional trespass, inverse condemnation, and “damages to property” for erosion caused by runoff from Crawford Road, which is owned and maintained by the County. Under the common enemy doctrine, a landowner may dispose of surface water in any way he or she sees fit, subject to certain exceptions. Because none of those exceptions applies here, the common enemy doctrine bars Haynes’s claims. The trial court did not err by granting the County summary judgment. We affirm.

FACTS

The Skylark development, located in Snohomish County, was privately built in 1992 and consists of nine lots. Skylark sits in a natural drainage basin downstream from Crawford Road, which is owned and maintained by Snohomish

County. A drainage system running along Crawford Road predates the development. Before Skylark was built, that drainage system carried water from a variety of upstream publically and privately held lands through a pipe to an outlet at the top of what is now Haynes's property. The water then flowed above ground. In order to accommodate the construction of houses, Skylark's developers installed 12-inch drainage pipes underground, along the water's natural course. The present drainage system conveys surface water underground from Crawford Road through the Skylark pipes to a detention pond. The pipes generally travel along a drainage easement corridor.

In December 1992, Lee Haynes purchased a house on Skylark lot 5. As they did for the rest of the development, Skylark's developers, not the County, installed the pipe running underground across Haynes's property. However, the developers did not dedicate an easement to the County for that portion of the pipe.

In early December 2007, Snohomish County experienced a "100 year storm." During the storm, water escaped from an open drainage catch basin¹ located on the property of Haynes's upstream neighbor (lot 6). The water flowed from the catch basin onto Haynes's lot, causing erosion and exposing the

¹ A catch basin provides an access point to a drainage pipe. Catch basins have either grated lids, which allow water to enter the drainage system, or solid lids, which do not. The solid lid here weighed 80 pounds and should have been bolted to the catch basin.

underground drainage pipe on his property.² Haynes noticed that the pipe was cracked, allowing water to seep out of it.

Shortly after the storm, Haynes spoke with Chris Kirkendall, a County employee who was in the Skylark development working on a project at the detention pond.³ Haynes gave Kirkendall permission to enter his land, and Kirkendall inspected Haynes's drainage system as well as that of his upstream neighbor. Kirkendall noticed that lot 6's catch basin lid had been removed, allowing a large amount of water to exit the drainage system during the storm.⁴ Additionally, Kirkendall observed that Haynes's neighbor had stacked plywood panels next to his house, concentrating and directing all of the water escaping from the drainage system onto Haynes's lot. Kirkendall noticed that the water running from lot 6 was causing erosion along Haynes's driveway. Kirkendall opened Haynes's catch basin and saw very little water entering the system. This indicated to him that the pipe under Haynes's driveway was plugged. During his inspection, Kirkendall also noticed water escaping through a "hole" in the side of the drainage pipe. Kirkendall told Haynes that because the damage to the

² The escaping water eroded the soil from underneath Haynes's truck, which became stuck and had to be towed out.

³ Kirkendall is an engineer in the Surface Water Management Division of Public Works at Snohomish County.

⁴ In his declaration, Haynes claimed that in 2006 he noticed the catch basin lids connected to the drainage pipe had been removed and not properly reattached. According to Haynes, he called the County to report the problem, but his calls were not returned.

drainage system was on Haynes's property, Haynes was responsible for repairing it.

James Blankenbeckler, a County engineer, stated in his declaration that privately built and owned drainage pipes are a landowner's responsibility. He said that the County repairs private systems only when the damage threatens public safety or infrastructure and only with the landowner's express permission. According to Blankenbeckler, once the County became aware of Haynes's drainage issue, it "began attempting to obtain an easement from Mr. Haynes to maintain, inspect, and potentially repair the pipe under his property." In July 2008, the County offered to repair and clean the damaged pipes in exchange for an easement. In August 2008, Haynes rejected the County's proposal. Haynes nevertheless stated in his declaration, "I have repeatedly tried to get Snohomish County to fix the drain pipe, but they have refused to fix the pipe saying that Snohomish County won't fix private property." Haynes claimed that since 2007, "[w]ater running from Crawford Road backs up in the plugged pipe and discharges through the crack and continually erodes my property. "

In January 2010, Haynes filed a lawsuit against Snohomish County, alleging intentional trespass, inverse condemnation, and "damages to property." He sought damages for trespass, "abatement of all continuing trespasses by defendants," including removal of the drainage pipe, damages for the injury to

his property, and just compensation based on the County's exercise of eminent domain. Among other affirmative defenses, the County asserted the common enemy doctrine and the statute of limitations.

Haynes moved for a preliminary injunction, which the trial court granted, finding that the County was committing continuing trespass by diverting water from Crawford Road across Haynes's property. The court ordered the County to repair the pipe.⁵ The County complied at a cost of nearly \$5,000. The repair halted any further erosion.

The County moved for summary judgment, and Haynes moved for partial summary judgment. Haynes argued that although the County repaired the pipe, it continued to trespass onto his property by diverting County water under his property as it makes its way to the Skylark detention pond. Additionally, Haynes contended that his property remained damaged after the pipe repair, stating, "Snohomish County has not attempted to restore the property to the condition that existed before the break by either repairing the damage to the asphalt or filling in the topsoil that was eroded."⁶ After oral argument, the trial court granted

⁵ The order granted the County a temporary easement over Haynes's property for the purpose of repairing the pipe. If the County had failed to repair the pipe within the specified time period, it would have been enjoined from diverting water from Crawford Road through the drainpipe underneath Haynes's property.

⁶ Although Haynes claimed in his complaint damages of at least \$15,804.92, he produced no evidence to substantiate that amount or demonstrate a decline in market value of the property. The only evidence in the record regarding injury to Haynes's property due to erosion was Haynes's

summary judgment for the County. Haynes appeals.

STANDARD OF REVIEW

We review summary judgment orders de novo.⁷ A trial court may grant summary judgment only when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law.⁸ When reviewing a summary judgment order, we engage in the same inquiry as the trial court, considering the facts and all reasonable inferences from the facts in the light most favorable to the nonmoving party.⁹ We may affirm the lower court's ruling on any ground established by the pleadings and supported by the record.¹⁰

ANALYSIS

Haynes contends the trial court improperly granted the County's summary judgment motion, reprising his arguments regarding trespass and inverse condemnation. The County responds that the common enemy doctrine shields it from any potential liability arising from damage caused by runoff from Crawford Road. We agree with the County that the common enemy doctrine bars Haynes's claims.

Since 1896, the common enemy doctrine has operated as a defense to
declaration, which included photographs of the damage.

⁷ Hadley v. Maxwell, 144 Wn.2d 306, 310-11, 27 P.3d 600 (2001).

⁸ CR 56(c).

⁹ Right-Price Recreation, LLC v. Connells Prairie Cmty. Council, 146 Wn.2d 370, 381, 46 P.3d 789 (2002).

¹⁰ Truck Ins. Exch. v. VanPort Homes, Inc., 147 Wn.2d 751, 766, 58 P.3d 276 (2002).

liability for damage caused by the diversion of surface water.¹¹ In its strictest form, the doctrine allows landowners to dispose of unwanted surface water in any way they see fit, without liability for resulting damage to neighboring properties.¹² “Surface water” is water that is “caused by the falling of rain or the melting of snow.”¹³ “The chief characteristic of surface water is its inability to maintain its identity and existence as a body of water. It is thus distinguished from water flowing in its natural course.”¹⁴ Should the water at issue meet this definition, it “is regarded as an outlaw and a common enemy against which anyone may defend himself, even though by so doing injury may result to others.”¹⁵

The common enemy rule, therefore, provides that “[i]f one in the lawful exercise of his right to control, manage or improve his own land, finds it necessary to protect it from surface water flowing from higher land, he may do so, and if damage thereby results to another, it is [damage without remedy].”¹⁶

In recognition of the inequities that result from a strict application of the common enemy doctrine, our Supreme Court has adopted three exceptions to

¹¹ Cass v. Dicks, 14 Wash. 75, 78-79, 44 P. 113 (1896).

¹² Currens v. Sleek, 138 Wn.2d 858, 861, 983 P.2d 626 (1999); see also Cass, 14 Wash. at 78.

¹³ Fitzpatrick v. Okanogan County, 169 Wn.2d 598, 607, 238 P.3d 1129 (2010) (quoting Cass, 14 Wash. at 78).

¹⁴ Halverson v. Skagit County, 139 Wn.2d 1, 15, 983 P.2d 643 (1999).

¹⁵ Cass, 14 Wash. at 78.

¹⁶ Fitzpatrick, 169 Wn.2d at 607 (alterations in original) (quoting Cass, 14 Wash. at 78).

¹⁷ Currens, 138 Wn.2d at 861-62, 869.

it.¹⁷ It follows that the County has the right to dispose of surface water draining from Crawford Road in any way it sees fit without regard to Haynes unless one of these exceptions applies. The first exception, also called the natural watercourse rule, “prevents interference with the natural flow of a waterway” based on the principle that waterways ““must be kept open to carry water into streams and lakes.””¹⁸ Thus, “a landowner who dams up a stream, gully, or drainway will not be shielded from liability under the common enemy doctrine.”¹⁹ Here, the water at issue—rain—is surface water, rather than water flowing in a natural drainway. Additionally, Haynes does not allege that the County has blocked or altered the flow of a watercourse or natural drainway. Therefore, the first exception does not apply.

The second exception prevents a landowner from artificially collecting and discharging surface water onto neighboring land in quantities greater than or in a manner different from the water’s natural flow.²⁰ Under this rule, a landowner may not create an “unnatural conduit” but may “direct diffuse surface waters into preexisting natural waterways and drainways.”²¹ This exception is also inapplicable. The County has not collected and discharged the surface water in a manner different from its natural flow. The stormwater drainage system

¹⁷ Currens, 138 Wn.2d at 861-62, 869.

¹⁸ Fitzpatrick, 169 Wn.2d at 608 (quoting Currens, 138 Wn.2d at 862).

¹⁹ Currens, 138 Wn.2d at 862.

²⁰ Currens, 138 Wn.2d at 862.

²¹ Currens, 138 Wn.2d at 862.

leading from Crawford Road generally follows the path that the water would naturally follow. And the County has not discharged runoff in greater quantities. The uncontroverted evidence in the record supports a finding that the volume of water flowing through the pipe has not increased.

The final exception requires landowners to exercise their rights with due care.²² However, Haynes does not claim that the County failed to use due care in channeling the surface water runoff from Crawford Road. Nor does the record support such a finding. Because Haynes failed to raise a genuine issue of material fact regarding the application of the common enemy doctrine, the doctrine precludes Haynes's claims for trespass and inverse condemnation.

Haynes contends that the common enemy doctrine does not apply because water running through a man-made drainage system is not a natural drainage way, but rather a system of artificial pipes. But “the flow of surface water along such depressions or drain ways may be hastened . . . by artificial means so long as the water is not diverted from its natural flow.”²³ Haynes further contends that Rothweiler v. Clark County²⁴ supports his claim. It does

²² Currens, 138 Wn.2d at 869 (holding that Washington’s common enemy doctrine “allows for a due care exception to the general rule against liability”).

²³ Trigg v. Timmerman, 90 Wash. 678, 681-82, 156 P. 846 (1916) (emphasis added) (quoting Annotation, Right to Hasten Flow of Surface Water Along Natural Drain Ways, 19 L.R.A. (N.S.) 167, 167 (1909)); see also Laurelon Terrace, Inc. v. City of Seattle, 40 Wn.2d 883, 892, 246 P.2d 1113 (1952) (“[T]he flow of surface water along natural drains may be hastened or incidentally increased by artificial means, so long as the water is not ultimately diverted from its natural flow onto the property of another.”).

not. In Rothweiler, the plaintiffs sued Clark County for negligence, nuisance, and negligent intrusion for failing to properly maintain and improve a stormwater drainage system that allegedly caused flooding on plaintiff's property.²⁵ Division Two held that the common enemy doctrine shielded Clark County from liability, even though the catch basins and drainage pipes were not naturally formed.²⁶ Rothweiler thus supports the County's, rather than Haynes's, position. Because the common enemy doctrine precludes Haynes's claims, we do not discuss the parties' arguments regarding trespass and inverse condemnation.

Haynes contends that the trial court erred by dismissing all of his claims in its summary judgment order because the County's motion for summary judgment failed to address his property damage claim. We disagree. "It is the responsibility of the moving party to raise in its summary judgment motion all of the issues on which it believes it is entitled to summary judgment."²⁷ Here the County's summary judgment motion argued that Haynes could not prove his claims for trespass or inverse condemnation. Significantly, the County also argued both that Haynes waived his right to recover for damage to his property by refusing to grant the County an easement and that he failed to mitigate his damages, thus preventing recovery. These arguments sufficiently addressed

²⁴ 108 Wn. App. 91, 29 P.3d 758 (2001).

²⁵ Rothweiler, 108 Wn. App. at 94.

²⁶ Rothweiler, 108 Wn. App. at 99.

²⁷ White v. Kent Med. Ctr., Inc., 61 Wn. App. 163, 168, 810 P.2d 4 (1991).

Haynes's property damage claim. The trial court did not err by dismissing his complaint in its entirety.

Finally, Haynes claims entitlement to attorney fees and costs on appeal based on RCW 8.25.070, RCW 8.25.075, and RCW 4.24.630. Because he is not the prevailing party, we deny his request.

CONCLUSION

Because the common enemy doctrine bars Haynes's trespass and inverse condemnation claims, we affirm the trial court's order granting the County's summary judgment motion.

WE CONCUR:

Becker, J.

Leach, C. J.

Grosse, J.