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COURT OF APPEALS DIV I
STATE OF WASHINGTON

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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

v.

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

BRIEF OF RESPONDENT SPRING

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I. ISSUE PRESENTED ON APPEAL AS TO THIS RESPONDENT

1) Where there is no evidence that Mr. Spring acted negligently regarding his use of the underground sewer line, can he be held liable for Plaintiffs' consequential damages?

2) Where Mr. Spring did nothing to cause Plaintiffs' damages, will indemnity arise under his easement?

II. COUNTER -STATEMENT OF THE CASE

A. Statement of Relevant Facts.

Plaintiffs own a home on West Mercer Way on Mercer Island. During the week of 07/30/12, the underground sewer line that services Plaintiffs' home backed up into their basement due to the roots of a tree that blocked the sewer line. CP 3. The tree and its roots were on Defendant Dr. James Blue's property, an undeveloped parcel located downhill and west of Plaintiffs' property. CP 2-3. Plaintiffs concede that the only condition that caused the sewer line to clog and back up into their basement were the tree roots on Dr. Blue's property. CP 53.

In opposition to all Defendants' motions for summary judgment, Plaintiffs introduced a declaration from engineer Bruce Dodds, who stated that if someone had placed a camera under Dr. Blue's property, they could have seen that roots from a tree on his property were clogging the sewer line.

Nowhere in his declaration did Mr. Dodds state that it was the custom and practice amongst private property owners to periodically inspect an underground sewer line that serviced their respective properties. CP 157-159.

Plaintiffs' claims against the Defendants are based on two separate easements. One applies to Mr. Spring, and the other applies to all other Defendants. CP 181-183, 185. Plaintiffs claim that under Spring's easement, he had an express duty to hold and save them harmless from damages arising from his use of the easement, regardless of the cause. CP 6. Plaintiffs concede no act or condition on Spring's, or any of the other Defendants' properties, other than Dr. Blue's, caused or contributed to the sewer line clogging. CP 53-54. Spring's utility easement says nothing about the duty to repair or maintain it. CP 181-183, 185.

Other than Dr. Blue, all of the other Defendants' properties are located uphill and east of Plaintiffs' property. CP 2-3. Defendant Spring learned of Plaintiffs' problem about two weeks after the sewer line clogged. CP 61. Up to that time, he had no knowledge of where the sewer line ran, and had never incurred a cost to maintain, repair or replace it, because there never had been a reason to. CP 61. Finally, neither Plaintiffs nor any of Defendants who benefitted from the sewer line, ever requested or suggested a protocol for inspecting the sewer line. CP 61.

B. Statement of Procedure.

Plaintiffs sued Mr. Spring and the other uphill Defendants on the grounds that the sewage that entered Plaintiffs' home came from the homes of their uphill neighbors. CP 3. Plaintiffs' Complaint alleged claims of negligence, trespass, nuisance, strict liability, breach of easement, and injunctive relief. CP 5-6. Plaintiffs also claimed that Mr. Spring had an express duty under his easement to hold and save them harmless from and against all damage arising from his use of the easement. CP 6. In addition to the cost to repair the sewer line, Plaintiffs sought consequential damage for the damage to their home. CP 7.

All Defendants moved for summary judgment. Plaintiffs opposed the motions, except as to their strict liability claims, which are not a part of this appeal.

The trial court granted all Defendants summary judgment and in its order, required all parties, except Dr. Blue, to share equally in the \$9,464.09 cost to repair the line. The Defendants agreed this was appropriate. Summary judgment was granted on all other issues in favor of all Defendants.

III. STANDARD OF REVIEW

An appellate court reviews a summary judgment order de novo, engaging in the same inquiry as the trial court. *Anderson v. Weslo, Inc.*, 79 Wn. App. 829, 833, 906 P.2d 336 (1995). The purpose of summary judgment is to avoid a useless trial where, as here, 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 merely rely on 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 demonstrating a genuine issue of material fact. *Id.*

IV. SUMMARY OF SPRING'S ARGUMENTS

Pursuant to RAP 10.1(g)(2), Mr. Spring hereby incorporates all facts and legal arguments asserted in the Rieke/Robertson's response brief, as well as the other uphill Defendants, because they apply to Mr. Spring as well. The only distinguishing factor between Spring and his uphill neighbors is that Spring's easement includes hold harmless language, whereas the easement for the other uphill Defendants does not. Therefore, Spring's response brief will focus on whether he is liable to Plaintiffs under the hold harmless provision in his easement. The trial court ruled Spring was not liable under the hold harmless provision in that easement. We believe that ruling was correct.

Two salient facts support the trial court's ruling. First, Plaintiffs conceded that the sole cause of their damages was the tree roots growing under Dr. Blue's property. Second, Plaintiffs failed to produce any evidence that it was the custom and practice for property owners to routinely inspect a

shared sewer line, where no one had reason to believe such inspection was necessary, and where no one had ever proposed such a protocol.

V. ARGUMENT

- A. There is no evidence that Mr. Spring acted negligently regarding his use of the underground sewer line.

The easement that applies to Spring states:

IT IS AGREED that the grantors of the easement described herein shall fully use and enjoy their premises, except as to the rights herein granted; and the grantee of such easement described herein does agree to hold and save his easement grantor harmless from and against any and all damage *arising from* his use of the right, easement and right of way herein granted and agrees to pay any damage or damages which may arise to the property, premises or rights of the easement grantor *through easement grantee's use, occupation and possession* of the rights herein granted. *Emphasis added.* CP 181

On summary judgment, Plaintiffs failed to offer any evidence that their damages arose out of Spring's use, occupation or possession of the easement. Rather, they conceded that their damages arose solely out of tree roots under Dr. Blue's property that clogged the sewer line. Plaintiffs relied on expert Bruce Dodds, who has more than 40 years of experience in both residential and commercial land development engineering, including sewage and construction engineering. CP 157-159. Nowhere in his declaration did Mr. Dodds state that in his experience there was a custom or practice amongst residential property owners to periodically

inspect an underground sewer line that serviced their respective properties. CP 157-159. Moreover, none of the parties ever experienced any problem with the underground sewer line; no one smelled anything out of the ordinary, no one was ever told to inspect the sewer line, and no one ever proposed an inspection protocol for the sewer line. CP 61, 75, 80, 135, 137, 149.

Furthermore, even if Mr. Spring inspected the underground sewer line that ran under his property with a camera, it would not have revealed tree roots growing under Dr. Blue's property. In sum, absent evidence that a custom and practice existed that required Spring and his neighbors, including the Plaintiffs, to inspect the entire underground sewer line, there is no evidence that would allow a jury to conclude that Spring's acts or omissions caused or contributed to the blockage that occurred. See *Buck Mountain Owners' Association v. Prestwich*, 174 Wn. App. 702, 308 P.3d 7644 (2013) (Where the court held the Defendant was required to contribute to the cost of an established maintenance protocol for an easement from which he benefitted). No such protocol was in place here.

B. Where Spring did nothing to cause Plaintiffs' damage, indemnity will not arise under the easement.

Washington Courts have consistently held that evidence of causation of a loss is the touchstone of liability under a contract indemnity

clause, though negligence may be incidental to the cause. *Jones v. Strom Constr. Co.* 84 Wn.2d 518, 527 P.2d 1115 (1974); *Parks v. Western Washington Fair Association*, 15 Wn. App. 852 (1976). In *Parks*, Plaintiffs alleged they slipped and fell on ice when leaving the grandstand at the Western Washington Fair. The Western Washington Fair Association believed the ice came from a snow cone, and tendered its defense to its exclusive “snow cone” concessionaire, based on the following provision of their concession contract:

In consideration of the privileges granted by this contract, the concessionaire agrees to protect and indemnify and hold harmless the association from any and all claims for damages, demands or suits, arising from injuries or damage sustained or alleged to be sustained by employees of the concessionaire or by any member of the public where such injuries or damage shall have resulted either directly or indirectly from the activities and business of the concessionaire in connection with this contract. *Parks*, 15 Wn. App. at 853

After the jury returned a verdict in the Association’s favor, they sought their attorney’s fees and costs from their concessionaire, which the trial court granted. *Id.* at, 854. On appeal, Division Two reversed. *Id.* at, 858. The court held that though negligence need not be established, there must be some evidence of control by the indemnitor over the instrumentality or conditions causing the accident in order to impose liability to indemnity or defend. *Id.* at, 857. Because such evidence did

not exist, indemnity would not apply.

Second, the *Parks*' court did not believe that the parties intended that the concessionaire be responsible for the actions of each of its customers. *Id.* If such a result were intended, the court said it should have been spelled out in certain terms on the face of the indemnity provision of the contract. *Id.*

Finally, the court stated that if the language of a contract is subject to interpretation because it is vague or ambiguous, it will be construed most strongly against the party who drafted it, in this case, the indemnitor. *Id.*

In our case, Plaintiffs concede that the sole cause of their damage was the tree roots on Dr. Blue's property, a condition Spring did not create or control. Second, the indemnity language in the easement did not state that the easement beneficiary would be responsible for the grantor's damages regardless of cause. If the grantor intended that result, it could and should have spelled that out. Finally, any ambiguity in the hold harmless language should be construed against the indemnitor, who drafted it.

Similarly, in *Jones v. Strom Constr. Co.*, our Supreme Court held that indemnification will not arise absent evidence of an overt act or omission on the part of the indemnitor in the performance of its

subcontract that caused or concurred in causing the loss involved. *Jones*, 84 Wn.2d at 521. In *Jones*, Plaintiff, a masonry worker was injured when the flooring he was standing on collapsed due to a lack of shoring. The shoring was the sole responsibility of the general contractor. *Id.* at, 518.

The general contractor had entered into a contract with its masonry subcontractor, who employed the Plaintiff, that provided for the subcontractor,

To indemnify and hold harmless the Contractor from and against any and all suits, claims, actions, losses, costs, penalties, and damages, of whatsoever kind or nature, including attorney's fees, arising out of, in connection with, or incident to the subcontractor's performance of this subcontract. *Id.* at, 521.

Jones held that it was the subcontractor's "performance" of the subcontract, and losses "arising" from, connected with, or incidental to that performance, which formed the keystone on which indemnity turned. *Id.* The court reasoned: "Thus, it is clear that unless an overt act or omission on the part of Belden in its performance of the subcontract in some way caused or concurred in causing the loss involved, indemnification would not arise. Belden's mere presence on the jobsite inculpably performing its specific contractual obligations, standing alone, would not constitute a cause or participating cause." *Id.*

The facts in *Jones* and the court's analysis of what was required for

indemnification to arise, apply to this case. Here, Plaintiffs acknowledge that the sole cause of their damage was the tree roots on Blue's property. Plaintiffs offered no evidence that anything Spring did or did not do caused their damage. Consistent with the reasoning in *Jones*, Spring's normal use of the sewer line standing alone does not constitute a cause or participating cause, and therefore indemnification does not arise.

C. The Restatement (Third) of Property § 4.13(4) governs the facts of this case. The trial court's allocation of the cost to repair was consistent with 4.13(4).

Here, Plaintiffs are the beneficiaries of the utility easement that extends under Dr. Blue's property. Plaintiffs' predecessors, the Dustos, retained this easement when they subdivided their property, and sold the western portion of their property to Dr. Blue's predecessor. CP 170, 172, 202. Therefore, Plaintiffs are dominant estate holders because Plaintiffs use the sewer line under Dr. Blue's property to convey their waste to the public sewer main.

Mr. Spring is the beneficiary of a separate utility easement that the Dustos agreed to with Spring's predecessors. That easement agreement said nothing about the duty to repair or maintain. CP 181-183, 185.

Under these facts, and as explained more fully in the Brief of Rieke and Robertson, § 4.13(4) of the Restatement (Third) of Property applies. It provides:

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

In addition, comment *e* regarding subsection §4.13(4) provides:

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.

Because there was no affirmative duty to repair under §4.13(4), the trial court correctly did not require the uphill Defendants to pay any portion of Plaintiffs' claimed consequential damages. The trial court's allocation of equal portions of the cost to repair the sewer line among Plaintiffs and all uphill Defendants is consistent with §4.13(4).

VI. CONCLUSION

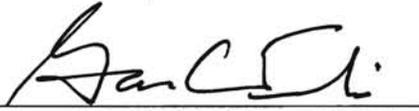
The following facts were undisputed before the trial court: 1) no one, including Plaintiffs, ever requested or suggested an inspection protocol for the underground sewer line that serviced the parties' properties; 2) Plaintiffs' expert never stated that in his experience it was the custom or practice for residential property owners to inspect an underground sewer line that serviced their respective properties; 3) The sole cause of Plaintiffs' damages was tree roots on undeveloped property

east and downhill from their home. Based on these undisputed facts, the trial court properly dismissed Plaintiffs' action against Spring.

Finally, for indemnity to apply there must be evidence of causation against the indemnitor. Here, Plaintiffs concede the sole cause of their damage was tree roots on Dr. Blue's property. Therefore, indemnity does not apply.

RESPECTFULLY SUBMITTED this 8TH day of July, 2014.

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