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No. 714414

IN THE COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION I

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

Plaintiffs/Appellants,

v.

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

Defendants/Respondents.

**APPELLANTS' OPENING BRIEF**

Michael D. Daudt, WSBA #25690  
Email: mdaudt@tmdwlaw.com  
Karen A. Willie, WSBA #15902  
Email: kwillie@tmdwlaw.com  
TERRELL MARSHALL DAUDT & WILLIE PLLC  
936 North 34th Street, Suite 300  
Seattle, Washington 98103-8869  
Telephone: (206) 816-6603  
*Attorneys for Plaintiffs/Appellant*

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STATE OF WASHINGTON

**ORIGINAL**

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## I. INTRODUCTION

Plaintiffs/Appellants Neil and Kiyomi Donner (the “Donners” or “Plaintiffs”) suffered significant damages when their neighbors’ sewage filled the basement of their home while the Donners were out of town. The sewage backup occurred when the roots of a tree located on property owned by Defendant/Respondent James Blue’s trust damaged the sewage line shared between the Donners and Defendants/Respondents John Rieke and Gene Robertson, James and Jane Hawkanson, Shane and Dana Kim, and John Spring.

As the owner of the tree that blocked the sewer line and ultimately caused damages to the Donners’ home, Defendant Blue breached his duty under *Forbus v. Knight*, 24 Wn.2d 297, 163 P.2d 822 (1946) to protect the Donners against encroachment and consequent injury resulting from the blockage. Pursuant to an easement agreement concerning the northern 10 feet of the Donners’ property, through which the shared sewer line runs, Defendant Spring breached his duty to ensure that his use of the sewer line on the Donners’ property did not cause or contribute to any damages. Defendants Reike/Robertson, Hawkansons, and Kims breached their duties under a second easement agreement to maintain the shared sewer pipe so as to avoid unreasonable interference with the enjoyment of the Donners’ property.

Because the breach of Defendants’ duties to the Donners gives rise

to valid claims for breach of easement, negligence, nuisance, trespass, and injunctive relief, the trial court erred when it dismissed the Donners' claims on summary judgment. Plaintiffs respectively request that the trial court's decision be reversed.

## **II. ASSIGNMENT OF ERROR**

### **A. Assignment of Error**

The trial court erred in granting summary judgment dismissing Plaintiffs' claims for breach of easement, negligence, nuisance, trespass, and injunctive relief.

### **B. Issues Pertaining to Assignment of Error**

1. Is Defendant Blue liable under *Forbus v. Knight* for damages suffered by the Donners?
2. Did Defendant Spring have a duty to maintain and repair the common sewage line pursuant to the 1977 easement agreement?
3. Did Defendants Reike/Robertson, Hawkansons, and Kims have a duty to maintain and repair the common sewage line pursuant to the 1963 easement agreement?
4. Did the breach of Defendants' duties give rise to valid claims for breach of easement, negligence, nuisance, trespass, and injunctive relief?

## **III. STATEMENT OF THE CASE**

The Donners own a home located at 5030 West Mercer Way in

Mercer Island, Washington. CP 170 lines 4-9. There is a shared side sewer line that serves the Donners' home and the properties owned by Defendants Reike/Robertson, Hawkansons, Kims, and Spring, who live uphill from the Donners (the "uphill Defendants"). *Id.* The side sewer line connects to a municipal sewer main at West Mercer Way, and from there runs uphill through the property owned by Defendant James Blue's trust (hereinafter the "Blue Property"), then uphill through the Donners' property, and then toward the four properties uphill from the Donners' property that are owned by the uphill Defendants. *Id.* A map depicting the location of the subject properties may be found at CP 175.

**A. The Donners' Property Was Damaged When Tree Roots Blocked the Common Sewer Line**

Sometime during the week of July 30, 2012, the side sewer line became blocked by tree roots on the Blue Property. CP 170, lines 10-18. No one was at the Donners' house when this occurred because they were out of town that week. *Id.* When they returned, they found that a large volume of sewage had backed up into the basement of their home. All of the sewage had come from the Defendants' homes that are situated uphill. *Id.* As a result of the sewage backup, the Donners suffered significant damages. *Id.*

The root intrusion that occurred on the Blue Property and caused the July 2012 sewage backflow into the Donners' home could have been detected and prevented well before July 2012 through routine inspection

of the sewer line. CP 159. Defendant Blue, however, did not maintain the overgrown trees on his property, and took no action to assure that the sewer line remained free of obstructions. *See* CP 149, lines 4-8 and 16-18.

**B. Two Easements Required the Uphill Defendants to Maintain the Sewage Line and Protect the Donners' Property from Damage**

Two applicable utility easements cover the northern 10 feet of the Donners' property, through which the shared sewer line is situated. CP 180-83, 185. The first is entitled "Easement Agreement" and was recorded on August 14, 1973. CP 180-83. The beneficiary of the 1973 Easement Agreement is Defendant Spring. *See* CP 171, lines 3-6. That agreement requires the beneficiary "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." CP 181.

The second applicable easement is reserved in a Statutory Warranty Deed, recorded June 17, 1963, from Milan and Olive Overbye to Arthur Dusto, who acquired what is now the Donners' property through the conveyance. CP 185. In the Statutory Warranty Deed, the Overbys reserved to themselves an easement "for ingress, egress and utilities" over the northern 10 feet of the Donners' property. *Id.* As the current owners

of what was originally the Overbyes' property, Defendants Rieke/Robertson, Hawkansons and Kims are the beneficiaries of the easement reservation in the 1963 Statutory Warranty Deed. CP 171, lines 15-18. The easement is silent concerning the duties of maintenance and repair and responsibility for damage resulting from use of the easement. *See id.*, lines 18-20.

**C. The Trial Court Granted Summary Judgment Against the Donners**

The Donners filed their Complaint for Damages and Injunctive Relief on May 21, 2013. CP 001. In November 2013, all Defendants filed motions for summary judgment. CP 035, 063, 082, 108, 138. The trial court granted all Defendants' motions for summary judgment on December 17, 2013, ordering all Defendants except Defendant Blue to pay their one-fifth proportionate share (\$1,892.81) of the \$9,464.09 cost to repair the sewer line. CP 251-53.

**IV. ARGUMENT**

**A. Standard of Review**

The appellate court reviews summary judgment decisions *de novo*, engaging in the same inquiry as the trial court, to determine if the moving party is entitled to summary judgment as a matter of law and if there is any genuine issue of material fact requiring a trial. *Michak v. Transnation Title Ins. Co.*, 148 Wn.2d 788, 794-95, 64 P.3d 22 (2003). A trial court's factual findings on summary judgment are entitled to no weight, and the

appellate court reviews the record de novo. All facts, and reasonable inferences therefrom, must be viewed most favorably to the party opposing the motion. Even if the facts are undisputed, if reasonable minds could draw different conclusions, summary judgment is improper. *Chelan County Deputy Sheriffs Ass'n v. Chelan County*, 109 Wn.2d 282, 745 P.2d 1 (1987).

**B. Defendant Blue is Liable under *Forbus v. Knight***

As owner of the land under which the common sewer line was damaged by obtrusive tree roots, Defendant Blue is liable for the damages that the Donners suffered as a result of the sewage backup. The Washington Supreme Court has unambiguously held that “[i]t 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.” *Forbus v. Knight*, 24 Wn.2d 297, 313, 163 P.2d 822 (1946).

In *Forbus*, the parties were adjacent land owners, and the roots of a tree located on the defendant’s property invaded and clogged the plaintiff’s sewer line on plaintiff’s property. *Id.* at 300-301. As a result, the plaintiff’s basement filled with sewage. *Id.* Citing the erroneous determination of the trial court that the sole proximate cause of the plaintiff’s damages was her own negligence in failing to properly cement the joints of the sewer line, the Supreme Court logically concluded that the

owner of the offending agency has a duty to protect against encroachment and consequent injury. *Id.* at 313.

Here, in facts analogous to those of *Forbus*, roots from a tree located on the Blue Property damaged and blocked a shared sewer line, and caused sewage to fill the Donners' basement. CP 170, lines 10-18. As the owner of the offending agency, Defendant Blue had a duty to protect the Donners against encroachment and consequent injury resulting from the blockage.

Although *Forbus* did not concern an easement, the same principle still applies; the Donners' property was damaged by an offending agency owned by Defendant Blue. Furthermore, insofar as the Donners are the beneficiaries of an easement granting a right to use the common line on the Blue Property, a servient estate owner has a duty to remove obstacles, including trees, which interfere with an easement owner's rights. In *Sunnyside Valley Irr. Dist. v. Dickie*, 111 Wn. App. 209, 221, 43 P.3d 1277 (2002), the defendant servient estate owner was sued by the easement owner because, among other things, he maintained trees in the easement area that interfered with the use of the easement. The trial court's injunction requiring their removal by the servient estate owner was upheld.

Here, the Donners' property rights were invaded by the offending tree roots in exactly the same way as they would have been had the roots

first migrated across the property boundary line before invading the sewer line, as occurred in *Forbus*. Furthermore, the fact of Defendant Blue's ownership of the offending tree is unaffected by whether he planted it or it grew spontaneously. Under *Forbus*, as the owner of the "offending agency," Defendant Blue is liable. Additionally, as the servient estate owner, Defendant Blue had a duty to remove obstacles which could interfere with the Donners' right to use the sewer line. *Sunnyside*, 111 Wn. App. at 221.

**C. Defendant Spring Has a Duty to Hold Harmless and Indemnify the Donners for Damages They Suffered**

While Defendant Blue is liable to the Donners under *Forbus v. Knight*, Defendant Spring is liable under the 1973 Easement Agreement. Pursuant to the Restatement (Third) of Property, the parties to an easement agreement are free to agree to allocate duties in any manner they see fit. *See* Restatement (Third) of Property (Servitudes) § 4.1 (2000) ("A servitude should be interpreted to give effect to the intention of the parties ascertained from the language used in the instrument, or the circumstances surrounding creation of the servitude, and to carry out the purpose for which it was created.").

Under the 1973 Easement Agreement applicable to Defendant Spring, Defendant Spring is obligated as the beneficiary to "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." CP 181. Defendant Spring's liability was triggered when the sewage line became blocked on the Blue Property and ceased to function properly on the Donners' property, the servient estate. Defendant Spring's subsequent use of the easement on the Donners' property contributed to the damage caused to the Donners' home. Because Defendant Spring had a duty to ensure that his use of the easement on the Donners' property did not cause or contribute to any damages, he must pay for the resulting injuries under the terms of the easement agreement.

**D. All Uphill Defendants Have a Duty To Maintain And Repair The Common Line On The Blue Property**

1. Equity Requires All Joint Easement Users to Contribute to Maintenance

Where an easement instrument fails to allocate maintenance responsibility, equity will require all common easement users to contribute to maintenance for all easement areas used, including easement areas that are not located on an easement user's own property. *See Buck Mountain Owners' Assoc. v. Prestwich*, 174 Wn. App. 702, 718, 308 P.3d 644 (2013) ("[I]n the absence of an agreement, joint use of an easement creates an obligation to share costs."). The Restatement (Third) of Property (Servitudes), quoted with approval in *Buck Mountain Owners' Assoc.*,

states in pertinent part that “[t]he 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.” Restatement (Third) of Property (Servitudes) § 4.13 (2000).

Except for Defendant Spring, all the Defendants uphill from the Donners are beneficiaries of the easement reserved with the 1963 Overbye-Dusto deed, which is silent concerning their duties to maintain and repair the sewer line. Both the Donners’ property and the Blue Property are servient estates under that easement. Accordingly, Defendants Reike/Robertson, Hawkansons, and Kims have a duty under Washington law to maintain the sewer pipe on the Donners’ property and the Blue Property so as to avoid unreasonable interference with the enjoyment of the Donners’ property. There is no dispute that Defendants Reike/Robertson, Hawkansons, and Kims breached their duty—they concede that they never performed any maintenance on the sewer line. *See* CP 065, lines 10-15; CP 110, lines 11-15;

The 1973 Easement Agreement, like the 1963 Statutory Warranty Deed, is also silent as to maintenance. Accordingly, Defendant Spring also has a duty to maintain. *See* Restatement (Third) of Property

(Servitudes) § 4.13(4) (2000) (“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.”). Defendant Spring likewise concedes that he never performed any maintenance on the sewer line. *See* CP 037, lines 1-9.

**E. The Breach of Defendants’ Duties Gives Rise to Claims for Breach of Easement, Negligence, Nuisance, Trespass, and Injunctive Relief**

As set forth above, Defendant Blue is liable to the Donners for failure to protect them against encroachment and consequent injury resulting from the blockage. The uphill Defendants are liable for the Donners’ damages resulting from the uphill Defendants’ failure to maintain the sewer line, not just maintenance and repair costs to the sewer line itself:

The owner of an easement is responsible for any damage resulting from a failure to maintain or repair the easement, absent any separate agreement. Accordingly, 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. An action for such damages is not barred by an agreement on the part of the servient owner to pay a part of the costs of repairs.

28A C.J.S. Easements § 229 (footnotes omitted). The claims arising from the breach of duty to maintain an easement can arise in both tort and contract. *See Walsh v. United States*, 672 F.2d 746, 747 (9th Cir. 1982) (negligence suit against United States for damage caused by failure to maintain cattle guards within highway easement allowed under Federal Tort Claims Act).

1. Plaintiffs Asserted Valid Breach of Easement Claims

As set forth above, the uphill Defendants failed to fulfill their duties to maintain the common sewer line and prevent unreasonable interference with the enjoyment of the Donners' property. Thus, the Donners have asserted valid claims for breach of easement against the uphill Defendants.

2. Plaintiffs Asserted Valid Negligence Claims

"In an action for negligence a plaintiff must prove four basic elements: (1) the existence of a duty, (2) breach of that duty, (3) resulting injury, and (4) proximate cause." *Degel v. Majestic Mobile Manor, Inc.*, 129 Wn.2d 43, 48, 914 P.2d 728 (1996). Here, Defendant Blue had a duty under *Forbus v. Knight* to protect the Donners from encroachment and resulting damages. The uphill Defendants all had a duty to maintain the sewer line and prevent injury to the Donners. Such duties were breached when the sewer line was blocked and sewage subsequently backed up and flooded the Donners' basement. Because, as set forth below, the damages

were proximately caused by the breach of Defendants' duties, the trial court erred in dismissing their negligence claims at summary judgment.

3. Plaintiffs Asserted Valid Trespass and Nuisance Claims

An action for trespass exists when there is an intentional or negligent intrusion onto or into the property of another. Restatement (Second) of Torts, §§ 158, 165, 166 (1965). This includes the misuse, overburdening or deviation from an existing easement. *See Hughes v. King Cty.*, 42 Wn. App. 776, 714 P.2d 316, review denied, 106 Wn.2d 1006 (1986). The uphill Defendants acknowledge that principles of negligence will support claims for both trespass and nuisance. *See, e.g.*, Defendant Kims' Motion to Dismiss at CP 86-87 (discussing negligent intrusion); Defendant Hawkansons' Motion for Summary Judgment at CP 11 ("rules of negligence are applied" to alleged nuisance when arising from negligent conduct).

As a result of the failure to maintain the sewer line, sewage from the uphill Defendants' homes intruded onto the Donners' property and flooded their basement. The blockage of the sewer line caused by Defendant Blue's tree was a negligent intrusion that interfered with Plaintiffs' property and easement rights. Thus, Plaintiffs have asserted valid trespass claims against all Defendants.

Actionable nuisance is defined broadly in Washington:  
"[W]hatever is injurious to health or indecent or offensive to the senses, or

an obstruction to the free use of property, so as to essentially interfere with the comfortable enjoyment of the life and property, is a nuisance and the subject of an action for damages and other and further relief.” RCW 7.48.010. Even minor infringements on the rights of property owners support claims for nuisance. *See, e.g., Gostina v. Ryland*, 116 Wash. 228, 235-36, 199 P. 298 (1921) (overhanging fir tree branches dropping needles on neighbor’s property constituted nuisance). Here, the nuisance caused by Defendants had a severe impact on the Donners, and they are entitled to relief for their resulting damages.

4. Causation is Established

The issue of proximate cause is not generally susceptible to summary judgment. *LaPlante v. State*, 85 Wn.2d 154, 159, 531 P.2d 299 (1975); *Wojcik v. Chrysler Corp.*, 50 Wn. App. 849, 853-54, 751 P.2d 854 (1988). Here, the facts establish clearly that Defendants’ failure to maintain caused the Donners’ damages. Had there been any inspection by the Defendants over the past several years, the developing root blockage would have been detected and addressed before it caused the sewage backup into the Donners’ home. CP 159, lines 1-3. It is not the role of the Court to weigh such evidence, but to resolve all reasonable inferences in favor of the non-moving party. *Duckworth v. Langland*, 95 Wn. App. 1, 8, 988 P.2d 967 (1998). Thus, the issue of proximate cause cannot be determined in favor of Defendants.

5. Injunctive Relief is Appropriate.

Because Defendants all insist that they have no duty to maintain to sewer line, they presumably have no intention of contributing toward maintenance. Thus, Plaintiffs are entitled to an order compelling them to do so. *See Sunnyside*, 111 Wn. App. at 221 (where defendant refused to comply with easement restrictions, including removal of interfering trees, injunctive relief was warranted).

6. Plaintiffs Did Not Oppose Dismissal of Their Claim for Strict Liability

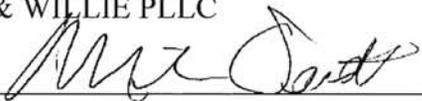
Although Plaintiffs believe that principles of strict liability could be applied under the facts of this case, because Plaintiffs' claims for breach of easement, negligence, trespass and nuisance are easily established, Plaintiffs did not oppose dismissal of their claim for strict liability against the uphill Defendants.

**V. CONCLUSION**

Plaintiffs Neil and Kiyomi Donner respectfully request that this Court reverse and remand this case to the superior court for trial.

RESPECTFULLY SUBMITTED AND DATED this 30th day of April, 2014.

TERRELL MARSHALL DAUDT  
& WILLIE PLLC

By:   
Michael D. Daudt, WSBA #25690

Email: mdaudt@tmdwlaw.com  
Karen A. Willie, WSBA #15902  
Email: kwillie@tmdwlaw.com  
936 North 34th Street, Suite 300  
Seattle, Washington 98103-8869  
Telephone: (206) 816-6603  
Facsimile: (206) 350-3528

*Attorneys for Plaintiffs/Appellants*

**DECLARATION OF SERVICE**

I, Michael D. Daudt, declare that on April 30, 2014, I caused a true and correct copy of the foregoing to be served on the following by the means indicated:

Thomas A. Heller, WSBA #14867  
Email: tomh@hellerwiegenstein.com  
HELLER WIEGENSTEIN PLLC  
144 Railroad Avenue, Suite 210  
Edmonds, WA 98020-4121

- U.S. Mail, postage prepaid
- Hand Delivered
- Overnight Courier
- Facsimile
- Electronic Mail

Pamela A. Okano, WSBA #7718  
Email: pokano@rmlaw.com  
REED MCCLURE  
1215 4th Avenue, Suite 1700  
Seattle, WA 98161

- U.S. Mail, postage prepaid
- Hand Delivered
- Overnight Courier
- Facsimile
- Electronic Mail

*Attorneys for Defendants John W. Rieke and Gene E. Robertson*

Michael A. Jaeger, WSBA #23166  
Email: jaeger@lbbslaw.com  
Emmelyn Hart, WSBA #28820  
Emmelyn.Hart@lewisbrisbois.com  
LEWIS BRISBOIS BISGAARD  
& SMITH LLP  
2101 Fourth Avenue, Suite 700  
Seattle, Washington 98121

- U.S. Mail, postage prepaid
- Hand Delivered
- Overnight Courier
- Facsimile
- Electronic Mail

*Attorneys for Defendants James C. Hawkanson and Jane H. Hawkanson*

William E. Gibbs, WSBA #8903  
Email: william.gibbs@comcast.net  
BERGMAN & GIBBS, LLP  
14205 SE 36th Street, Suite 100  
Bellevue, Washington 98006

- U.S. Mail, postage prepaid
- Hand Delivered
- Overnight Courier
- Facsimile
- Electronic Mail

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STATE OF WASHINGTON  
2014 APR 30 PM 3:26

*Attorneys for Defendant James M. Blue, as Trustee for Northwest  
Neurological Surgery Trust*

Gary A. Trabolsi, WSBA #13215  
Email: gtrabolsi@gardnerbond.com  
GARDNER TRABOLSI &  
ASSOCIATES PLLC  
2200 Sixth Avenue, Suite 600  
Seattle, Washington 98121

- U.S. Mail, postage prepaid  
 Hand Delivered  
 Overnight Courier  
 Facsimile  
 Electronic Mail

*Attorneys for Defendant John E. Spring*

Gordon G. Hauschild, WSBA #21005  
Email: ghauschild@wshblaw.com  
WOOD SMITH HENNING  
& BERMAN, LLP  
520 Pike Street, Suite 1205  
Seattle, Washington 98101

- U.S. Mail, postage prepaid  
 Hand Delivered  
 Overnight Courier  
 Facsimile  
 Electronic Mail

*Attorneys for Defendant Shane Kim and Dana Kim*

I declare under penalty of perjury under the laws of the State of  
Washington that the foregoing is true and correct.

DATED this 30th day of April, 2014.

TERRELL MARSHALL DAUDT  
& WILLIE PLLC

By 

Michael D. Daudt, WSBA #25690  
Email: mdaudt@tmdwlaw.com  
936 North 34th Street, Suite 300  
Seattle, Washington 98103-8869

*Attorneys for Plaintiffs/Appellants*