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NO. 71441-4-I

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

NEIL DONNER and KIYOMI G. DONNER, husband and wife, and the marital
community thereof,

Appellants,

vs.

JAMES M. BLUE, as trustee for Northwest Neurological Surgery Trust; JOHN
RIEKE and GENE E. ROBERTSON, husband and wife and the marital community
thereof; JAMES C. HAWKANSON and JANE H. HAKANSON, husband and wife,
and the marital community thereof; JOHN E. SPRING, a single person; SHANE
KIM and DANA KIM, husband and wife. and the marital community thereof,

Respondents.

APPEAL FROM YAKIMA COUNTY SUPERIOR COURT
Honorable William L. Downing, Judge

BRIEF OF RESPONDENTS RIEKE AND ROBERTSON

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I. NATURE OF THE CASE

Plaintiffs sued Dr. Rieke and Mrs. Robertson and other uphill neighbors because of a sewage backup in plaintiffs' home. The backup was caused when roots of a tree on unimproved property owned by a downhill neighbor clogged a shared side sewer line. The sewer line served *all* improved properties involved in this case.

Dr. Rieke and Ms. Robertson knew nothing about the tree roots, the sewer line connection's location, or that there was anything wrong with the sewer line. They did nothing to cause the obstruction.

The trial court ordered plaintiffs, Dr. Rieke and Mrs. Robertson, and other uphill neighbors to share in the sewer line repair costs. That ruling is not challenged on appeal. However, plaintiffs appeal summary judgment in defendants' favor insofar as it denied them other damages.

II. ISSUE PRESENTED

Can Dr. Rieke and Mrs. Robertson be liable for plaintiffs' damages over and above repair costs to a sewer line?

III. STATEMENT OF THE CASE

A. STATEMENT OF RELEVANT FACTS.

In 1993 respondents/defendants Dr. John Rieke and Gene Robertson, purchased and moved into a home at 5001 88th Avenue Southeast on Mercer Island. (CP 74-75, 79-80) Their house, as well as the

properties of their neighbors who are also parties to this suit, are on a steep hill, sloping east to west, toward Lake Washington. (CP 75, 80)

Dr. Rieke and Mrs. Robertson, as well as respondents/defendants Spring, Hawkanson, and Kim, are all uphill neighbors to plaintiffs Donner. Dr. Rieke and Mrs. Robertson's house is east of the Donner home. (CP 170) Mr. Spring lives east, and the Hawkansons live south, of Dr. Rieke and Mrs. Robertson. (CP 175) The Kims live south of Mr. Spring and the Hawkansons. (CP 175) Downhill from these parties and adjacent to plaintiff Donners' property is unimproved property owned by respondent/defendant Dr. Blue, as trustee for Northwest Neurological Surgery Trust.¹ (CP 148-49) The Blue property fronts on West Mercer Way. (CP 175) A map of the properties is included in the Appendix hereto. (CP 175)

The side sewer line at issue serves all parties to this litigation except for Dr. Blue, who has no need for it yet since his property is unimproved. (CP 149, 170) The sewer line, however, runs under the Blue property to connect to the public sewer line under West Mercer Way. (CP 170)

¹ For ease of reference, this brief will treat the trust property as being owned by Dr. Blue.

Except for the Spring property, the properties owned by all parties were once owned by the Overbyes. (CP 171) In a 1963 statutory warranty deed, the Overbyes conveyed what eventually would become the Blue and Donner properties to Blue's and Donners' predecessor, the Dustos. (CP 171, 185) The statutory warranty deed reserved to the Overbyes (and thus to their successors—Rieke/Robertson, the Hawkansons, and the Kims) an easement for ingress, egress, and utilities over the properties later acquired by Dr. Blue and the Donners. (CP 185) The sewer line at issue runs along this easement. The 1963 deed reserving the easement says nothing about responsibility for damages or any duty to repair or maintain. (CP 171)

In 1964 the Dustos sold the western portion of their property to Dr. Blue's predecessor, but reserved a utility easement over what would eventually become Dr. Blue's land. (CP 172, 202) Thus, the Dustos' remaining parcel (now owned by plaintiffs) enjoyed and still enjoys use of the sewer easement over Dr. Blue's property.

On or about July 30, 2012, a sewer backup caused damage to plaintiffs' home. The backup was caused when roots from a tree growing on the Blue property blocked the sewer line under the Blue property. (CP 3, 163, 166, 170)

Prior to the sewer backup, Dr. Rieke and Ms. Robertson had lived in their home for approximately 20 years without incident relevant to the current dispute. (CP 74-75, 79-80) Specifically, neither—

- knew where the sewer utility line that ran under their property was connected;
- ever experienced any problem that would lead them to expect the sewer line was deficient (for example, the toilets always worked fine);
- ever smelled anything out of the ordinary that might suggest there was something wrong with the sewer line;
- had to inspect or do anything to maintain the sewer line, and no one, including the City of Mercer Island, had ever told them they had to do so;
- had done anything to cause the alleged blockage or property damage to plaintiffs. (CP 75, 80)

B. STATEMENT OF PROCEDURE.

Nonetheless, plaintiffs sued Dr. Rieke and Mrs. Robertson and the other defendants. Plaintiffs claimed the sewage that had entered their home came from the homes of their uphill neighbors, *i.e.*, all defendants except Dr. Blue. (CP 3) These uphill neighbors, including Dr. Rieke and Mrs. Robertson, will hereinafter be referred to as “the uphill defendants.”

Plaintiffs' complaint alleged claims for negligence, trespass, nuisance, strict liability, breach of easement, and injunctive relief. Plaintiffs claimed that Dr. Rieke and Mrs. Robertson, as well as the other defendants, had a duty to maintain and keep the sewer line free of obstructions. (CP 4-7) In addition to the cost to repair the sewer line, plaintiffs also sought consequential damages. (CP 3-4)

All defendants moved for summary judgment. Plaintiffs opposed the motions, except as to the strict liability claims, which are not part of this appeal. (CP 203-10)

In their opposition, plaintiffs submitted expert testimony as to the gradual nature of tree root intrusion into sewer lines and its detectability. (CP 157-59) There was, however, no expert testimony that inspection or maintenance of sewer lines by sewer easement owners was a customary or usual practice. Indeed, at oral argument, plaintiff's counsel conceded:

But, you know, truthfully, I think I would have to concede that as a general sort of—if you look at how people normally operate, people don't normally say, you know, yeah, clean the gutters, scope the sewer line. That's not part of sort of the normal homeowner maintenance that we are all accustomed to doing.

(RP 34) Plaintiffs' counsel further admitted:

The fault—Mr. Trabolsi began by saying, well, no party is at fault. And that's true. *There is no fault* in the conventional negligence sense at all—at issue here. The issue is not fault for inspection, there is no—or lack of

inspection, there is no authority addressing the inspection issue at all.

(RP 32-33) (emphasis added).

At the suggestion of the uphill defendants, the trial court apportioned plaintiffs' \$9,464.09 cost to repair the sewer line equally amongst plaintiffs and each set of uphill defendants. (CP 91; RP 9, 19) There has been no cross-appeal from that ruling. Summary judgment was entered in favor of all defendants. (CP 251-53)

IV. ARGUMENT

The purpose of summary judgment is to avoid a useless trial where there is no genuine issue of material fact. *Conradt v. Four Star Promotions, Inc.*, 45 Wn. App. 847, 848, 728 P.2d 617 (1986). A party opposing summary judgment may not rely on mere conclusory allegations, speculative statements, or argumentative assertions. *Boguch v. Landover Corp.*, 153 Wn. App. 595, 610, 224 P.3d 795 (2009). Rather, that party must produce specific facts showing a genuine issue of material fact. *Id.*

Significantly, Dr. Rieke and Mrs. Robertson are not appealing from the award of their proportionate share of the costs to repair the shared sewer line. Nor is any other party.

Thus, this appeal is limited to whether Dr. Rieke and Mrs. Robertson can be liable for anything more. The answer is "no." As will be discussed, plaintiffs failed to meet their burden of producing specific facts

that Dr. Rieke and Mrs. Robertson could be liable for anything more. Summary judgment was properly granted.²

A. DR. RIEKE AND MRS. ROBERTSON CANNOT BE LIABLE FOR BREACH OF EASEMENT AS A MATTER OF LAW.

As plaintiffs candidly admit, the deed creating Dr. Rieke and Mrs. Robertson's easement is silent as to repairs, maintenance, or damages. (Appellants' Opening Brief 5) Thus, this appeal is based solely on the common law. Specifically, plaintiffs contend that RESTATEMENT (THIRD) OF PROPERTY § 4.13 applies to require reversal of the summary judgment. (Appellants' Opening Brief 10)

Plaintiffs claim that section 4.13 provides:

The beneficiary of an easement or profit has a duty to the holder of the servient estate to repair and maintain the portions of the servient estate and the improvements used in the enjoyment of the servitude that are under the beneficiary's control, to the extent necessary to

- (a) prevent unreasonable interference with the enjoyment of the servient estate, or
- (b) avoid liability of the servient-estate owner to third parties.

² Pursuant to RAP 10.1(g)(2), Dr. Rieke and Mrs. Robertson hereby incorporate by reference the Brief of Respondent Spring. Although that brief deals primarily with a hold harmless provision that does not apply to Dr. Rieke and Mrs. Robertson, Spring's discussion of fault and plaintiffs' failure to come forth with evidence is equally applicable to Dr. Rieke and Mrs. Robertson.

(Appellants' Opening Brief 10 (quoting RESTATEMENT (THIRD) OF PROPERTY § 4.13)). Plaintiffs further imply that *Buck Mountain Owners' Association v. Prestwich*, 174 Wn. App. 702, 718, 308 P.3d 644 (2013), approved the above language. (Appellant's Opening Brief 9-10)

Plaintiffs are wrong. First, their position that they were the owners of a servient estate is erroneous. Plaintiffs, like the uphill defendants, were the owners of a dominant estate because they, like the uphill defendants, used that portion of the sewer line that became obstructed under Dr. Blue's property. Therefore, the language they quote as section 4.13 would not help them in this case.

Furthermore, plaintiffs neglect to disclose that—

- the language they claim constitutes section 4.13 is really the language of section 4.13(1), and
- *Buck Mountain* never approved of section 4.13(1).³

Rather, the subsection of the RESTATEMENT (THIRD) OF PROPERTY that applies to this case is subsection (4), not subsection (1), because plaintiffs as well as the uphill defendants all used that portion of the sewer line under Dr. Blue's property that became obstructed. Subsection (4) mandates affirmance. Although Dr. Rieke and Mrs. Robertson were liable

³ A copy of the section 4.13, in its entirety, is set forth in the Appendix hereto.

for their proportionate share of the easement repair cost, they had no affirmative duties vis-à-vis the sewer line and thus cannot be liable for plaintiffs' damages over and above that repair cost.

1. RESTATEMENT (THIRD) OF PROPERTY § 4.13(4) Applies.

The fundamental error in plaintiffs' case is their assumption that they were servient owners in relation to the uphill defendants. Plaintiffs' theory is that the sewage backup would have never occurred if the uphill defendants had either prevented the tree root obstruction of the sewer line *under Dr. Blue's property* or removed it before the sewage backup occurred. As to the sewer line under Dr. Blue's property, plaintiffs (like the uphill defendants) are dominant estate holders, not servient holders. This is because plaintiffs, like the uphill defendants, use the sewer line under Dr. Blue's property to convey their waste to the public sewer main. Because Dr. Blue's property is unimproved, he does not yet use the sewer line. Thus, his property is the only servient estate in this case. *See generally Borgel v. Hoffman*, 219 Pa. Super. 260, 280 A.2d 608 (1971).

Under these circumstances, the governing rule is set forth in RESTATEMENT (THIRD) OF PROPERTY § 4.13(4), which provides:

The holders of separate easements ... who use the same improvements or portion of the servient estate in the enjoyment of their servitudes have a duty to each other to contribute to the reasonable costs of repair and maintenance of the improvements or portion of the servient estate.

Section 4.13(4) governs the relationship between the servitude beneficiaries, not their relationship with the servient estate owner. Section 4.13, comment *e*. Many courts elsewhere have adopted section 4.13(4)'s approach when faced with multiple servitude beneficiaries.⁴

As discussed *supra*, plaintiffs and Dr. Rieke and Mrs. Robertson are servitude beneficiaries. They jointly use “improvements or portion of the servient estate,” *i.e.*, the sewer line under Dr. Blue’s property, where the obstruction occurred.

Moreover, as required by section 4.13(4), plaintiffs and Dr. Rieke and Mrs. Robertson are holders of separate easements. The Rieke/Robertson easement came into existence in 1963 when the Overbyes (who once owned the properties later purchased by Dr. Rieke and Mrs. Robertson and by plaintiffs) conveyed to the Dustos the property that would only *later* be subdivided and ultimately sold to Dr. Blue and plaintiffs respectively. The Overbye deed to the Dustos expressly reserved a utilities easement over the property conveyed in favor of the Overbyes’ remaining properties, which included the property that Dr. Rieke and Mrs. Robertson would ultimately purchase.

⁴ *Baker v. Hines*, 406 S.W.3d 21, 28-29 (Ky. App. 2013); *Drolsum v. Luzuriaga*, 93 Md. 1, 611 A.2d 116, 125 (1992); *McDonald v. Bemboom*, 694 S.W.2d 782, 786 (Mo. App. 1985); *Cohen v. Banks*, 169 Misc.2d 374, 642 N.Y.S.2d 797, 800 (1996); *Lindhorst v. Wright*, 616 P.2d 450, 454-55 (Okla. App. 1980).

This 1963 deed could not have created the utility/sewer easement plaintiffs now enjoy under the Blue property because the 1963 deed conveyed *both* of what later became the Blue property and plaintiffs' property. The purchasers, the Dustos, had no need for a sewer easement across their own land. Plaintiffs' utility/sewer easement did not come into being until the Dustos subsequently subdivided the property and sold the western half to Dr. Blue's predecessor.

Thus, section 4.13(4) applies. However, by its terms, it applies only to the "reasonable costs of repair and maintenance of the improvements or portion of the servient estate." It says nothing about the damages plaintiffs seek here—damages above and beyond the costs to repair the sewer line under Dr. Blue's property.

In fact, those types of damages are not recoverable under section 4.13(4). Comment *e* to RESTATEMENT (THIRD) OF PROPERTY provides the following discussion of section 4.13(4):

No affirmative duty to initiate repair is imposed by this section [section 4.13(4)], but once repair or maintenance is reasonably undertaken by one or more of the servitude beneficiaries, the others have a duty to contribute to the reasonable costs.

Because there is no affirmative duty to repair under section 4.13(4), the trial court was correct in declining to impose on Dr. Rieke and Mrs. Robertson plaintiffs' damages over and above the sewer line repair costs.

This makes sense. Section 4.13 sets forth rules of property law, not of contract or tort. “The owner of an easement is not liable for injuries resulting from the ordinary use of the easement as a use reasonable within the terms of the easement.” 28A C.J.S. § 244. *accord, McKay v. Boise Project Board of Control*, 141 Idaho 463, 111 P.3d 148, 158 (2005). Thus, absent a contract or a tort, damages principles for contract and tort do not apply.

Sun Pipe Line Co. v. Kirkpatrick, 514 S.W.2d 789 (Tex. Civ. App. 1974), is illustrative. There a pipeline easement ran across plaintiff’s land. The easement holder inspected the pipe by air. Because overhanging tree limbs obscured aerial views of the pipe, the easement holder sprayed the trees, killing or damaging not only the offending limbs, but the trees themselves. Conceding the easement holder had the right to manually remove the offending limbs, plaintiff sued because of the spray damage.

The issue was whether plaintiff had to prove negligence to recover damages. The court ruled that he did:

“[W]here one has an easement right over land .., in order for the owner of title to the land to recover damages growing out of the use of such easement, he must show that the defendant was guilty of negligence in the manner in which it was used.”

514 S.W.2d at 792 (quoting *Texas Power & Light Co. v. Casey*, 138 S.W.2d 594, 597-98 (Tex. Civ. App. 1940)). See also *Rehwalt v. American Falls Reservoir District No. 2*, 97 Idaho 634, 550 P.2d 137, 139 (1976).

Here, plaintiffs offered no evidence of negligence. Plaintiffs do not, and cannot, claim that Dr. Rieke or Mrs. Robertson caused the obstruction in the sewer line on Dr. Blue's property. The obstruction was caused solely by roots of a tree on Dr. Blue's property, the estate servient to all uphill defendants. Only the person or entity who created or maintained the obstruction of the easement can be sued. *Alabama Power Co. v. Ray*, 260 Ala. 506, 71 So. 2d 91, 92 (1954); *Hardin v. Sin Claire*, 115 Cal. 460, 47 P. 363 (1896).

Borgel v. Hoffman, 219 Pa. Super. 260, 280 A.2d 608 (1971), provides a helpful comparison. Plaintiff fell in a driveway that ran between two rows of houses. She sued the owners of one house, claiming that the fall occurred on that part of the driveway owned by them and that they had been negligent in their maintenance and repair of that portion. These defendants, in turn, sought contribution from the owners of other houses on either side of the driveway.

The trial court granted summary judgment to the owners whose houses did not abut that portion of the driveway where the accident occurred. The appellate court affirmed because "each of the owners [is]

responsible for the maintenance and repair of only that portion of the driveway abutting or located on his own land.” 280 A.2d at 610 (emphasis added). *See Okkerse v. Howe*, 405 Pa. Super. 608, 593 A.2d 431 (1991).

Although no Washington court has expressly adopted section 4.13(4), Washington courts have adopted its corollary, section 4.13(3).

That section provides that absent an express agreement to the contrary:

Joint use by the servient owner and the servitude beneficiary of improvements used in enjoyment of an easement or profit, or of the servient estate for the purpose authorized by the easement or profit, gives rise to an obligation to contribute jointly to the costs reasonably incurred for repair and maintenance of the portion of the servient estate or improvements used in common.

Thus, when the servient owner shares in the use of the easement with the dominant owners, section 4.13(3) applies a rule similar to, and consistent with, section 4.13(4).⁵ Like section 4.13(4), section 4.13(3) does not impose an affirmative duty on the easement owner to make repairs. RESTATEMENT (THIRD) OF PROPERTY § 4.13, comment *b* (where “the servient estate is being used by the servitude owner in common ... with the owner of the servient estate, the owner of the servitude does not have an affirmative duty to make repairs”).

⁵ Since Dr. Blue did not share in the use of the sewer line, section 4.13(3) does not govern this case.

Washington courts have adopted section 4.13(3)'s approach. *Bushy v. Weldon*, 30 Wn.2d 266, 191 P.2d 302 (1948), and *Buck Mountain Owners' Association v. Prestwich*, 174 Wn. App. 702, 308 P.3d 644 (2013), held that absent contrary language in a deed, a court may allocate the cost of repairs or maintenance of an easement equally amongst those sharing its use including the servient owner.⁶ Indeed, as *Buck Mountain* expressly recognized, the Supreme Court in *Bushy* tacitly adopted the approach of section 4.13(3). *Buck Mountain*, 174 Wn. App. at 718.

Since section 4.13(4) is so similar to section 4.13(3), this court should adopt section 4.13(4) and apply it in this case. The trial court essentially did so in its allocation of sewer line repair costs amongst plaintiffs and the four sets of uphill defendants.

In sum, because section 4.13(4) applies, Dr. Rieke and Mrs. Robertson had no duty to inspect, repair, or maintain the easement under Dr. Blue's property and thus did not breach the easement. Summary judgment in their favor must be affirmed.

⁶ *Buck Mountain Ass'n* illustrates this shared liability for costs to repair or maintain the easement itself applies even absent an obstruction or interference with the easement. See *Buck Mountain*, 174 Wn. App. at 710-12 (pre-damage maintenance assessments).

2. Plaintiffs' Authorities Do Not Apply.

As mentioned earlier, page 10 of Appellants' Opening Brief quotes as section 4.13 of the RESTATEMENT (THIRD) OF Property what is really section 4.13(1). Section 4.13(1) does not apply.

First, section 4.13(1), by its terms, applies only when "the portions of the servient estate and the improvements used in the enjoyment of the servitude" "are under the beneficiary's control." Comment b reiterates:

Once the easement owner has started making use of the easement, there is a duty to make such repairs or do such maintenance as may be necessary to avoid unreasonable interference with the servient estate. However, the affirmative duty to make repairs extends only to portions of the servient estate or of the improvements used in enjoyment of the easement that are *under the beneficiary's control*.

(Emphasis added.) Even if the repairs and maintenance plaintiffs claim should have been done would have prevented unreasonable interference "with the servient estate,"⁷ plaintiffs have failed to show the sewer pipe under Dr. Blue's property was under Dr. Rieke's or Mrs. Robertson's control.

Second, by its terms, section 4.13(1) assumes there is a single beneficiary using the easement ("[t]he beneficiary of an easement or profit

⁷ As explained *supra*, the servient estate here was Dr Blue's property. He has never claimed any interference, let alone unreasonable interference, with his property.

has a duty ...”). In contrast, section 4.13(3) applies to “[j]oint use by the servient owner and the servitude beneficiary,” and section 4.13(4) expressly refers to “[t]he holders of separate easements ... who use the same improvements or portion of the servient estate.” Indeed, foreshadowing sections 4.13(3)-(4), comment *b* on section 4.13(1) specifically states:

If the servient estate is being used by the servitude owner in common either with holders of other similar servitudes or with the owner of the servient estate, the owner of the servitude does not have an affirmative duty to make repairs, but does have a duty to contribute to the reasonable costs of repairs or maintenance undertaken by others.

Because the sewer line here had multiple beneficiaries, section 4.13(1) is inapplicable.

Plaintiffs also rely heavily on a statement in 28A C.J.S. § 229. (Appellants’ Opening Brief 11-12) That statement says, “The owner of an easement is responsible for any damage resulting from a failure to maintain or repair the easement.” This statement also does not apply here.

First, the statement assumes there is but one owner or user of the easement. Here, there were multiple owners/users.

Second, plaintiffs ignore the heading to section 229, which provides the context for that section. The heading states:

If the character of the easement is such that a failure to keep it in repair will result in injury to the servient estate or

to third persons, the owner of the easement will be liable in damages for the injury so caused.

Plaintiffs claim their property is the servient estate. But as discussed *supra*, plaintiffs' property was a dominant estate. For that reason as well, section 229 does not apply.

Plaintiffs' reliance on *Walsh v. United States*, 672 F.2d 746 (9th Cir. 1982), is misplaced. That case involved "the rights and liabilities of the owner of the dominant tenement vis-à-vis the owner of the servient tenement," *id.* at 748, not the rights and liabilities between multiple users in common of a portion of an easement.

In short, plaintiffs have failed to cite any authority that supports their breach of easement theory. The trial court's summary judgment must be affirmed.

B. DR. RIEKE AND MRS. ROBERTSON CANNOT BE LIABLE FOR NEGLIGENCE AS A MATTER OF LAW.

Plaintiffs also claim they are entitled to recover based on negligence. The elements of negligence are duty, breach of that duty, injury, and proximate causation. *Hostetler v. Ward*, 41 Wn. App. 343, 349, 704 P.2d 1193 (1985), *rev. denied*, 106 Wn.2d 1004 (1986). The duty owed is a duty of reasonable care. *Alston v. Blythe*, 88 Wn. App. 26, 31, 943 P.2d 692 (1997). Absent fault, there can be no negligence. *See*

Sullivan v. Lyon Steamship, Ltd., 63 Wn.2d 316, 324, 387 P.2d 76 (1963),
cert. denied, 377 U.S. 932 (1964).

Plaintiffs' appeal of the dismissal of their negligence claim is without merit because they have admitted that no one was at fault. At oral argument below, plaintiffs' counsel conceded:

But, you know, truthfully, I think I would have to concede that as a general sort of—if you look at how people normally operate, people don't normally say, you know, yeah, clean the gutters, scope the sewer line. That's not part of sort of the normal homeowner maintenance that we are all accustomed to doing.

....
The fault—Mr. Trabolsi began by saying, well, no party is at fault. And that's true. ***There is no fault*** in the conventional negligence sense at all—at issue here. The issue is not fault for inspection, there is no—or lack of inspection, there is no authority addressing the inspection issue at all.

(RP 34, 32) (emphasis added).

Fault is based on actual or constructive notice of the injury-causing condition. *Lewis v. Krussel*, 101 Wn. App. 178, 186, 2 P.3d 486, *rev. denied*, 142 Wn.2d 1023 (2000). For example, in *Lewis* two healthy trees on defendants property fell onto plaintiffs' home during a storm. Defendants knew windstorms had knocked down other trees on their property and nearby in earlier years. Nonetheless, the Court of Appeals ruled that defendants were entitled to summary judgment, explaining:

In general, the owner of land located in or adjacent to an urban or residential area has a duty of reasonable care to prevent defective trees from posing a hazard to others on the adjacent land. ...[A] possessor or owner of urban or residential land who has actual or constructive knowledge of defective trees is under a duty to take corrective action for the protection of the plaintiff on adjacent land.

Actual or constructive notice of a “patent” danger is an essential component of the duty of reasonable care. Absent such notice, the landowner is under no duty to “consistently and constantly” check for defects.”

101 Wn. App. at 186-87 (citations omitted); *see Albin v. National Bank*, 60 Wn.2d 745, 375 P.2d 487 (1962). Because the trees were healthy, defendants lacked notice and were entitled to summary judgment.

Like the plaintiffs in *Lewis*, plaintiffs here have failed to produce any evidence that Dr. Rieke or Mrs. Robertson had the required notice that roots from a tree on Dr. Blue’s property would clog the sewer line under Dr. Blue’s property. It was undisputed that they did not know where the sewer connection was, had never experienced any problem that would lead them to believe the sewer line was deficient, had never smelled anything out of the ordinary that might suggest there was something wrong with the sewer line, had never had to inspect or do anything to maintain the sewer line, had never been told by anyone they had to inspect or maintain the sewer line, and had not done anything to cause the alleged blockage or property damage to plaintiffs. (CP 75, 80)

Furthermore, plaintiffs failed to present evidence of any custom amongst common users of an easement to inspect or repair the sewer line under their respective properties, let alone under another neighbor's property, that might establish a standard of care. In any event, as discussed *supra*, Dr. Rieke and Mrs. Robertson had no affirmative duty to inspect or repair.

Under these circumstances, the trial court was right to dismiss plaintiffs' negligence claim. This court should affirm.

C. DR. RIEKE AND MRS. ROBERTSON CANNOT BE LIABLE FOR NUISANCE OR TRESPASS AS A MATTER OF LAW.

Nuisance and trespass are similar claims, both focusing on invasion of plaintiff's interest in property. *Gaines v. Pierce County*, 66 Wn. App. 715, 719, 834 P.2d 631 (1992), *rev. denied*, 120 Wn.2d 1021 (1993). Either can occur intentionally or negligently. *Olympic Pipe Line Co. v. Thoeny*, 124 Wn. App. 381, 393, 101 P.3d 430 (2004, *rev. denied*, 154 Wn.2d 1026 (2005); *Hughes v. King County*, 42 Wn. App. 776, 714 P.2d 316, *rev. denied*, 106 Wn.2d 1006 (1986). Plaintiffs do not claim Dr. Rieke or Mrs. Robertson committed an intentional tort.

To prove negligent nuisance or negligent trespass, a plaintiff must prove the elements of negligence. *Gaines*, 66 Wn. App. at 719-20. As discussed in the preceding section, plaintiffs have failed to do so and have

acknowledged as much. (RP 32) Consequently, the nuisance and trespass claims fail as a matter of law.

Moreover, *Forbus v. Knight*, 24 Wn.2d 297, 163 P.2d 822 (1945), precludes plaintiffs' recovery against Dr. Rieke and Mrs. Robertson under a nuisance theory. In *Forbus*, plaintiff's home suffered several sewage backups. The backups appeared to have been caused by tree roots in the sewer line. Some of the roots came from a tree on defendant's property.

Plaintiff sued for nuisance. The trial court dismissed on the ground that plaintiff had been negligent in failing to properly cement the sewer line joints. Reversing and remanding for trial, the Washington Supreme Court explained that the duty lay with the owner of the offending tree:

It is the duty of the one who is the *owner of the offending agency* to restrain its encroachment upon the property of another, not the duty of the victim to defend or protect himself against such encroachment and its consequent injury.

24 Wn.2d at 313 (emphasis added).

Forbus cited with approval decisions from other states holding that the party causing the nuisance should be liable. See *Buckingham v. Elliott*, 62 Miss. 296, 301 (1884) (owner of well could recover damages from owner of tree whose roots encroached upon well); *Stevens v. Moon*, 54 Cal. App. 737, 202 P. 961, 963 (1921) (one injured by encroaching roots from another's tree can recover from tree owner). See also *Norwood v.*

City of New York, 95 Misc.2d 55, 406 N.Y.S.2d 256 (1978) (city that planted tree over plaintiff's sewer line liable in damages).

Unlike the defendants in the foregoing cases, Dr. Rieke and Mrs. Robertson did not own the offending tree. Dr. Rieke and Mrs. Robertson cannot be liable for nuisance as a matter of law.

Although *Forbus* did not discuss easements and the owner of a servient estate generally has no duty to repair or maintain an easement, 25 AM.JUR.2D *Easements & Licenses in Real Property* § 82, the owner of a servient estate is not completely free of obligation: such an owner owes a duty not to interfere with the easement that runs through his or her land. *Sunnyside Valley Irrigation District v. Dickie*, 111 Wn. App. 209, 219, 43 P.3d 1277 (2002), *aff'd*, 149 Wn.2d 873, 73 P.3d 369 (2003).

The *Hughes* case is controlling on plaintiffs' trespass claim. There the county had an easement over plaintiffs' property for the installation of a storm sewage drainage system. Despite the county's efforts at improving the system, plaintiffs' property repeatedly flooded during rains. Plaintiffs sued for trespass. The trial court found the county guilty of trespass as the dominant owner over the servient estate.

This court reversed and remanded for dismissal, explaining:

Neither theory is supported by the evidence or findings in this case. The plaintiff bears the burden of establishing the elements of trespass.

No evidence suggests that King County has in any way materially altered the flow of water through the drainage system. . . .

Nor is there any evidence that negligence by King County contributed in any way to the flooding that damaged appellant's property. . . .

42 Wn. App. at 318, 319 (emphasis added) (citations omitted).

Dr. Rieke and Mrs. Robertson demonstrated they had done nothing to cause the obstruction that resulted in the sewer backup and had no reason to know that tree roots from Dr. Blue's property would cause the obstruction. The burden then shifted to plaintiffs to come forth with specific facts demonstrating a genuine issue of material fact. They failed to do so. *Hughes* mandates dismissal of the trespass claim.

D. DR. RIEKE AND MRS. ROBERTSON CANNOT BE LIABLE FOR INJUNCTIVE RELIEF AS A MATTER OF LAW.

To be entitled to injunctive relief, plaintiffs must show:

(1) a clear legal or equitable right; (2) a well-grounded fear of immediate invasion of that right; and (3) that the acts complained of are either resulting in or will result in actual or substantial injury.

Sunnyside Valley Irrigation District v. Dickie, 111 Wn. App. 209, 220, 43 P.3d 1277 (2002). Plaintiffs did not make the required showing.

Here, Dr. Rieke and Mrs. Robertson agreed to pay and have paid a pro rata share of the repair costs to the sewer line. They have no affirmative duty of repair, inspect, or maintain. Thus, plaintiffs have no

clear legal or equitable right against them. Plaintiffs have also failed to show a well grounded fear of *immediate* invasion of any right or any acts of Dr. Rieke or Mrs. Robertson that resulted in or will result in actual or substantial injury. The trial court did not err in denying injunctive relief.

V. CONCLUSION

Plaintiffs have not cited *a single* authority that Dr. Rieke and Mrs. Robertson can be liable for plaintiffs' damages over and above their proportional share of the sewer line repair costs where, as here, both parties used that portion of the sewer line where the obstruction occurred, under Dr. Blue's property, pursuant to separate easements.

The trial court was thus correct in granting summary judgment to Dr. Rieke and Mrs. Robertson. This court should affirm.

DATED this 3th day of July, 2014.

REED McCLURE

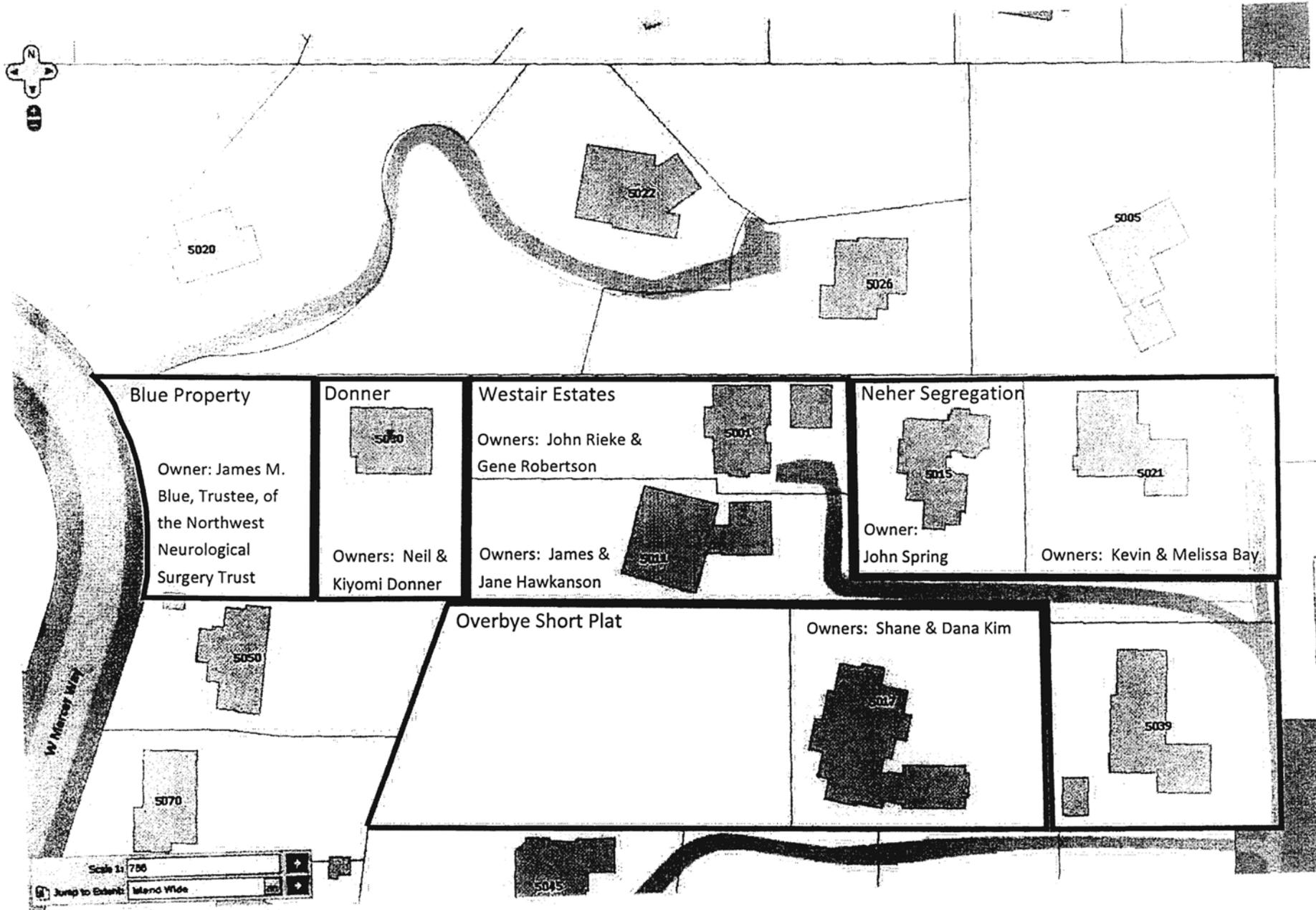
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CP 125
APPENDIX A



RESTATEMENT OF THE LAW THIRD

THE AMERICAN LAW INSTITUTE

RESTATEMENT OF THE LAW

PROPERTY

Servitudes

As Adopted and Promulgated

BY

THE AMERICAN LAW INSTITUTE
AT WASHINGTON, D.C.

May 12, 1998

Volume 1
Chapters 1 to 4



ST. PAUL, MN
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2000

APPENDIX B

Magnolia Pipe Line Co. v. City of Tyler, 348 S.W.2d 537 (Tex.Ct.App. 1961) (city required to pay costs of lowering and encasing oil pipeline originally constructed at proper depth in rural area to protect against damage from installation and paving of new streets).

Commissioner of Highways v. Stuarts Draft Water Co., 197 Va. 36, 87 S.E.2d 756 (1955) (public-highway easement includes rights to change the grade in improving the way; holder of subsequent easement for water pipeline must bear costs of relocating pipeline).

STATUTORY NOTE

(All statutory citations are to WESTLAW, as of April 1, 1999)

Massachusetts: Mass. Ann. Laws ch. 187, § 5 (the "owner . . . of real estate abutting on a private way who [has] by deed existing rights of ingress and egress upon such way . . . shall have the right by implication" to install gas, telephone, water, sewer, and electrical service along the right of way, subject to provision that installation of these utilities must not interfere with the existing use of the way by others)

§ 4.13 Duties of Repair and Maintenance

Unless the terms of a servitude determined under § 4.1 provide otherwise, duties to repair and maintain the servient estate and the improvements used in the enjoyment of a servitude are as follows:

(1) The beneficiary of an easement or profit has a duty to the holder of the servient estate to repair and maintain the portions of the servient estate and the improvements used in the enjoyment of the servitude that are under the beneficiary's control, to the extent necessary to

(a) prevent unreasonable interference with the enjoyment of the servient estate, or

(b) avoid liability of the servient-estate owner to third parties.

(2) Except as required by § 4.9, the holder of the servient estate has no duty to the beneficiary of an easement or profit to repair or maintain the servient estate or the improvements used in the enjoyment of the easement or profit.

(3) Joint use by the servient owner and the servitude beneficiary of improvements used in enjoyment of an easement or profit, or of the servient estate for the purpose authorized by the easement or profit, gives rise to an

obligation to contribute jointly to the costs reasonably incurred for repair and maintenance of the portion of the servient estate or improvements used in common.

(4) The holders of separate easements or profits who use the same improvements or portion of the servient estate in the enjoyment of their servitudes have a duty to each other to contribute to the reasonable costs of repair and maintenance of the improvements or portion of the servient estate.

Cross-References:

Restatement Second, Torts, Chapter 13, Liability for Condition and Use of Land; § 4.9, Servient Owner's Right to Use Estate Burdened by a Servitude; § 4.10, Use Rights Conferred by Servitudes; § 4.12, Rights of Holders of Separate Servitudes in Same Property; § 6.3, Power to Create a Common-Interest-Community Association; Chapter 7, Modification and Termination of Servitudes; § 8.3, Availability and Selection of Remedies for Enforcement of Servitudes.

Comment:

a. Application. The rules stated in this section apply only as an aid to determining the intent or expectations of the parties under the rules stated in § 4.1, and to supply terms omitted by the parties in creating a servitude. Subject to the limits stated in Chapter 3, Validity of Servitude Arrangements, the parties are free to determine the extent of their obligations *inter se* to keep an easement or profit in repair. The rules stated in this section only address the obligations of servitude holders and servient owners among themselves. They do not address the responsibilities the various users of the servient estate may have to others for personal injury or other damage caused by conditions on the servient estate, a subject that is outside the scope of this Restatement. See Restatement Second, Torts, Chapter 13, Liability for Condition and Use of Land. The rules stated in this section apply only to easements and profits.

b. Servitude holder's duty to repair and maintain, subsection (1). Under the rule stated in § 4.10, the holder of an easement or profit is entitled to make any use of the servient estate that is reasonable for enjoyment of the servitude, including the right to construct, improve, repair, and maintain improvements that are reasonably necessary. The right of the easement or profit owner is qualified, however, by the general principle that the use may not interfere unreasonably with the enjoyment of the servient estate. The rule stated in this subsection elaborates that general principle by providing that the servitude beneficiary has a duty to repair and maintain those portions of the servient estate, and the improvements

used in enjoyment of the easement or profit, that are under the beneficiary's control, to the extent necessary to prevent unreasonable interference with the servient estate.

In the absence of an agreement to the contrary, the owner of an easement or profit has no duty to use it, or to make any improvements to the servient estate, and is free to abandon the servitude. Since the duty set forth in this subsection is a qualification of the privilege created by the easement or profit, no duty arises until the servitude beneficiary makes use of the easement or profit, and any duty that arises generally ceases on abandonment (see § 7.4, Modification or Extinguishment by Abandonment). Once the easement owner has started making use of the easement, there is a duty to make such repairs or do such maintenance as may be necessary to avoid unreasonable interference with the servient estate. However, the affirmative duty to make repairs extends only to portions of the servient estate or of the improvements used in enjoyment of the easement that are under the beneficiary's control. If the servient estate is being used by the servitude owner in common either with holders of other similar servitudes or with the owner of the servient estate, the owner of the servitude does not have an affirmative duty to make repairs, but does have a duty to contribute to the reasonable costs of repairs or maintenance undertaken by others.

Illustrations:

1. O, the owner of Blackacre, acquired an easement to build a road across Whiteacre to provide access to a public highway. Whiteacre is used as a cattle ranch. When O built the road, O cut the Whiteacre fences and installed cattle guards where the road entered and exited Whiteacre. The road is not used to serve Whiteacre. Because O has control of the road, O has a duty to maintain the cattle guards to prevent unreasonable interference with use of Whiteacre as a cattle ranch.
2. Same facts as Illustration 1, except that O acquired an easement to use an existing road across Whiteacre, which was also used by the owner of Whiteacre. In the absence of other facts or circumstances, O does not have a duty to maintain the cattle guards because O is not in control of the road. Under the rule stated in § 4.10, O would have the right to make repairs to the cattle guards, and, under the rule stated in subsection (3), O would have the duty to contribute to costs reasonably incurred by the owner of Whiteacre for maintenance and repair of the road.

3. Irrigation Company ships water through a canal located on Whiteacre pursuant to an easement for canal purposes. Irrigation Company has control of the canal and owes a duty to the owner of Whiteacre to maintain and repair the canal to avoid unreasonable interference with the enjoyment of Whiteacre and to avoid liability on the part of the owner of Whiteacre to third parties for injuries suffered on account of the condition of the canal.

c. Servient-estate owner generally has no duty to repair or maintain servient estate, subsection (2). The purchaser of an easement or profit buys the right to use land belonging to someone else for a particular purpose. If improvements are necessary for the purpose, the purchaser will usually make them, and will thereafter make repairs as desired. The basic obligation imposed on the owner of the servient estate is negative: not to interfere with the use authorized by the servitude. However, to avoid unreasonably interfering with the use authorized by the servitude, the servient owner may be required to repair improvements on the servient estate.

Illustration:

4. Power Company properly installed poles and a power line across Blackacre pursuant to an easement. O, the owner of Blackacre then built a road crossing under the power line. If proper drainage is provided and maintained, the road does not interfere with the power line, but if the drainage becomes inadequate, the foundations for the poles may be undermined. Unless the easement provides to the contrary, O has the duty to maintain the drainage to avoid interfering with the power poles.

d. Joint use by servitude beneficiary and owner of servient estate, subsection (3). When the owner of the servient estate and the beneficiary of an easement or profit both make the use of the servient estate that is authorized by the easement or profit, they are both liable to contribute to the costs reasonably incurred for repair and maintenance of the portion of the servient estate and the improvements they use in common. This rule, which like all the rules stated in this Chapter yields to a contrary intent of the parties, is based on a rather weak assumption as to what the parties probably intended, or would have intended had they thought about the question. Because the circumstances of the creation and use of easements and profits can vary so widely, this rule may not fit well in a particular case. It should

yield readily to inferences as to the actual or probable intent of the parties drawn from the circumstances of the particular case.

In allocating costs between the owner of the servient estate and the holders of easements or profits, factors that should be considered include the values of their respective contributions to construction and improvement of any facilities for enjoyment of the easement or profit, including the value of the land contributed by the servient owner, and the amount paid for the easement. In addition, the frequency and intensity of use made by each and the value of any other contributions that enhance the value of the servitude or the servient estate should be taken into account.

e. Maintenance and repair obligations among holders of separate easements, subsection (4). The holders of separate easement rights to use the same improvements are obligated to contribute to the reasonable costs of repair and maintenance of the portion of the servient estate or the improvements used in enjoyment of the servitude. The rule stated in this section governs the relationship among the servitude beneficiaries; it does not govern their relationship with the owner of the servient estate, which is determined under subsections (1), (2), and (3). No affirmative duty to initiate repair is imposed by this section, but once repair or maintenance is reasonably undertaken by one or more of the servitude beneficiaries, the others have a duty to contribute to the reasonable costs. The responsibility of each user should reflect a fair proportion of the costs. The basis of fair apportionment will vary depending on the circumstances. Factors that may be relevant include the amount and intensity of actual use and the value of other contributions made by the users to improvement and maintenance of the easement or profit. If the holders of the separate use rights are obligated to pay for maintenance without regard to their actual usage of the easement and cannot terminate their liability by abandonment, they may be a common-interest community with the powers and duties set forth in Chapter 6.

REPORTER'S NOTE

The rules stated in this section are consistent with generally accepted authority:

Restatement of Property § 485, Comment *b*, provided that such duty of repair as exists is on the owner of the easement. "The duty is for the benefit of the owner of the servient tenement and goes only to the extent

of requiring the owner of an easement to so maintain and repair the premises subject to the easement as to prevent unreasonable interference with the use of the servient tenement by the possessor of it."

Jon W. Bruce & James W. Ely, Jr.,
The Law of Easements and Licenses
in Land § 7.09, Repair, Maintenance