

No. 48075-1-II

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

Ted Spice,

Appellant,

vs.

Bryan Bartleson and Dorothy M . Bartleson

Respondents,

RESPONDENT'S OPENING BRIEF

Antoni Froehling, WSBA #8721
122 East Stewart Ave.
Tacoma, WA 98372
Telephone: (253) 770-0116
Facsimile: (253) 770-0144
Attorney for Respondents

FILED
COURT OF APPEALS
DIVISION II
2016 APR -6 AM 10:58
STATE OF WASHINGTON
BY 
DEPUTY

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	IDENTITY OF RESPONDENTS.....	2
III.	ASSIGNMENTS OF ERROR.....	2
IV.	STATEMENT OF ISSUES.....	2
V.	STATEMENT OF THE CASE.....	3
VI.	SUMMARY OF ARGUMENTS.....	6
VII.	ARGUMENT.....	8
	A. Standard of Review.....	8
	B. Mr. Spice can prove none of the four elements needed to prevail on a claim for trespass.....	9
	1. Damages.....	10
	2. Common Utilities.....	13
	3. Exclusivity.....	15
	C. Attorneys fees should be awarded to Mr. Bartleson.....	17
VIII.	CONCLUSION.....	18

TABLE OF AUTHORITIES

REVISED CODE OF WASHINGTON

RCW 4.56.250(1)(a).....13

RCW 84.04.090.....14

CASES

Brown v. Voss,
105 Wn.2d 366, 715 P.2d 514 (1986).....16

City of Tacoma v. City of Bonney Lake,
173 Wn.2d 584, 269 P.3d 1017 (2012)

Crites v. Koch
49 Wn.App. 171, 741 P.2d 1005 (Div. 3 1987).....16

Dean v. Fishing Co. of Alaska, Inc.
177 Wn.2d 399, 300 P.3d 815 (2013).....8

Fradkin v. Northshore Utility Dist.
96 Wn.App. 118, 977 P.2d 1265 (Div. 1 1999).....16

Grundy v. Brack Family Trust
151 Wn.App. 557, 213 P.3d 619 (Div. 2 2009).....10, 13

Hedlund v. White,
67 Wn.App. 409, 836 P.2d 250 (Div. 2 1992).....9

Johnston-Forbes v. Matsunaga,
177 Wn.App. 402, 311 P.3d 1260 (Div. 2 2013).....12

Phillips v. King County,
136 Wn.2d 946, 968 P.2d 871 (1998).....9

Richardson v. Cox,
108 Wn.App. 881, 26 P.3d 970 (Div. 3 2001).....15,16

Sheikh v. Choe

156 Wn.2d 441, 128 P.3d 574 (2006).....	8
<i>Sneed v. Barna</i> , 843 Wn.App. 843, 912 P.2d 1034 (Div. 2 1996).....	9,10
<i>Sofie v. Fibreboard Corp.</i> , 112 Wn.2d 636, 771 P.2d 711 (1989).....	13
<i>Spencer v. Luton</i> , 180 Wn.App. 1002 (2014).....	10
<i>Wallace v. Lewis County</i> , 134 Wn.App. 1, 137 P.3d 101 (Div. 2 2006).....	9,16
CIVIL RULES OF PROCEDURE	
CR 56(c).....	8

I. INTRODUCTION

Mr. Bartleson and Mr. Spice are next-door neighbors in Puyallup, Washington. This is the third time Mr. Spice has sued Mr. Bartleson. This case arose when Mr. Spice looked onto Mr. Bartleson's property and realized that the portable toilets that, at one time, had stood on Mr. Bartleson's property were gone. Because Mr. Spice thought that Mr. Bartleson had no access to water, he hired a firm to come investigate. The firm located a waterline buried in a road easement that crossed Mr. Spice's property and connected to Mr. Bartleson's property. Mr. Spice sued Mr. Bartleson for intentional trespass.

After the trial court granted summary judgment in favor of Mr. Bartleson, Mr. Spice appealed. Mr. Bartleson respectfully requests that the Court deny Mr. Spice's appeal for three reasons. First, Mr. Spice's damages are non-existent. He is simply upset that Mr. Bartleson has access to water on a piece of property where, previously, both parties had assumed none existed. That is not an actionable element of damage. Second, because the easement where Mr. Spice found the waterline is a roadway open to the public, he cannot show that he maintained exclusive possession of the easement on which he alleges that Mr. Bartleson trespassed. Finally, the Road Maintenance Order that governs the

easement across Mr. Spice's property specifically allows maintenance of common utilities within the easement. By asking the Court to reverse the trial court, Mr. Spice must argue that water is not a common utility – a nonsensical definition by any standard.

For these reasons, Mr. Bartleson respectfully requests that the Court deny Mr. Spice's appeal and affirm the trial court's Order Granting Summary Judgment.

II. IDENTITY OF RESPONDENTS

Bryan and Dorothy Bartleson are a married couple residing in Pierce County, Washington State.

III. ASSIGNMENTS OF ERROR

Mr. Bartleson assigns no error to the trial court.

IV. STATEMENT OF THE ISSUES

1. Whether maintenance of an already-existing waterline in a road easement constitutes actual and substantial damage to the owner of the burdened property. No, to establish a claim for trespass, a plaintiff must establish actual and substantial damages.
2. Whether water is a common utility. Yes, by any definition, water is a common utility.

3. Whether the owner of an easement that is open to the public may show that he has exclusive possession and thus, establish a trespass claim. No, to establish a trespass claim, a plaintiff must show that the type of possession is that expected of an owner under the circumstances.

V. STATEMENT OF THE CASE

Combined, Mr. Spice and Mr. Bartleson own five adjacent properties in Puyallup. CP 190-191, 264. Mr. Bartleson owns the following three properties: 1) Parcel 040224094, 11403 to 11405 58th St. Ct. E.; 2) Parcel number 0420224095, 11323 to 11325 58th St. Ct. E.; and 3) Parcel number 40224138, 11306 58th St. Ct. E. The former two properties are known as the “Bartleson duplexes.” CP 268. The last property is known as the “five acres” property. CP 191. Mr. Bartleson purchased his duplex properties from the Estate of James Williams. CT. 194. Mr. Spice owns the following two properties: 1) Parcel Number 040224137, 11305 58th St. Ct. E.; and 2) 0420224096, 11319 58th St. Ct. E. Mr. Bartleson agrees with Mr. Spice’s summary of the five properties and reprints it here for the Court’s reference:

<u>Parcel</u>	<u>Common</u>	<u>Owner</u>
0420224094	11403 to 11405 58 th St. Ct. E.	Bartleson Duplex (formerly Williams)
0420224095	11323 to 11325 58 th St. Ct. E.	Bartleson Duplex (formerly Williams)
0420224138	11306 58 th St. Ct. E.	Bartleson (“five

		acres”)
0420224137	11305 58 th St. Ct. E.	Spice
0420224096	11319 58 th St. Ct. E.	Spice

A map of the five properties appears at CP 236. Mr. Bartleson has an easement that begins on his five acre parcel, runs through Mr. Spice’s 11319 58th St. Ct. E. property, continues through Mr. Bartleson’s duplex properties, and connects to 14th Ave. Ct. E., which runs north-south to the east of Mr. Bartleson’s duplex properties. CP 236, 317.

In 2008, Mr. Spice sued Mr. Bartleson in Pierce County Superior Court in case number 08-2-11200-0.¹ That litigation resulted in a roadway easement that burdens Mr. Spice’s property and benefits Mr. Bartleson’s five-acre parcel. CP 298-301. The easement required Mr. Spice to convey to Mr. 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 lying and being situated in Pierce County, Washington described as [essentially, 58th St. Ct. E.]. CP 298. Mr. Bartleson was granted “the right of ingress and egress upon the lands above described for purpose of constructing,

¹ It is worth notice that Mr. Spice is a litigious fellow. He has filed approximately 18 lawsuits over the course of his lifetime. That does not count eviction suits filed against various tenants. He has been a defendant in several more cases. This is at least the third time he has sued Bryan Bartleson and it is his fourth appeal to this Court. CP 181-186.

maintaining and repairing the above described road improvements.” CP 300. “Said easement includes a construction easement over, across, and under the property described above for installation of any gravel necessary for full use of the property and any other terms in the Road Maintenance Order filed under Pierce County Superior Court Cause No. 08-2-11200-0.” CP 300.

The Road Maintenance Order states as follows:

Access to the Owners’ properties is to be over and through a road easement described in Exhibit B and as 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 124. (emphasis added)

After the 2008 litigation, the Court ordered Mr. Bartleson to cap a waterline servicing his five-acre property because the water originated from a meter for which Mr. Spice had to pay. Def. Br. p. 4. After that water line was capped, Mr. Bartleson poked around his five-acre property and found a spigot that still produced water. CP 43. He traced the line back and found that it ran along the roadway which was subject to the easement. CP 43. Mr. Bartleson then extended that line and used it to convey water to the five acre property. CP 18:21-24, 43. Mr. Bartleson’s investigation confirmed the observations of a previous tenant, Colin

Stephens. CP 479. In fact, all five properties were, at one time, owned solely by Mr. Williams who installed a mess of electrical lines, water lines, cable lines, phone lines, and other various utilities during his ownership. CP 45. At some point, Mr. Spice noticed that Mr. Bartleson was no longer using portable toilets on the property and hired CNI Locates LTD to investigate. CP 324-325. CNI Locates discovered the water line beneath the road easement. CP 324-325.

Mr. Spice filed this action on June 12, 2014, claiming that the existence of the waterline in the roadway constituted trespass and, additionally, had caused Mr. Spice damage. CP 1-3. On May 21, 2015, Mr. Bartleson filed summary judgment. CP 264. On July 17, 2015, the trial court granted Mr. Bartleson's motion reasoning that "there was no invasion by the Defendants of Plaintiff'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 352-53. The Court also denied Mr. Spice's motion for reconsideration. CP 355. On September 24, 2015, Mr. Spice appealed.

VI. SUMMARY OF ARGUMENTS

To establish a claim for trespass, a plaintiff must prove the following four elements: (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.

For the entirety of this case, Mr. Spice has struggled to articulate how, exactly, Mr. Bartleson's alleged trespass has damaged him. Essentially, Mr. Spice argues that Mr. Bartleson should be paying him to utilize a waterline that already existed in the roadway because Mr. Spice was under the mistaken impression that Mr. Bartleson had no water access on the property. One party's fortune is not another party's damage. Because actual and substantial damages are an integral element of an intentional trespass claim, Mr. Spice's claim must fail.

In addition, to prevail on his position, Mr. Spice faces the awkward proposition of arguing that a waterline is not a common utility. The trial court ruled that Mr. Spice's claim must fail because the Road Maintenance Order that governed the easement connecting Mr. Spice's property to Mr. Bartleson's allows for maintenance of common utilities. And water is, by any definition, a common utility.

Finally, Mr. Spice's claim must fail because he cannot show that he enjoyed exclusive possession of the easement on which he alleges that Mr. Bartleson trespassed. As he testified in his deposition, anyone may

drive up and down that easement at any time of any day. It is open to the public. Although a plaintiff need not show that he or she enjoyed an absolutely exclusive right of possession to prevail on a trespass claim, the exclusivity must be of the type expected by a reasonable owner under the circumstances. An owner of property that is burdened with a public easement that is also subject to a road maintenance order that allows for the maintenance of common utilities cannot expect that he has exclusive possession of it for purposes of an intentional trespass action.

For these reasons, Mr. Bartleson respectfully requests that the Court deny Mr. Spice's appeal and affirm the trial court's order.

VII. ARGUMENT

A. Standard of Review

The Court reviews de novo an order granting summary judgment. *Sheikh v. Choe*, 156 Wn.2d 441, 447, 128 P.3d 574 (2006). "Summary judgment is appropriate if 'there is no genuine issue as to any material fact' and 'the moving party is entitled to a judgment as a matter of law.'" *Dean v. Fishing Co. of Alaska, Inc.*, 177 Wn.2d 399, 405, 300 P.3d 815 (2013) (citing CR. 56(c)).

B. Mr. Spice can prove none of the four elements needed to prevail on a claim for trespass.

A claim for trespass is a claim that the defendant intruded “onto the property of another” and in so doing interfered with the other’s right to exclusive possession. *Phillips v. King County*, 136 Wn.2d 946, 957 n. 4, 968 P.2d 871 (1998) (citing *Hedlund v. White*, 67 Wn.App. 409, 418 n. 12, 836 P.2d 250 (Div. 2 1992)). To establish a trespass claim, a plaintiff must prove the following four elements: (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*, 134 Wn.App. 1, 15, 137 P.3d 101 (Div. 2 2006). Although the trial court granted summary judgment on the exclusivity factor, CP 353, Mr. Bartleson raised Mr. Spice’s lack of actual and substantial damages in his summary judgment motion. CP 353; 612, 615. In fact, all of the elements of intentional trespass had been raised and defended in Plaintiff’s original summary judgment motion. (CP Plaintiff’s Motion for Partial Summary Judgment filed November 21, 2014 and CP Defendant’s Memo in Opposition to Plaintiff’s Motion). Hence, Mr. Spice’s lack of damages presents an additional reason why the Court should affirm the decision of the trial court. RAP 9.12; *Sneed v. Barna*, 80 Wn.App. 843, 847, 912 P.2d

1035 (Div. 2 1996) (Holding that an argument neither pleaded nor argued to the trial court cannot be raised for the first time on appeal).

1. Damages

Mr. Spice's claim must fail because he cannot show that he suffered any damages, an integral component of an intentional trespass claim. A failure to show actual and substantial damages will result in dismissal of such a claim. *Spencer v. Luton*, 180 Wn.App. 1002 (2014). Instructive here is *Grundy v. Brack Family Trust*, 151 Wn.App. 557, 213 P.3d 619 (Div. 2 2009). There, the plaintiff brought an intentional trespass claim against her neighbor alleging that the neighbor's reinforcement of a seawall caused additional water and sea spray to land on her property, yellowing the grass and landing debris. *Id.* at 566. Those slight damages were not enough: "Grundy's failure to prove substantial injury is fatal to her claim." *Id.* at 568.

The same could be said here. Mr. Bartleson requested on three different occasions that Mr. Spice set forth the damages he suffered as a result of Mr. Bartleson's alleged trespass. In his brief, Mr. Spice noted that he did not even notice the alleged trespass until he realized that Mr. Bartleson was no longer using portable toilets on his property. Plf. Br. p. 5. In discovery, Mr. Bartleson propounded the following interrogatory:

“Please itemize each and every element of damage you are claiming results from the alleged trespass by defendant. This question is intended to quantify each item of damage you are claiming and requests your calculations for how each such amount is arrived at.” CP 177. In response, Mr. Spice wrote: “1. Reasonable value of use of property since the water line(s) were installed. 2. Cost of removing water line(s). Amounts are being determined by an appraiser and this answer will be supplemented when the report is received.” CP 177. Mr. Spice has never updated his response to Mr. Bartleson’s interrogatory.

During his deposition, Mr. Spice testified as follows:

Q: You’ve contended in this lawsuit that you’re damaged by the existence of that water line?

A: Correct.

Q: And would you explain how you’re damaged?

A: Well, I’m – I can’t give you specifics. I’m not a – I’m not an appraiser. I don’t understand the total aspects of the – you know, how much time it costs to use an easement for a certain period of time, and what that equation is to figure that out, and – I’ve got a guy who is going to do the appraisal on what the damages are, and I can’t give you specifics on all that.

Q: Can you articulate what you think the damages consist of? I know you can’t give a figure, but I’m trying to get your idea of how this damages you.

A: Like I say, as far as I can tell, there’s a - there’s a cost for use of a certain amount of space. I mean if you – if you put – if you do

some type of eminent domain, you – you come in and install something across somebody’s property, you could lose the right to that piece of property by having – by somebody having their facilities on your property if you don’t do something legally about it. That right there, in itself, being – being liable and being exposed to losing that portion of your property is – is not good right there.

Q: Isn’t that –

A: Secondly, there has to be some kind of equation for the use of – of the easement itself. To try to use that space for water, there has to be some kind of equation or factor.

Later, Mr. Spice articulated another potential damage:

“If he’s benefiting financially – whatever it is that he’s benefitting from by having water or utilities come across my property at – then there’s – there has to be some kind of – I feel there should be some kind of equation as to what the potential development for that property is, and there should be some value to me – me being able to be compensated if he wasn’t using – using my easement, my – using those water lines across my property to supply his development.”²

In other words, Mr. Spice contends he was damaged because Mr. Bartleson’s property may be worth more with water than it is without

² Mr. Spice claims, for the first time on appeal, that he has also suffered damages because the existence of the water line “impacts and limits where on Spice’s property he could install septic or sewer systems.” Plf. Br. p. 18. Assuming that claim is a viable one, Mr. Bartleson urges the Court not to consider it because it was raised for the first time on appeal. *Johnston-Forbes v. Matsunaga*, 177 Wn.App. 402, 407-08, 311 P.3d 1260 (Div. 2 2013) (“We do not consider an issue a party raises for the first time on appeal unless that party demonstrates a manifest error affecting a constitutional right.”).

water. That is not damage. Economic damages are: “objectively verifiable monetary losses, including medical expenses, loss of earnings, burial costs, loss of use of property, cost of replacement or repair, cost of obtaining substitute domestic services, loss of employment, and loss of business or employment opportunities.” RCW 4.56.250(1)(a) (held unconstitutional on other grounds by *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 771 P.2d 711 (1989)). In trespass actions, these damages must be actual and substantial; a failure to show such damages – like Mr. Spice’s failure here – is fatal to a plaintiff’s claim. *Grundy*, 151 Wn.App. at 568.

2. *Common Utilities*

Mr. Spice’s claim must fail because water is a common utility subject to the Road Maintenance Order. The easement at issue was formed after earlier litigation between the parties and is subject to a “Road Maintenance Order.” The Road Maintenance Order includes the following language:

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 easements areas such as paving, gravel, landscaping, common utilities, fences, etc.

CP 226. Mr. Spice argues that a water line is not a “common utility” as it appears in the Road Maintenance Order above. This argument contains no basis in logic or fact.

The term “common utilities” lacks a statutory definition. Nevertheless, one may infer that water is a common utility. “The term real property shall also include a mobile home . . . with fixed pipe connections with sewer, water or other utilities.” RCW 84.04.090. *See also City of Tacoma v. City of Bonney Lake*, 173 Wn.2d 584, 269 P.3d 1017 (2012) (describing water as a utility). Finally, *Black’s Law Dictionary* defines a utility as: “Firm owning and operating facilities for production and distribution of water, electricity, as telecommunications to the public.” Hence, a water line is a utility, and subject to a Road Maintenance Order signed between the parties during previous litigation. CP 565-570. Although the Road Maintenance Order subjects both parties to the same restrictions, Mr. Spice believes that the Order only prevents Mr. Bartleson from placing a water line in the road, not him:

Q: “You don’t know whether the easement language prevents you from running water across the road, but you’re sure that the easement language prevents Bartleson from running water down the road?”

A: “That’s correct.”

CP 172. In other words, Mr. Spice interprets the agreement differently when applying its restrictions to his own actions than he does when applying it to Mr. Bartleson's. That interpretation is one of convenience; it squares with his awkward position: that a water line – already placed within the road – is not a common utility. But it does not follow any reasonable interpretation of the term.

3. Exclusivity

Mr. Spice's claim must fail because he cannot show that he maintained exclusive control of the easement. Contrary to Mr. Spice's assertion, the trial court did not grant summary judgment to Mr. Bartleson because he was immune from trespass liability; it granted summary judgment because "there was no invasion by the Defendants of Plaintiff'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.

An easement "is a nonpossessory right to use in some way another's land without compensation." *Richardson v. Cox*, 108 Wn.App. 881, 883, 26 P.3d 970 (Div. 3 2001). The misuse of an easement renders a defendant potentially liable for trespass. *Brown v. Voss*, 105 Wn.2d 366, 372, 715 P.2d 514 (1986). But liability is not absolute; a plaintiff must still

establish all four requirements to prevail on his trespass claim. *Fradkin v. Northshore Utility Dist.*, 96 Wn.App. 118, 124, 977 P.2d 1265 (Div. 1 1999) (“[T]he question in any action for trespass is whether there has been an intentional or negligent intrusion onto or into the property of another, or, an unprivileged remaining on land in another’s possession.”). Hence, to prevail on his claim, Mr. Spice must show “an invasion of property affecting an interest in exclusive possession.” *Wallace*, 134 Wn.App. at 15.

It appears that there is a dearth of case law examining the meaning of exclusive possession in the trespass context. However, many courts have analyzed the term when evaluating whether a property is subject to adverse possession. In that context, “shared occupancy of disputed property by the adverse possessor and the title owner excludes exclusive possession.” *Crites v. Koch*, 49 Wn.App. 171, 174, 741 P.2d 1005 (Div. 3 1987). A claimant’s possession need not be absolutely exclusive. *Id.* “Rather, the possession must be of a type that would be expected of an owner under the circumstances.” *Id.*

In his deposition, Mr. Spice conceded that he did not have exclusive possession of the road easement:

Q: You do agree that the road – that you do not have exclusive use to be on the road, correct?

A: That's true.

Q: All right. In fact, anybody can travel up and down that road, correct?

A: Well, yes, But it's for easement

CP 170.

In other words, Mr. Spice is unable to establish that his use of the property was exclusive; anyone could use it at any time.

C. Attorneys fees should be awarded to Mr. Bartleson

Mr. Bartleson respectfully requests that the Court affirm the trial court's order. The Road Maintenance Order awards attorneys fees and costs to the party prevailing in an enforcement action stemming from the order. CP 310. Mr. Bartleson was granted summary judgment because the actions he took in maintaining the water line were lawful under the Road Maintenance Order and because Mr. Spice could not establish the four elements required to prevail on his intentional trespass claim.

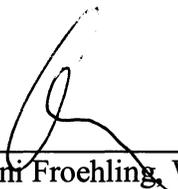
VIII. CONCLUSION

To prevail on his trespass claim, Mr. Spice must show, *inter alia*, that he suffered damages, that he maintained exclusive possession of the

road easement, and that water is not a common utility and subject to the easement's Road Maintenance Order. He can establish none of these requirements. For those and the foregoing reasons, Mr. Bartleson respectfully requests that the Court affirm the trial court's decision.

Dated this 6 day of April, 2016

FROEHLING LAW OFFICE



Antoni Froehling, WSBA #8721
Attorney for Respondents

CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that I served the foregoing document to the Court of Appeals, Division II and to Jonathan Baner via first class mail and email.

Dated this 6th day of April, 2016



Betty Hendricks

FILED
COURT OF APPEALS
DIVISION II
2016 APR -6 AM 10:58
STATE OF WASHINGTON
BY _____
DEPUTY