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DIVISION II
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STATE OF WASHINGTON
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No. 48075-1-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

Ted Spice,

Appellant,

vs.

Bryan Bartelson and Dorothy M. Bartelson,

Respondents

APPELLANT'S OPENING BRIEF

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Appellant's Opening Brief

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I. INTRODUCTION

This case originated in Pierce County Superior Court as an action for trespass regarding a waterline installed under a roadway that goes over the real property of Appellant Ted Spice (“Spice”) to connect three parcels of Appellees’ Bryan and Dorothy Bartelson¹ (“Bartelson”) real property. Previous litigation between the parties had culminated in a roadway easement and an order regarding water services that provide the relevant easement language. The principal dispute concerns whether the waterline is a trespass despite being located beneath the road on the roadway easement.

Appellant Spice appeals a summary judgment order of the superior court dismissing his complaint based on the court’s determination that the installation of the waterline over the easement is not a trespass as a matter of law because the existence of an easement prevents Spice from having “exclusive” control over that portion of his property and thus the definition of trespass cannot be met.

II. IDENTITY OF APPELLANTS

Appellant Ted Spice is an individual residing in Washington State.

III. ASSIGNMENTS OF ERROR

¹ At various points contained in the record the Bartelson name is improperly spelled as “Bartleson.”

1. The trial court incorrectly found there was “no invasion” by Bartelson of Spice’s “property interest in the exclusive possession of his land since the property in question was subject to easement for roads and common utilities.” CP 353 (Order number 1).
2. The trial court incorrectly denied Spice’s motion for summary judgment. CP 353 (Order number 2).
3. The trial court incorrectly granted Bartelson’s motion for summary judgment and dismissed Spice’s complaint below. CP 353 (Order number 3).

IV. STATEMENT OF ISSUES

1. Whether an easement specifically designed for a roadway also permits installation of utilities because a related maintenance agreement has a reference to common utilities? No, the language of the easement and the circumstances surrounding it reveal that the intent of the parties was merely for the construction and maintenance of a roadway.
2. Whether the existence of an easement prevents the servient estate owner from bringing an action for trespass when the dominant estate owner violates the terms of the easement? No, the improper extension of an easement has long been subject to actions in trespass.

V. STATEMENT OF THE CASE

Spice and Bartelson are neighboring property owners in Puyallup, WA. Spice owns real estate commonly known as 11319 and 11305 58th St. Ct. E in Puyallup, WA. CP 190-91. Bartleson owns real estate commonly known as 11306 58th St. Ct. E. (the “Five Acre” parcel). CP 191. Bartelson also owns two parcels of real property commonly known as 11403 to 11405 58th St. Ct. E. and 11323 to 11325 58th St. Ct. E. (collectively these two parcels are referred to as the “Bartelson duplexes”). CP 268. The Bartelson duplexes were previously owned by the Estate of James Williams. CP 194. The following table summarizes the properties:

<u>Parcel</u>	<u>Common</u>	<u>Owner</u>
0420224094	11403 to 11405 58 th St. Ct. E.	Bartelson Duplex (formerly Williams)
0420224095	11323 to 11325 58 th St. Ct. E.	Bartelson Duplex (formerly Williams)
040224138	11306 58 th St. Ct. E. (“five acres”)	Bartelson
0420224137	11305 58 th St. Ct. E.	Spice
0420224096	11319 58 th St. Ct. E. (between Five Acres and Bartleson duplexes)	Spice

Spice’s 11319 Parcel bisects Bartelson’s Five Acres (located west of Spice’s 11319 Parcel) and the Bartelson duplexes. See CP 301. The roadway easement at issue here concerns 58th St. Ct. E. 58th St. Ct. E. that travels east to west connecting 114th Ave. Ct. E. through Bartelson’s

duplexes, then through Spice's properties, and, as a result of the roadway easement at issue, continues on to Bartleson's Five Acres. See CP 317.²

In 2008 Spice initiated a related action against Bartleson in Pierce County Superior Court (08-2-11200-0) ("2008 Litigation") that resulted in a roadway easement ("the Roadway Easement") burdening the Spice Parcel and benefitting the Five Acre Parcel. CP 298-301³. The Roadway Easement provides in relevant part that Spice conveyed to Bartleson "a permanent non-exclusive road easement a road easement (*sic*) and right-of-way with the right to erect, construct, install, lay and thereafter use, operate, inspect, repair, maintain, and replace over, across and/or under a certain parcel of real property [describes the road]." CP 298. The Roadway Easement recognizes that the easement "includes a construction easement . . . for installation of any gravel necessary for full use . . . and any other terms in the Road Maintenance Order filed under" the 2008 Pierce County Superior Court case. CP 300.

Subsequent to the conclusion of the 2008 Litigation a waterline servicing Bartleson's Five Acres was capped pursuant to court order.⁴ RP

² The picture contained in the record should be oriented such that the typed characters contained are upright and such that 58th St. Ct. E. travels east to west. However, the picture does not reveal the other endpoint of 58th St. Ct. E.

³ Several reciprocal easements of identical language are actually present. However, relevant to this appeal is only the Roadway Easement and Road Maintenance Order benefitting Bartleson's properties.

⁴ Bartleson had previously relied on a waterline that was fed from a meter that, in effect, caused Spice to be billed for Bartleson's water use. RP 18:19-24.

18:19-23. Bartelson began to use portable toilets on the property as he had no water access. RP 8:7-11. At some point Spice realized that Bartelson no longer had the portable toilets in use and appeared to have water. RP 8:7-11. Spice hired CNI Locates LTD and discovered that a waterline existed underneath the roadway easement. CP 324-25. There is no dispute that the waterline servicing Bartelson's Five Acres is beneath the Roadway Easement and that Bartelson, at least, improved the waterline subsequent to the 2008 Litigation. Spice contends that the waterline was installed subsequent to the 2008 Litigation. Bartelson, by contrast, claims that he merely discovered the waterline and began using it. CP 18:21-24. Bartelson does admit that he replaced electrical PVC pipe with new piping in 2011 or 2012. CP 61:21 to 62:4, 64:11-16.

Spice, in proving his contention that the waterline was installed recently, notes that the Bartelson Duplexes had a new waterline installed (prior to Bartelson obtaining ownership) in 2008. See CP 16:18-21 and CP 38-40 (a work order for when Bartelson's predecessor in interest installed new waterlines for the Bartleson Duplexes); see also CP 36:12-22 (when predecessor was installing waterlines for the Bartleson Duplex there was no attempt to connect those lines to the Five Acres). That new piping utilizes modern plastic piping, which is incompatible with the galvanized metal lines the original builders utilized on all the relevant properties. See

CP 4:15-23. Additionally, when Bartleson was purchasing the Five Acres the seller indicated that the only available utility was electricity, and not water. See CP 76, see also CP 36:16-22 (seller indicating Bartleson never informed of being able to use a waterline to service his Five Acres). Furthermore, Spice investigated and discovered that the waterline installed within the Roadway Easement was modern plastic. CP 16:27-17:1-4. Thus, it seems Spice has well demonstrated that Bartleson installed the offending waterline himself and did not merely repair an existing line.

Spice initiated this lawsuit on June 12, 2014 to remove the waterline and award damages caused by the trespass. CP 1. Spice alleged that Bartleson had improperly installed the waterline under the Roadway Easement in violation of the terms of that easement and in violation of the Road Maintenance Order. CP 2. Illustration are available at CP 126, 325, 329.

On May 21, 2015 Bartleson filed a motion for summary judgment and a memorandum in support of the motion asking the Court to dismiss Spice's lawsuit. CP 264. Within a week Spice began introducing evidence to contest the motion and on July 8, 2015 motioned for additional time to respond. CP 266, 273. On July 17, 2015 the trial Court granted summary judgment dismissing Spice's complaint, denying Spice's motion or summary judgment, and denying Spice's motion to continue. CP 352-53.

The trial court reasoned that the existing easement was intended to cover the installed water line. CP 353. A motion for reconsideration, timely filed, was also denied. CP 355.

Bartleson acknowledges that a factual dispute regarding *when* the water line in question was installed and by who. RP 18:15-18. A roofing contractor that had an office on Bartleson's Five Acres indicated that there was "no running water" on the property and that he actually brought a bucket of water to utilize a flush toilet. CP 128:3-9. Spice maintains that Bartleson himself installed the waterline, but even assuming *arguendo* that he did not, the use of the waterline is still a trespass.

VI. SUMMARY OF ARGUMENTS

Bartleson has an easement merely for ingress and egress over Spice's property such that he will have direct access between the properties that Spice's property bisects. The Roadway Easement does not allow for the installation of utilities. The plain language of Roadway Easement and Maintenance Order do not provide for a utility easement. Furthermore, even if the Maintenance Order creates an ambiguity regarding whether Bartleson can install utilities the circumstances make it clear that the parties never intended for Bartleson to have a utility easement.

Bartleson's installation of a waterline over Spice's property along the Roadway Easement is a trespass. The trial court incorrectly determined

that misuse of an easement cannot be a trespass, and Spice respectfully requests that this Court reverse the trial court's decision dismissing his complaint.

VII. ARGUMENT

A. Standard of review

This appeal is of an order denying summary judgment brought by Spice and granting summary judgment brought by Bartelson. As such on review the Court should engage “in the same inquiry as the trial court, which is to consider all facts submitted as contained in the record and reasonable inferences therefrom in favor of the nonmoving party.” Phillips v. King County, 968 P.2d 871, 136 Wn.2d 946, 956 (1998).

B. Bartelson's waterline is a trespass

“[T]respas is an intrusion onto the property of another that interferes with the other's right to exclusive possession.” Phillips v. King County, 968 P.2d 871, 136 Wn.2d 946, 957 n.4 (1998) (citing Hedlund v. White, 67 Wash.App. 409, 418 n. 12, 836 P.2d 250 (1992)). To establish trespass a plaintiff “must show (1) an invasion of property affecting an interest in exclusive possession; (2) an intentional act; (3) reasonable foreseeability that the act would disturb the plaintiff's possessory interest; and (4) actual and substantial damages.” Wallace v. Lewis County, 137 P.3d 101, 134

Wn.App. 1, 15 (2006) . The only factor ruled on below involved the “exclusivity” element. RP 26:12-14, RP 19-20 (“it can’t satisfy the first element which is the nonexclusive possession.”).

i. Exclusivity

The trial court incorrectly denied Spice’s motion for summary judgment, and granted Bartelson’s motion for summary judgment. Bartelson maintained that by virtue of the Roadway Easement and the Road Maintenance Order he is immune from trespassing upon the land that the Road Easement describes because the existence of the Road Easement means that Spice does not have “exclusive” control over his own land. The trial court agreed. That argument, taken to its logical extreme, means Bartelson could do *anything* on the Roadway Easement and not be subject to trespass.

That argument is undermined by the language of the Roadway Easement itself as well as the nature of easements and trespass.⁵ Contrary

⁵ The intentional channeling of water across the lands of another has historically been recognized as subject to a claim for trespass. See e.g. Buxel v. King County, 60 Wash.2d 404, 406 374 P.2d 250 (1962) (recognizing the county’s channeling of surface waters through artificial channels onto Buxel’s property constituted a trespass); see also Hedlund v. White, 836 P.2d 250, 67 Wn.App. 409, 416-18 (1992) (finding trespass resulting from a new drainage system that diverted surface waters into a creek on neighbors property). Spice recognizes that in Hedlund and Buxel the surface waters caused obvious damage. However, the cases do recognize that in some circumstances channeling water through the lands of another is a trespass.

to the ruling of the trial court, the misuse of an easement is subject to trespass, and therefore, under the facts of this case, summary judgment in Bartelson's favor was inappropriate.

It has long been recognized that any extension of an "easement not necessarily included in the grant is a trespass to realty and renders the owner of the dominant tenement liable in a tort action to the owner of the servient tenement." Raven Red Ash Coal Co. v. Ball, 185 Va. 534 (Virginia 1946) (citing Tennessee, Massachusetts, and Kentucky cases) (cited favorably in Brown v. Voss, 715 P.2d 514, 105 Wn.2d 366, 374 (1986) (Dore, J. dissenting on the issue of relief); see also Richardson v. Cox, 108 Wn. App. 881, 892 (2001) (recognizing that the "overburden[ing] of a residential roadway easement for commercial purposes constitutes trespass as a matter of law); Fradkin v. Northshore Utility Dist., 977 P.2d 1265, 96 Wn.App. 118, 123 (1999) ("an easement does not shield the holder from an action for trespass where there is evidence of misuse, overburdening or deviation from the easement.").

An easement is a *nonpossessory* right to use another's land in some way without compensation. Maier v. Giske, 223 P.3d 1265, 154 Wn.App. 6, 15 (2010) (emphasis added); see also Butler v. Craft Eng. Const. Co., Inc., 843 P.2d 1071, 67 Wn.App. 684, 697 (1992) (an easement "is a non-possessory interest in land which is in possession of another."). The

meaning of an easement being non-possessory is that the servient estate owner still possesses his or her property, but it is subject to defined use by another. Here the question is primarily whether the defined use in the Roadway Easement permits Bartelson to install waterlines. If it is not, then Bartelson has interfered with Spice's exclusive use of his 11319 property.

In determining the rights of a dominant estate for an express easement the written instrument controls and is construed to give effect to the intention of the parties. Brown v. Voss, 715 P.2d 514, 105 Wn.2d 366, 371 (1986). To determine intent "a court is to look at the contract as a whole, the subject matter and objective of the contract, the circumstances under which the contract was made, the subsequent acts of the parties and the reasonableness of the respective interpretations advanced by the parties." Butler v. Craft Eng. Const. Co., Inc., 843 P.2d 1071, 67 Wn.App. 684, 697 (1992). In construing an easement "if an ambiguity exists, the court should consider the situations and circumstances of the parties at the time of the grant." Schwab v. City of Seattle, 826 P.2d 1089, 64 Wn.App. 742, 751 (1992). A court may consider parol evidence to explain the ambiguity. Id.

The Roadway Easement (CP 298-301) provides access from Bartelson's duplexes through Spice's 11319 Property to Bartelson's 5 acres. It allows a "permanent non-exclusive road easement a road

easement and right-of-way with the right to erect, construct, install, lay and thereafter use . . . maintain, and replace over.” CP 298. The Roadway Easement recognizes that “this easement and right-of-way shall give and convey . . . the right of ingress and egress upon the lands . . . described for the purpose of constructing, maintaining and repairing the above described *road improvements*.” CP 300 (emphasis added). It does not provide for any utilities.⁶

The trial court agreed with Bartelson’s principal argument below that the Maintenance Order provides for the right to install the waterlines because Recital B in the Maintenance Order states:

Access to the Owners’ properties is to be over and through a road easement described in Exhibit B and as is depicted in Exhibit C attached hereto and incorporated herein by this reference (“Road”). The Road shall include all and any amenities within the easement areas such as paving, gravel, landscaping, common utilities, fences, etc.

CP 226.

The Maintenance Order did not create or define the scope of the easement at issue here. It is, as its title suggests, a document that outlines the terms upon which the various easement owners shall maintain the Roadway Easement. Recital C indicates that the parties “wish to use the

⁶ The Roadway Easement does reference that it includes “any other terms in the Road Maintenance Order.” CP 300. However, the “terms” of the Maintenance Order must be a reference to those parts designated under the heading “order.”

Road and to provide for the future maintenance and repair of the Road and to share the cost.” CP 227. Recital D indicates that the parties “further wish to minimize their potential liability exposure.” CP 227. Recital E provides that “[t]o address these concerns [of maintenance and liability], the Owners wish to enter into this Order.” The Maintenance Order expressly recognizes that its purpose is to address liability and maintenance concerns and that is what the Maintenance Order actually does.

Even assuming *arguendo* that the Maintenance Order creates some ambiguity for the Roadway Easement, the ambiguity can be resolved in this case by the unique fact that the Roadway Easement was created by judicial order. Contained in the 2008 litigation is the April 16, 2010 “amended order re joint easement for water lines and release of claim of water service.” CP 190-92. There the intent of the parties, via judicial order, specifically provided that “Plaintiffs’ properties [11319] will not be subject to *any claim for easement for water, or water rights* for the benefit of the Bartleson (*sic*) property.” CP 191 (emphasis added). It also indicates “Plaintiffs [Spice] are hereby allowed to cap off *any* water lines currently servicing the properties legally described [describes 11305 and 11319 Spice properties] . . . that extend onto the Bartleson (*sic*) [11306 Five Acres] property.” CP 191 (emphasis added).

Furthermore, the 2008 Litigation was also resolved via the April 16, 2010 “Order re joint easements for road and road maintenance order.” CP 286-289.⁷ The order provides, in effect, that the parties are each granted an easement for ingress and egress from the section of 58th St. Ct. E. road starting at Bartelson’s Duplexes⁸ going through Spice’s 11319 Property and ending at Bartelson’s 5 Acres. The order grants⁹ to Bartelson “a permanent non-exclusive road easement for the currently existing driveway (58th St. Ct. E.) from Plaintiff Ted Spice.” CP 287. The order goes into detail about how the road shall be measured, maintained, and improved. It does not, at any point, discuss utilities. See CP 286-289. It would be unusual for the parties or that trial court to include language that detail “smooth transitions” in paving or the installation of curbing and sidewalks, and yet leave the installation of utilities as a silently assumed part of the order.

The Road Maintenance Order indicates that “access to the Owners’ [including Spice and Bartelson] properties is to be over and through a road easement (“Road”). The Road shall include all and any amenities within the easement areas such as paving, gravel, landscaping, common

⁷ CP 290-317 contains the exhibits to the order including the Roadway Easement and Maintenance Order to be recorded.

⁸ Formerly owned by the Estate of James Williams.

⁹ It appears that the order misidentifies its exhibits. Exhibit E of the order (CP 298-301) grants the Roadway Easement relevant here whereas Exhibit F of the order (CP 301-05) is the grant *to* Spice from Bartelson.

utilities, fences, etc.” CP 227. The term “Road” is defined to be 58th St. Ct. E. CP 315. The Road Maintenance Order then acknowledges the existence or creation of the roadway easement “a perpetual, non-exclusive easement for ingress, egress over and across the Easement Road.” CP 227. The Road Maintenance Order provides details about paving and the sharing of certain expenses. CP 227-28.

The language of Recital B cannot be interpreted to define the scope of the Roadway Easement or provide any benefits to Bartelson.

Substituting in the defined term “Road” that recital indicates “58th St. Ct. E. shall include all and any amenities *within* the easement such as . . . etc.” (emphasis added). CP 307. The phrase merely indicates that the parties understand that any amenities that *do* exist must be placed within the roadway, and not outside the easement area. See CP 281:1-282:3. For example, in the 2008 Litigation the court specifically addressed that Bartelson may place ecology blocks, but they “will only be allowed on the easement property.” CP 288. Thus the Road Maintenance Order was written to reflect that concern.

This understanding is enhanced by the phrase “such as . . . etc.” Parties to an easement, particularly one being agreed to in order to end litigation and to “formaliz[e], clarify[], and update[e]” their respective

easements, would not vaguely describe their agreed rights as “etc.” See CP 307.

When considering both of the April 16, 2010 orders together as well as the Road Easement and Road Maintenance Order it is abundantly clear that Bartelson was not being granted an easement to install any waterlines through or on Spice’s property. The court in the 2008 Litigation could not have been more clear when it ordered that Spice’s “properties [11319] will not be subject to *any claim for easement for water, or water rights* for the benefit of the Bartleson (*sic*) property.” CP 191.

ii. Intent was to use the waterline over Spice’s property

Intent in “tort liability is not necessarily a hostile intent, or a desire to do any harm. Rather it is an intent to bring about a result which will invade the interests of another in a way that the law will not sanction.” Bradley v. American Smelting and Refining Co., 709 P.2d 782, 104 Wn.2d 677, 683 (Wash. 1985).

Spice and Bartelson offer differing views as to when and who installed the offending waterline. If Bartelson did install the waterline, as the facts indicate, then he must have possessed the requisite intent under traditional tort law. However, Bartelson acknowledges that he uses that waterline. At the very least he purposefully went through the effort to

investigate and utilize a waterline through Spice's property. CP 140:9-14, 213:7-16. By utilizing that waterline he has placed new restrictions on Spice's property. See discussion *infra* VII-B-iv regarding septic systems.

iii. Reasonably foreseeable that the waterline would interfere with Spice's possession

Foreseeability traditionally depends on whether the injury complained of "should have been recognized by common experience, the special experience of the alleged wrongdoer, or by a person of ordinary prudence and foresight. Schneider v. Strifert, 77 Wn. App. 58, 63 (1995).

Here, Bartelson was well aware of what property was owned by him and what property was owned by Spice. He also knew precisely what use of any easement was permitted. Bartelson had the benefit of knowledge gained from litigation that culminated in a trial, and, indeed it was he, not his attorney, that explained the locations and use of the agreed easements in the 2008 Litigation. CP 281-82. It cannot be seriously argued that the installation of a waterline through the property of another would not alert the installer to the possibility that the landowner would be impacted. Furthermore, with regard to knowledge of the injury Bartelson cannot claim ignorance of the legal effects regarding sewer and septic

systems in the area that would occur should he run a waterline along the Roadway Easement.

iv. Damages

The very essence of the nature of property is the right to its exclusive use. Olwell v. Nye & Nissen Co., 173 P.2d 652, 26 Wn.2d 282, 286, (1946). Courts will award damage to compensate for even slight injury. See Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 491, 422 (1982) (awarding relief for a “cable slightly less than one-half inch in diameter and of approximately 30 feet in length” above roof of apartment building).

Here this is not an instance of a temporary or passing offense. The pipeline pierces the substructure of Spice’s property and continues to do so. An appraisal indicates the utility easement that Bartelson awarded himself would have a value of approximately \$9,702. CP 333.

Furthermore, the installation of a waterline impacts and limits where on Spice’s property he could install septic or sewer systems. See WAC 246-272A-0210. See also Pierce County Department of Planning and Land Services, July 2013 Water Service Installation Bulletin #44 <available online at <https://www.co.pierce.wa.us/DocumentCenter/View/4535>>. Under the

applicable administrative code any septic or sewer line must be located at least 10 ft. from pressurized water supply lines – a restriction Spice did not previously have.

C. Attorney fees should be ordered

The trial court decision should be reversed. Spice is entitled to an award of attorney fees (if summary judgment is ordered in his favor). The Road Maintenance Order states that if any “Owner incurs costs and attorney’s fees in enforcing this Order, the prevailing party shall be awarded such costs and attorney’s fees.” CP 310. Spice in this action is attempting to enforce the Road Maintenance Agreement and the Roadway Easement. The Road Maintenance Order in its “order” section “orders” that the easement is for ingress and egress. Spice seeks to enforce that as the sole purpose. See CP 307.

VIII. CONCLUSION

Bartelson has improperly relied upon the Roadway Easement to take from Spice a utility easement. The overburdening or misuse of an easement has traditionally been subject to relief as trespass. Here the Roadway Easement and Maintenance Order clearly and unambiguously provide that the easement Spice granted to Bartelson was for ingress and egress only. To the extent the recital language in

the Road Maintenance Order does create ambiguity, that ambiguity is fully resolved by looking at the court orders from the 2008 Litigation including the specific ruling that Spice's property is not subject to any water easement¹⁰ and that any water lines can be capped.

DATED this February 16, 2016



Jonathan Baner, WSBA #43612
Attorney for Appellant

CERTIFICATE OF SERVICE

I, ELAINE I. SMITH, a person over 18 years of age, served: Court of Appeals division II and to **ANTONI FROEHLING** a true and correct copy of the document to which this certification is affixed, February 16, 2016 via first class mail postage pre-paid. Mr. Froehling was also served via e-mail. I declare under penalty of perjury under the laws of the State of Washington that the forgoing is a true and correct statement. Signed at Tacoma, WA on 2/16/16.



Elaine I. Smith, Paralegal

¹⁰ Although probably obvious, there are no rivers, springs, or wells that any party has ever claimed to have a right to use relevant here. The "water easement" referenced in the 2008 Litigation is in regard to a connection to water services from a public utility.

