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COURT OF APPEALS,
DIVISION I
STATE OF WASHINGTON

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JOSEPHINE CLIPSE,
Petitioner/Cross-Respondent,

v.

MICHELS PIPELINE CONSTRUCTION,
Respondent, AND
PIPE EXPERTS, LLC,
Respondent/Cross-Petitioner,

and

JOSEPH CLIPSE, Third-Party Defendant

REPLY BRIEF OF RESPONDENTS/CROSS-PETITIONERS

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ORIGINAL

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I. LEGAL ARGUMENT

The contractors submit the following reply brief pursuant to RAP 10.2(d).

1. The Contract Specifications are not Relevant to either of Ms. Clipse's Causes of Action

Ms. Clipse claims the trial court committed a manifest abuse of discretion when it excluded evidence of the “General Requirements/Technical Specifications” but fails to articulate how and why the specs are relevant to either of her two causes of action. Ms. Clipse makes a very narrow and specific negligence claim – that the “defendant failed to properly install the cleanout section of pipe connected to the underground sewer pipe on plaintiff’s property.” CP 6; CP 285. Ms. Clipse asks this Court to ignore her complaint and focus on a general standard of care. Specifically, Ms. Clipse claims the general specifications are relevant because they were “probative in determining whether the contractors properly carried out and completed the work associated with the project.” *Clipse Reply*, p. 10.

The inherent problem with Mr. Clipse’s argument is that she has not made a general negligence claim. CP 6; CP 285. Whether or not the contractors abided by the various provisions in the general specifications is not relevant to the specific issue of whether Pipe Experts improperly installed the cleanout pipe at the Clipse residence. CP 6. The Clipses

have not shown how the general specifications are relevant to this inquiry. More importantly, the Clipeses have failed to show how the trial court committed a manifest abuse of discretion when it excluded the specifications under ER 402.

The Clipeses mistakenly contend the case of *Freeman v. Navarre*, 47 Wn.2d 760, 771, 289 P.2d 1015 (1955) is “virtually identical” to the situation in this case. *Freeman* goes through a lengthy discussion about privity as a defense to negligence claims and concludes that a manufacturer owes a duty of reasonable care to the ultimate consumer of its product when the risk of injury is foreseeable. *Freeman* has no application to this case.

Ms. Clipse’s only other claim is for liability under RCW 4.24.630. The trial court excluded the general specifications with respect to Ms. Clipeses RCW 4.24.630 claim for the reasons set forth in the contractors’ underlying brief. The Clipeses fail to show how the trial court violated the heightened standard of manifest abuse of discretion by excluding the general specifications pursuant to ER 402 and ER 403. As such, the trial court’s evidentiary decision should not be disturbed.

2. The Clipeses Concede the Trial Court’s Interpretation of RCW 4.24.630 is Incorrect

The issue for review is whether the trial court erred when it ruled a person can act wrongfully under RCW 4.24.630 without showing

intentional and unreasonable conduct. The Clipeses' brief concedes the trial court's interpretation is incorrect but instead argues the physical act of going onto the land qualifies as the "wrongful" act contemplated by the drafters of the statute. Under this basis alone the Court should find the trial court erred when it held a person can act wrongfully by simply showing lack of authorization under RCW 4.24.630. The statute requires intentional and unreasonable conduct *in addition to* lack of knowledge. The trial court erred when it ruled otherwise.

3. RCW 4.24.630 Requires Intentional and Unreasonable Acts Upon Another's Property

The Clipeses argue RCW 4.24.630 does not require a commission of intentional and unreasonable acts upon another's property. Instead they claim the act of going onto the property itself is sufficient to impose liability under the statute. This interpretation ignores the plain language of the statute and existing case law.

RCW 4.24.630 does not impose liability when a person wrongfully goes onto the land of another but, rather, when a person goes onto the land of another and then wrongfully causes waste or injury. *Wash Rev. Code* § 4.24.630. This statute is premised upon "a wrongful invasion or physical trespass upon another's property, a commission of intentional and unreasonable acts upon another's property, **and** subsequent destruction of physical or personal property by the invader to another's property..."

Colwell v. Etzwell, 119 Wn.App. 432, 441, 81 P.3d 895 (2003) (emphasis added). The intentional and unreasonable act or acts must occur “upon” the land. *Id.* Simply going onto the property alone is not sufficient to trigger liability and treble damages under RCW 4.24.630.

The Clipses cite *Grundy v. Brack Family Trust*, 151 Wn.App. 557, 213 P.3d 619 (2009) in support of their belief that the wrongful act or acts provision of RCW 4.24.630 applies to the act of going onto the land. *Grundy* is a Division II case that does not analyze RCW 4.24.630 but instead addresses the muddled tort of intentional trespass. *Grundy v. Brack Family Trust*, 151 Wn.App. at 568 fn 8 citing *Wallace v. Lewis County*, 134 Wn.App. 1, 15, 137 P.3d 101 (2006). In *Grundy* the plaintiff’s intentional trespass claim failed because her damages were neither “actual and substantial,” nor were they foreseeable. *Id.* at 569.

The Clipses argue “the elements necessary to prove statutory trespass under RCW 4.24.630 are essentially the same as those necessary to prove the intentional tort of trespass.” *Cclipse Reply*, p. 5. Implicitly, the Clipses argue imposition of liability under the tort of intentional trespass equates to imposing liability under RCW 4.24.630. Despite these arguments, RCW 4.24.630 and the tort of intentional trespass remain separate causes of action with separate elements and separate punishments.

RCW 4.24.630 requires a “commission of intentional and unreasonable acts upon another’s property” and results in treble damages, reasonable attorneys fees, and other litigation costs. *Wash Rev. Code* § 4.24.630; *Colwell v. Etwell*, 119 Wn.App. at 441. The sanctions for intentional trespass, conversely, are not nearly as severe. *Grundy v. Brack Family Trust*, 151 Wn.App. at 568 fn 8. Intentional trespass also requires foreseeability of injury. *Id*; *Bradley v. Am. Smelting & Ref Co.*, 104 Wn.2d 677, 709 P.2d 782 (1985). In short, proving liability for intentional trespass does not mandate a finding of liability under RCW 4.24.630. More importantly, Ms. Clipse did not plead a cause of action for intentional trespass and, even if she did, could not prove foreseeability. CP 6; CP 285.

The plain language of RCW 4.24.630 and existing case law confirm Ms. Clipse must show Pipe Experts intentionally and unreasonably caused the wastewater backup at the Clipse residence. Ms. Clipse cannot meet this burden and this Court should rule accordingly.

II. CONCLUSION

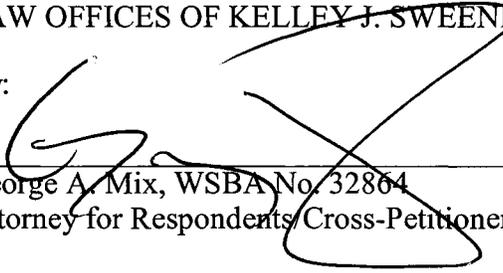
Based on the foregoing arguments the Court should affirm the trial court’s exclusion of the general specifications under ER 402 and 403 and find the trial court erred when it ruled a person can act wrongfully under

RCW 4.24.630 without showing intentional and unreasonable conduct upon the land.

RESPECTFULLY SUBMITTED this 29th day of October, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that on October 30th 2009 I caused to be served a true and correct copy of the foregoing Reply Brief of Respondents/Cross-Petitioners by the method indicated below, and addressed to the following:

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