

No. 62911-5-I

**COURT OF APPEALS
STATE OF WASHINGTON**

JOSEPHINE CLIPSE,
a single individual

Petitioner,

v.

MICHEL'S PIPELINE CONSTRUCTION, INC., a Wisconsin corporation;
PIPE EXPERTS, LLC, a Washington limited liability company,

Respondents and Cross-Petitioner.

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**REPLY BRIEF OF PETITIONER
JOSEPHINE CLIPSE**

William E. Pierson, Jr., WSBA No. 13619
Law Office of William E. Pierson, Jr. | PC
The Pioneer Building
600 First Avenue, Suite 206
Seattle, WA 98104
Telephone: (206) 254-0915
Facsimile: (206) 254-0916
bill.pierson@weplaw.com

Attorneys for Petitioner
JOSEPHINE CLIPSE

TABLE OF CONTENTS

I.	REBUTTAL TO RESPONDENT’S STATEMENT OF THE CASE.....	1
II.	LEGAL ARGUMENT	2
	A. The Contractors Fundamentally Mischaracterize The Nature Of What RCW 4.24.630 Is Intended To Address.....	2
	B. The Contractors’ Breach of Their Contract With King County Is Relevant Evidence In This Lawsuit To Demonstrate Statutory Trespass and Negligence.....	8
III.	CONCLUSION	14

TABLE OF AUTHORITIES

Cases

<i>Bradley v. Am. Smelting & Ref. Co.</i> , 104 Wn.2d 677, 709 P.2d 782 (1985).....	2
<i>Brutsche v. City of Kent</i> , 164 Wn.2d 664, 193 P.3d 110 (2008).....	3
<i>Fradkin v. Northshore Util. Dist.</i> , 96 Wn. App. 118, 977 P.2d 1265 (1999).....	2
<i>Freeman v. Navarre</i> , 47 Wn.2d 760, 289 P.2d 1015 (1955).....	10
<i>Grundy v. Brack Family Trust</i> , Slip Opinion 37251-1 (August 11, 2009).....	3
<i>In re Detention of G.V.</i> , 124 Wn.2d 288, 877 P.2d 680 (1994).....	8
<i>In re Matter of the Forfeiture of One 1970 Chevrolet Chevelle, et al.</i> , Slip Opinion 81116-4 (September 3, 2009).....	3,6,15
<i>Kenney v. Abraham</i> , 199 Wash. 167, 90 P.2d 713 (1939).....	12
<i>State v. Bebb</i> , 44 Wn. App. 803, 723 P.2d 512 (1986).....	9
<i>State v. C.N.H.</i> , 90 Wn. App. 947, 954 P.2d 1345 (1998).....	8
<i>State v. Rice</i> , 48 Wn. App. 7, 737 P.2d 726 (1987).....	9
<i>Valley Construction Co. v. Lake Hills Sewer District</i> , 67 Wn.2d 910, 410 P.2d 796 (1966).....	12
<i>Ward v. Ceco Corp.</i> , 40 Wn.App. 619, 699 P.2d 814 (1985).....	14

Statutes

RCW 4.24.630.....	2,3,5,6,10,13,14
-------------------	------------------

Rules

ER 401.....	8
ER 403.....	13
RAP 10.3(a)(5).....	1

Treatises

<i>Restatement (Second) of Torts</i> §158.....	2
<i>Restatement (Second) of Torts</i> §214.....	2

I. REBUTTAL TO RESPONDENT'S STATEMENT OF THE CASE

This lawsuit arises out of a back up of sewage on October 4, 2003 that substantially damaged the house and personal property owned by petitioner, JOSEPHINE CLIPSE ("Ms. Clipse") located at 24803 35th Place S., Kent, Washington 98032. [CP 44; 277, ¶¶11, 12]

Ms. Clipse brought this suit against respondents, MICHELS PIPELINE CONSTRUCTION, INC. and PIPE EXPERTS, INC. (hereinafter collectively referred to as "the contractors"), alleging they were legally responsible for these damages under a theory of either statutory trespass or negligence. [CP 275, ¶1]

At page two of its brief, the contractors state, "Joe [Clipse] has a substantial criminal history which includes forgery, theft, unlawful issuance of bank checks, extortion and welfare fraud. CP 187-219" What the contractors neglect to mention to this Court, in violation of their obligation not to mislead this Court [RAP 10.3(a)(5)], is that the trial court below granted Ms. Clipse's motion *in limine* preventing the contractors from introducing any evidence that Mr. Clipse was convicted of a crime with the lone exception of a 2003 conviction for attempted

forgery arrived at as part of a *Newton* plea agreement. CP 215-218.

II. LEGAL ARGUMENT

A. **The Contractors Fundamentally Mischaracterize The Nature Of What RCW 4.24.630 Is Intended To Address.**

The contractors argue RCW 4.24.630 is intended to punish those who intentionally and unreasonably damage the land of others. This characterization is patently incorrect. RCW 4.24.630 is intended to punish those who intentionally and unreasonably trespass upon the land of another.

A person is liable for the intentional tort of trespass if he or she intentionally (1) enters or causes another person or a thing to enter land in the possession of another or (2) remains on the land or (3) fails to remove from the land a thing that he or she is under a duty to remove. *Bradley v. Am. Smelting & Ref. Co.*, 104 Wn.2d 677, 681-84, 709 P.2d 782 (1985) (applying *Restatement (Second) of Torts* §158). Liability for damage may arise under *Restatement (Second) of Torts* §214(1), which provides that "[a]n actor who has in an unreasonable manner exercised any privilege to enter land is subject to liability for any harm to a legally protected interest of another caused by such unreasonable conduct." *Fradkin v. Northshore Util. Dist.*,

96 Wn. App. 118, 123, 977 P.2d 1265 (1999). *See also Brutsche v. City of Kent*, 164 Wn.2d 664, 673-674, 193 P.3d 110 (2008).

Ms. Clipse's interpretation of RCW 4.24.630 is buttressed by the following observation by Division Two in *Grundy v. Brack Family Trust*, Slip Opinion 37251-1 (August 11, 2009) wherein it was stated:

Intentional trespass requires an intentional act. But the defendant need not have intended the trespass; he need only have been substantially certain that the trespass would result from his intentional actions. *Brutsche v. City of Kent*, 164 Wn.2d 664, 674 n.7, 193 P.3d 110 (2008).

The Bracks intentionally raised their bulkhead. But the issue for intentional trespass is whether they had "knowledge that [raising their bulkhead would] to a substantial certainty result in the entry of the [sea water and debris]" onto Grundy's property. *Bradley*, 104 Wn.2d at 682 (quoting 1 *Restatement (Second) of Torts* § 158 comment i at 279 (1965)).

Ms. Clipse's interpretation of RCW 4.24.630 is further underscored by the recent Washington State Supreme Court decision in *In re Matter of the Forfeiture of One 1970 Chevrolet*

Chevelle, et al., Slip Opinion 81116-4 (September 3, 2009). In discussing whether the state's drug trafficking forfeiture statute, RCW 69.50.505, required objective versus subjective knowledge by a vehicle's owner in order for the state to seize a vehicle, the Court observed:

In other statutes, the legislature has utilized terms to require objective versus subjective knowledge. *See, e.g.*, RCW 4.24.630(1) ("For purposes of this section, a person acts 'wrongfully' if the person intentionally and unreasonably commits the act or acts while *knowing, or having reason to know*, that he or she lacks authorization to so act." (emphasis added)); RCW 19.108.010(2)(b)(ii) ("At the time of disclosure or use, *knew or had reason to know . . .*" (emphasis added)). Where the legislature uses certain statutory language in one statute and different language in another, a difference in legislative intent is evidenced. *State v. Roggenkamp*, 153 Wn.2d 614, 625, 106 P.3d 196 (2005). We assume the legislature means exactly what it says and interpret the wording of statutes according to those terms. Where the legislature uses different terms we deem the legislature to have intended different meanings. Because we recognize the legislature is familiar with objective versus subjective "knowledge," the use of "knowledge"

on its own in the "innocent owner" provision establishes the legislature intended actual knowledge as the standard.

The elements necessary to prove statutory trespass under RCW 4.24.630 are essentially the same as those necessary to prove the intentional tort of trespass. The Washington State Supreme Court has refined statutory trespass under RCW 4.24.630 to incorporate an objective standard as to the state of mind the defendant must possess in order to be held liable under RCW 4.24.630. In determining liability under this statute, the state of mind necessary to show intent applies to the act or act of coming onto another's property, not to the cause-in-fact of the actual damage causing agency or instrumentality. *Grundy v. Brack Family Trust*, Slip Opinion 37251-1 (August 11, 2009). If a defendant wrongfully and intentionally comes onto the property of another, RCW 4.24.630 presumes that the damages that consequently result from that act were committed wrongfully since the person or persons who commit such damage shouldn't have been on the property in question to begin with.

The contractors' argument that the trial court's interpretation of RCW 4.24.630 transforms this statute into a negligence cause of action again highlights the contractors'

fundamental mischaracterization of RCW 4.24.630. As the Washington State Supreme Court recognized in *In re Matter of the Forfeiture of One 1970 Chevrolet Chevelle, et al.*, Slip Opinion 81116-4 (September 3, 2009), the words “wrongfully”, “intentionally” and “unreasonably” as used in RCW 4.24.630 refer to the objective standard incorporated in this statute to define the state of mind a plaintiff must show a defendant possessed at the time defendant came onto the property of plaintiff. The contractor’s discussion of negligence with respect to RCW 4.24.630 would be relevant if the words “wrongfully”, “intentionally” and “unreasonably” applied specifically to the agency or instrumentality causing the damage. They do not. They do apply to the state of mind a defendant must possess in order to be held liable under RCW 4.24.630.

The contractors claim Ms. Clipse cannot meet her burden of proof with respect to her claim against the contractors for breach of RCW 4.24.630 because she cannot demonstrate the contractors intentionally and unreasonably caused the backup of sewage in her basement. Again, this highlights the contractors’ fundamental inability to grasp what exactly the “intentional” and “wrongful” elements of RCW 4.24.630 specifically apply to. RCW 4.24.630 applies to trespass. The wrongful act or acts in a trespass action is coming onto the property of another without

proper authorization. As pointed out in Ms. Clipse's opening brief, Ms. Clipse contends the contractors' act of coming onto her property and completing the work was without authorization and therefore "intentional and unreasonable" because the contractors knew, based on the requirements set out in the construction contract and the project specifications agreed to with King County, that: (a) they were not to enter onto any privately owned property unless the contractors' possessed a right of entry agreement signed by the property owner [CP 313] ; (b) they were not to proceed with any work before concluding a side sewer work agreement with the homeowner [CP 378] ; and (c) they were to secure a public works permit from the City of Kent before beginning any work on an individual property [CP 339] . It is undisputed the contractors never possessed any of things before beginning work on Ms. Clipse's property. Consequently, the contractors should have known they were trespassing on Ms. Clipse's property when they arrived on or about October 2, 2003 to begin work on her property.

The contractors finally claim Ms. Clipse cannot establish damages in this case because, "The only wrongful conduct that resulted in damage was digging the whole without written authorization." In fact, according to the contract specifications for the pilot project, Ms. Clipse's property was never supposed to

be part of the pilot project to begin with. [CP 349-355] The purpose of all the contract requirements outlined above was to prevent a potential trespass by the contractors in the course of completing their work under the pilot project. [CP 313] The cause of the damage to Ms. Clipse property was the installation of a new, albeit faulty, side sewer pipe that never should have been installed to begin with. Consequently, all of the damages Ms. Clipse sustained in this case proximately resulted from the contractors coming onto her property in the first place. But for the presence of the contractors on her property, the sewage backup attributable to the faulty installation of a new side sewer on October 4, 2003 would not have occurred.

B. The Contractors' Breach of Their Contract With King County Is Relevant Evidence In This Lawsuit To Demonstrate Statutory Trespass and Negligence.

A trial court's decision to admit evidence is reviewed for an abuse of discretion. *State v. C.N.H.*, 90 Wn. App. 947, 954 P.2d 1345 (1998). Discretion is not abused unless the decision is manifestly unreasonable, is based on untenable grounds, or was made for untenable reasons. *In re Detention of G.V.*, 124 Wn.2d 288, 295, 877 P.2d 680 (1994). The trial court's decision to prevent Ms. Clipse from introducing the "General

Requirements/Technical Specifications” for the pilot project was based on and made for untenable reasons.

Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. ER 401. ER 402 requires only a showing of minimal logical relevance – *any* tendency to make the existence of a fact more or less probable. *State v. Bebb*, 44 Wn.App. 803, 723 P.2d 512 (1986). Facts that are of consequence include facts that offer direct evidence of an element of a claim or defense. *State v. Rice*, 48 Wn. App. 7, 737 P.2d 726 (1987).

The “General Requirements/Technical Specifications” for the pilot project dictated the means and methods to be employed in completing the work associated with the pilot project. By agreeing to these specifications as part of its agreement with King County, the contractors voluntarily and of their own volition set the minimum standards by which the work associated with the pilot project was to be completed. These specifications included the process by which the contractors were supposed to acquire authorization to go onto the property of an indicial homeowner in order to install a new side sewer. These specifications, which the contractors agreed to at the inception of

the project, were most certainly probative in determining whether the contractors properly carried out and completed the work associated with the pilot project.

The contractors claim the contract specifications are not relevant to show the failure to properly install the new side sewer because: (1) the contract with King County for the pilot project did not contain a provision by which the contractors agreed to accept an additional duty that would result in an additional affirmative duty that would result in liability; and (2) Ms. Clipse did not allege breach of contract. In essence, the contractors submit to this Court that they owed one standard of care to King County as identified in the “General Requirements/Technical Specifications”, and some unidentified, lesser standard of care to the recipient of their work, in this case Ms. Clipse. Such a contention is patently ridiculous.

In *Freeman v. Navarre*, 47 Wn.2d 760, 771, 289 P.2d 1015 (1955), the Washington Supreme Court specifically held an engineering firm and manufacturer of a heating system could be found negligent by demonstrating their respective failure to comply with construction specifications agreed to for the installation the heating system. The present situation is virtually identical to that in involved in the *Freeman* decision. In their

opening brief, the contractors do not even mention the *Freeman* decision.

It is undisputed the contractors knew, or had reason to know, that they did not have authorization to be on Ms. Clipse's property on October 2 and 3, 2003 since the contractors: (1) knew Ms. Clipse, not her son, was the owner of 24803 35th Place S., Kent, Washington 98032; and (2) had not secured the required agreements and permits prior to entering onto Ms. Clipse's

It is undisputed the work done by defendant on Ms. Clipse's property on October 2 and 3, 2003 included the installation of a new cleanout pipe. It is undisputed that if this new cleanout pipe had not been installed, the damage to Ms. Clipse's property on October 4, 2003 would never have occurred. Consequently, there is no genuine issue of material fact to dispute that defendant violated RCW 4.24.630 as a matter of law in working on Ms. Clipse's property on October 2 and 3, 2003 and that this work proximately caused the damages Ms. Clipse's property sustained as a result of the sewage backup on or about October 4, 2003.

In accordance with the "General Requirements/Technical Specifications" for the pilot project, before beginning construction work on any particular piece of property that was included in the pilot project, it was the responsibility of the

contractors to check with King County to see that a right-of-entry agreement form had been signed by the owner for that particular property before the contractors began working on that particular property. [CP 313] This right-of-entry agreement specifically stated King County and its contractors would be responsible for any damage done in the course of completing any work on any particular property involved in the pilot project. [CP 343, ¶3] The contractors were not to proceed with working on a particular property until the owner of that property gave permission to enter the property to complete this work by signing a right-of-entry agreement. [CP 313] No written right-of-entry agreement was ever secured by the contractors to complete work of any nature on Ms. Clipse's property. [CP 312]

In addition, the construction specifications for the pilot project required that the defendants see to it that a "side sewer work agreement" be signed by both King County and the owner for a particular property before defendants began working on that particular property. [CP 378] The "side sewer work agreement" served as a "notice to proceed" from King County and was a prerequisite for getting paid for work done on a particular property. [*Id.*] The City of Kent also required a public works permit be taken out for work done on individual properties. [CP 339] No side sewer work agreement or city permit was ever secured by

defendants to complete any work on plaintiff's property. [CP 378]

Breach of contract remains admissible evidence of the defendant's negligence since the contract may establish the standard of care agreed to by the defendant. This is particularly probative in the construction context where the construction contract oftentimes specifically sets out the means and methods whereby the construction work is to be completed. These means and methods are typically set out in the plans and specifications adopted for the project. See e.g. *Kenney v. Abraham*, 199 Wash. 167, 168, 90 P.2d 713 (1939); *Valley Construction Co. v. Lake Hills Sewer District*, 67 Wn.2d 910, 410 P.2d 796 (1966). In this case, it is irrelevant whether or not Ms. Clipse entered into a contract with the contractors for the completion of the pilot project. No matter whether Ms. Clipse was or was not a party to a contract with the contractors, the contractors agreed with King County to carry out the steps outlined above as part of the minimum standards for satisfactorily completing the work called for to complete the pilot project. The contractors' failure to meet these minimum standards in carrying out their work was relevant to demonstrate both: (a) the element of intent to demonstrate statutory trespass; and (b) their breach of the specific standard of

care applicable to their work as set out in their contract with King County.

The contractors place a great deal of significance in the decision reached in *Ward v. Ceco Corp.*, 40 Wn.App. 619, 699 P.2d 814 (1985). The contractors' placement of such importance on this decision is typically misleading. The issue in this case is what evidence is relevant to establish the standard of care the contractors were bound to follow in the course of completing the pilot project. To that end, Ms. Clipse believes the minimum standards incorporated in the contract agreed to with King County are relevant in establishing the standard of care to be applied to the contractors in determining whether they intentionally trespassed on Ms. Clipse's property and/or completed the installation of a new side sewer in a satisfactory fashion. In the *Ward* case, the issue was not whether the applicable contract would establish the standard of care the contractors would be held to, but whether the contract could be used to shift responsibility from the general contractor to a subcontractor. *Id.*, 40 Wn. App at 629. The issue in this case is whether to hold the contractors responsible for their actions based on an agreed to minimum set of standards, not whether that responsibility can be shifted from one contractor to another. The *Ward* decision thus has no applicability to the present case.

The contractors claim the admission of the specifications would be “misleading” and therefore should be inadmissible under ER 403. Specifically, the contractors argue RCW 4.24.630 does not require written authorization, only “authorization”. The contractors claim admitting the contract specifications would impose a higher standard on the contractors than is required by RCW 4.24.630. This distinction is specious.

As the Washington State Supreme Court recognized in *In re Matter of the Forfeiture of One 1970 Chevrolet Chevelle, et al.*, Slip Opinion 81116-4 (September 3, 2009), the words “wrongfully”, “intentionally” and “unreasonably” as used in RCW 4.24.630 refer to an objective standard incorporated into this statute to define the state of mind a plaintiff must show a defendant possessed at the time defendant came onto the property of plaintiff. The contract specifications make it quite evident what the contractors should have known they were supposed to do before going onto M. Clipse’s property. It would not mislead the jury one bit to demonstrate for the jury what the contractors agreed to do in their contract with King County in order to secure the permission of homeowners to come onto the property of an individual homeowner before starting work on the property.

Such evidence would most likely lead the jury to render a verdict in favor of Ms. Clipse in this lawsuit.

III. CONCLUSION

The contractors were wrongfully on Ms. Clipse's property on October 2 and 3, 2003 and did not have authorization to be on her property doing work of any nature on those dates. Consequently, the contractors are liable under RCW 4.24.630 to Ms. Clipse as a matter of law in this lawsuit for the damages she sustained as a result of the sewage backup on October 4, 2003.

RESPECTFULLY SUBMITTED this 30th day of
September, 2009.

LAW OFFICE OF
WILLIAM E. PIERSON, JR. | PC

By 
William E. Pierson, Jr.
WSBA No. 13619

Attorneys for Petitioner
JOSEPHINE CLIPSE

CERTIFICATE OF SERVICE

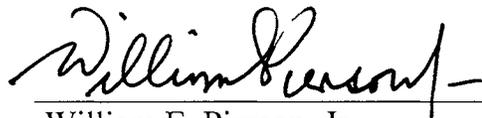
The undersigned certifies that on this day he caused to be served in the manner noted below, a copy of the document to which this certificate is attached, on the following counsel of record:

**Attorneys for Respondents/
Cross-Petitioners
MICHELS PIPELINE CONSTRUCTION, INC.
PIPE EXPERTS, LLC:**

George A. Mix
LAW OFFICES OF KELLEY J. SWEENEY
1191 Second Avenue, Suite 500
Seattle, WA 98101-2990

- via U.S. Mail
- via hand delivery
- via air courier
- via facsimile

DATED this 30th day of September, 2009.



William E. Pierson, Jr.

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