

OREGON LAW UPDATE

Water, Water Every Where, but No Nuisance or Trespass

case in point...

From the desk of Jeff Eberhard: Neighborly disputes can often arise as a result of something as small as a little water. In this case, the Court of Appeals discussed trespass as a nuisance when a property owner's drainage system caused water to enter a neighbor's land after the property owner relied on the recommendations of the county officials.

Claims Pointer: Homeowners can be liable for trespass and/or nuisance when water from their property causes damage to another. However, in the absence of "ultrahazardous activity," (as in the case below) the injured party must establish that the trespass or nuisance was "intentional"—which is defined as knowing or having reason to know that trespass or nuisance would occur.

Gibson v. Morris, 270 Or App 608 (2015).

In 2007, William and Karen Morris ("the Morrises") contracted to have their septic system replaced after their old system failed. As part of that installation, the Morrises obtained a permit through Clackamas County ("the County"), which sent a soil scientist to evaluate the project. After its evaluation, the County required that the Morrises install a "groundwater interceptor" to divert water from the septic system drainage field.

The interceptor diverted surface and groundwater down a pipe which exited about 36 feet away from a neighboring property owned by David and Valerie Gibson ("the Gibsons"). Around 2001, the Gibsons had noticed that the edge of their property bordering the Morrises' property was soggy and they installed a trench to collect extra groundwater. After the septic tank installation, the Gibsons noticed that there was more water than normal and identified that it was coming from the Morrises' property.

In 2010, the Gibsons sent a letter to the Morrises asserting that the groundwater interceptor was causing water intrusion and demanding that they install dry wells to store and divert water coming from the groundwater interceptor. The Morrises contacted the County, which sent two water rights experts to evaluate their property. The experts concluded that the water exiting the pipe seeped into the ground long before it flowed to the Gibsons' property and that any flow onto their property would naturally occur without the groundwater interceptor. Relying on the County experts' conclusions, the Morrises refused to comply with the Gibsons' demand.

The Gibsons sued for economic and equitable

relief. The case was tried to a judge. After hearing all of the evidence, including the above, and the testimony of two experts (not the County experts), the trial court found that while the Morrises' drainage in fact caused water intrusion onto the Gibsons' property, the Gibsons did not establish that the Morrises were negligent or intentional in causing or allowing the water intrusion to occur. The Gibsons appealed.

The Court of Appeals first explained that while a property owner can be liable for trespass (the physical intrusion onto another's land) and nuisance (deprivation of another's enjoyment of their land), a party seeking a remedy under those theories must establish that the other party either knew or should have known that a trespass would occur or that they continued to let the trespass occur after discovering it.

The Gibsons argued that the trial court erred by finding that the Morrises did not know or have reason to know that their groundwater interceptor was causing water to enter the Gibsons' property. The Court of Appeals, however, held that there was sufficient evidence for the trial court to find that the Morrises did not act intentionally. One of the key facts was that the Morrises relied on County officials who told them they were not causing water to flow onto the Gibsons' property. The Gibsons argued that the Morrises should not have relied on County recommendations over the Gibsons' letter notifying them of the water drainage problem, but the Court disagreed and held that there was sufficient evidence to determine that the Morrises were not negligent. The Court rejected the Gibsons' assignments of error and affirmed the trial court ruling.



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