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I. ASSIGNMENTS OF ERROR

It was error for the Trial Court to grant summary judgment in favor of the City of Ocean Shores. The evidence before the Trial Court presented genuine issues of material fact that precluded summary judgment in favor of the City. There were also issues of *res ipsa loquitur* and contributory negligence that should have precluded summary judgment.

II. STATEMENT OF THE CASE

Appellant Frederick Cooperrider appeals from a ruling of the Trial Court granting summary judgment in favor of the City of Ocean Shores.

The facts of this matter are fairly straightforward. Appellant Frederick Cooperrider and Respondent the City of Ocean Shores were engaged in a long-running dispute over City-assessed utility charges for Mr. Cooperrider's property after Mr. Cooperrider left Washington for a job on the East Coast in 1998. In an attempt to end the dispute and to stop charges from accruing on the vacant house, Mr. Cooperrider wrote to the City on August 26, 2002, requesting that the city terminate water service

to his property. *See* First Cooperrider Declaration, Exhibit A.¹ At the time, water service was shut off at the meter due to non-payment. The letter asked the City to “please disconnect immediately the water service at 1267 East Ocean Shores Blvd SW. The disconnect fee of \$41.50 (see §13.12.100 M) is enclosed.” *See* First Cooperrider Declaration, Exhibit A. Ocean Shores Municipal Code § 13.12.100(m), referenced by Mr. Cooperrider in his termination request, states “[c]harge to remove a water meter at the request of property owner, forty-one dollars and fifty cents.” *See* First Cooperrider Declaration, Exhibit B. Mr. Cooperrider also enclosed funds he believed sufficient to cover all outstanding water-related charges.

On August 28, the City’s billing records indicate that a portion of the check Mr. Cooperrider submitted to pay his outstanding water charges was applied in the amount of \$53.50 under the “Other” category. *See* First Cooperrider Declaration, Exhibit D. This is the same amount described in the Ocean Shores Municipal Code §13.12.100(f) for restoration of service

1. It has come to Appellant’s attention that the First Declaration of Frederick Cooperrider, designated by Appellant as part of the record on appeal, was erroneously excluded from the packet of Clerk’s Papers transmitted to the Court. Appellant has filed a supplemental designation to correct this error, and will refer to that document as the “First Cooperrider Declaration” throughout this brief.

after discontinuation for failure to pay water charges. Municipal Code §13.12.100(f) states that: “[r]estoration of service after water service has been discontinued by the city for violation of ordinance or for failure to pay water charges: 1. During regular business hours, fifty-three dollars and fifty cents.” *See* First Cooperrider Declaration, Exhibit B. A review of the City’s billing records indicate that this charge of \$53.50 was first assessed on May 21, 2002. *See* First Cooperrider Declaration, Exhibit D.

However, Mr. Cooperrider’s water service was not restored on May 21, 2002. Instead, it was disconnected for non-payment. *See* Thomas Declaration at ¶ 3, CP 66. Therefore, the \$53.50 appears to have been assessed as a reconnection fee in anticipation of the date on which the City would turn the water back on. The City maintains it was a disconnection fee. “The master file report for the Cooperrider property shows that a service disconnection fee was assessed to the Cooperrider property in May 21, 2002.” *See* Marche Declaration at ¶ 8, CP 26. On June 22, 2001, a portion of Mr. Cooperrider’s check was applied in the amount of \$53.50 under the “Other” category. However, there is no corresponding date on which this \$53.50 was assessed. *See* Cooperrider Declaration, Exhibit D.

Also on August 28, 2002, the City’s attorney, Jo-Ellen Thomas,

wrote back regarding the August 26 letter and payment. *See* First Cooperrider Declaration, Exhibit C. In her letter, Ms. Thomas indicated that the outstanding utility bill for the property was in an amount greater than what Mr. Cooperrider had paid, and that he would need to submit an additional \$147.90 in order to have his water service terminated and his meter removed. Ms. Thomas explained that of that \$147.90, \$41.50 was a fee for removing the water meter and the remainder, \$106.40, was money that the City still felt was owed by Mr. Cooperrider. Ms. Thomas stated “We will remove your water meter after your check for the entire amount (\$147.90) clears the bank.” *See* First Cooperrider Declaration, Exhibit C.

Because he was unable to resolve the dispute with the City, Mr. Cooperrider listed the property for sale. The City continued to bill Cooperrider for having the meter in the ground. In January, 2004, Mr. Cooperrider learned from a contractor that the house had suffered extensive water damage when the water in his kitchen pipe froze during a cold spell and the pipe burst. Cooperrider sold the water-damaged house, and the City collected all outstanding water charges out of escrow at closing.

III. ARGUMENT

A. **The Trial Court Should Not Have Granted Summary Judgment to the City When, as Here, There were Genuine Issues of Material Fact**

The function of summary judgment is to avoid a useless trial.

However, “trial is not useless, but absolutely necessary, where there is genuine issue as to any material fact.” Preston v. Duncan, 55 Wn.2d 678, 681, 349 P.2d 605 (1960) (punctuation added). “Summary judgement is proper where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.” Hertog v. City of Seattle, 138 Wn.2d 265, 275, 979 P.2d 400 (1999); Taggart v. State, 118 Wn.2d 195, 199, 822 P.2d 243 (1992); CR 56(c).

1. **Summary Judgment Is Not Proper When, as Here, There are Genuine Issues of Material Fact as to Negligence and Trespass**

The City argued that summary judgment was appropriate, alleging that Cooperrider failed to show negligence or trespass. The City claimed that Cooperrider could not possibly show that the City had a duty to Cooperrider, breached that duty, and that Cooperrider’s injuries were caused by the breach. However, the Washington Supreme Court has noted

that “issues of negligence and proximate cause are generally not susceptible to summary judgment.” Owen v. Burlington N. & Santa Fe R.R., 153 Wn.2d 780, 788, 108 P.3d 1220 (2005), *quoting* Ruff v. King County, 125 Wn.2d 697, 703, 887 P.2d 886 (1995). Further, “[b]reach and proximate cause are generally fact questions for the trier of fact. However, if reasonable minds could not differ, these factual questions may be determined as a matter of law.” Hertog, 138 Wn.2d at 275, *citing* Sherman v. State, 128 Wn.2d 164, 183, 905 P.2d 355 (1995). Thus the standard, in a summary judgment motion on the question of negligence, is whether reasonable minds might differ. When considering any summary judgment motion, “[t]he facts and reasonable inferences from the facts are considered in the light most favorable to the nonmoving party.” Hertog, 138 Wn.2d at 275; Taggart, 118 Wn.2d at 199. Therefore, in considering whether Mr. Cooperrider can show that the City acted negligently or whether Mr. Cooperrider can show that the City committed trespass and caused his injuries, the Court should consider all the facts and reasonable inferences therefrom in the light most favorable to Mr. Cooperrider.

Here, an inference of *res ipsa loquitur* was permissible as to the City’s negligence. Since the inference of *res ipsa loquitur* was

permissible, the Trial Court should not have granted the City's summary judgment motion, but instead have submitted the issue to the trier of fact. Moreover, Cooperrider also made out a compelling case that the City was negligent and caused Mr. Cooperrider's injury, or that the City committed trespass to Mr. Cooperrider's house. The Court should have submitted that issue to the trier of fact as well, rather than granting the City's motion for summary judgment. Finally, the transcript of summary judgment proceedings shows that the Trial Court believed that Mr. Cooperrider was contributorily negligent and may have caused his own injuries. However, there were genuine issues of material fact regarding whether Cooperrider was contributorily negligent. Therefore, the Trial Court should have submitted that issue to the trier of fact as well and should not have granted summary judgment in favor of the City.

B. An Inference Of Res Ipsa Loquitur is Appropriate In This Case

The doctrine of res ipsa loquitur spares the plaintiff – appellant Mr. Cooperrider was the plaintiff in the action below – the requirement of proving specific acts of negligence in cases where a plaintiff asserts that they have suffered injury, the cause of which cannot be fully explained, and the injury is of a type that would not ordinarily result if the defendant

were not negligent. In such cases the jury is permitted to infer negligence. Pacheco v. Ames, 149 Wn.2d 431, 436, 69 P.3d 324 (2003); Miller v. Kennedy, 91 Wn.2d 155, 159-60, 588 P.2d 734 (1978); Douglas v. Bussabarger, 73 Wn.2d 476, 482, 438 P.2d 829 (1968) (*citing Pederson v. Dumouchel*, 72 Wn.2d 73, 81, 431 P.2d 973 (1967)); Kemalyan v. Henderson, 45 Wn.2d 693, 702, 277 P.2d 372 (1954). Here, Mr. Cooperrider asserts that he was injured by water flooding his Ocean Shores house after freezing weather caused the water in his kitchen pipe to freeze and the pipe to burst, when such water **should not have been flowing through his pipes**. The water should not have been flowing through his pipes because 1) the City had shut off his water service for non-payment and 2) Cooperrider had requested in writing and had paid the City for the City to remove his water meter. Cooperrider cannot fully explain how water came to be flowing through his pipes, as he did not have control over the City's shutoff valve. It is possible that the City negligently turned the water back on without informing Mr. Cooperrider that it was doing so and it is also possible that a third person accessed the City's easily accessible valve box and turned Mr. Cooperrider's water on. However, it is clear that the City's failure to remove the water meter

allowed water to flow through his pipes despite the fact that Mr. Cooperrider's water service was turned off. If the City had removed the meter and terminated service, as Cooperider requested, there would have been no way for water to enter his pipes and damage his home.

Finally, for purposes of the *res ipsa* test, the injury must be of a type that would not ordinarily result if the defendant (the City in this case) was not negligent. If the City turned on the water – absent Mr. Cooperrider's paying his overdue water bills and in contravention of the City's own policy – without telling Mr. Cooperrider, then Mr. Cooperrider, residing in Vienna, Virginia, would have no way of knowing that his house would be vulnerable to freezing and bursting pipes in the winter weather. If, on the other hand, a third person accessed the City's unlocked valve box, then the City is at fault for negligently allowing such easy access. The City's failure to remove the water meter was the root cause in either case, and the City should be held liable for not having done so after Mr. Cooperrider complied with the City's code requirements and requested the removal of the water meter in writing and paid the requisite fee.

1. **Cooperrider Established the Three Elements of Res Ipsa Loquitur**

Washington courts have held that there are three necessary elements of res ipsa loquitur. The doctrine is only applicable when the evidence shows: (1) the accident or occurrence producing the injury is of a kind which ordinarily does not happen in the absence of someone's negligence, (2) the injuries are caused by an agency or instrumentality within the exclusive control of the defendant, and (3) the injury-causing accident or occurrence is not due to any voluntary action or contribution on the part of the plaintiff. Pacheco, 149 Wn.2d at 436; Zukowsky v. Brown, 79 Wn.2d 586, 593, 488 P.2d 269 (1971) (*quoting Horner v. N. Pac. Beneficial Ass'n Hosps., Inc.*, 62 Wn.2d 351, 359, 382 P.2d 518 (1963)).

a. **The Accident Does Not Usually Happen in the Absence of Negligence**

There are three alternative ways that Washington courts have held the first element can be fulfilled: (1) when the act causing the injury is so palpably negligent that it may be inferred as a matter of law, i.e., leaving foreign objects, sponges, scissors, etc., in the body, or amputation of a wrong member; (2) when the general experience and observation of

mankind teaches that the result would not be expected without negligence; and (3) when proof by experts in an esoteric field creates an inference that negligence caused the injuries. Pacheco, 149 Wn.2d at 438, Zukowsky, 79 Wn.2d at 595 (*quoting* Horner, 62 Wn.2d at 360, and *citing* Pederson, 72 Wn.2d 73).

Here, Mr. Cooperrider can show that the second prong applies. The general experience and observation of mankind teaches that when water service to a home is turned off by the provider, and the homeowner makes no effort to resume the water service (and in fact made efforts to assure that water service was terminated permanently), and yet water service is turned back on and the kitchen is flooded, that this result would not be expected without negligence. Therefore, the Trial Court erred in refusing to consider the alternative ways in which the first element of *res ipsa loquitur* may be fulfilled; the court said, “The first element of *res ipsa* is that the act causing the injury is so palpably negligent that negligence may be inferred as a matter of law, and they talk about leaving foreign objects in bod[i]es after operations and amputating the wrong leg or something like that.” Report of Proceedings 25-26: 23-25, 1-3. The trial Court should have considered the other ways that the first element may be

fulfilled.

b. The Injuries Are Caused by Something Within the Control of Defendant and the Accident Is Not Due to an Action on the Part of the Plaintiff

Since the advent of comparative fault, the second and third elements of *res ipsa loquitur* are merged and analyzed together. “With the advent of comparative fault, the third element has little relevance and is generally merged into the second element.” Marshall v. Western Air Lines, Inc., 62 Wn. App. 251, 261, 813 P.2d 1269 (1991). “These elements are therefore analyzed together.” Tinder v. Nordstrom, Inc., 84 Wn. App. 787, 795, 929 P.2d 1209 (1997) (*citing Marshall*, 62 Wn. App. at 261). “If the event producing the injury resulted from the plaintiff’s negligence, as opposed to the defendant’s, and a reasonable inference of negligence on the part of the defendant does not exist, then the plaintiff may not rely on the *res ipsa loquitur* doctrine.” Marshall, 62 Wn. App. at 261. Here, however, the City cannot show that the event producing the injury resulted from Mr. Cooperrider’s alleged contributory negligence as opposed to the City’s own negligence, while Mr. Cooperrider has certainly alleged sufficient evidence to permit a reasonable inference of the City’s

negligence.

The fact that Mr. Cooperrider may have been *contributorily* negligent, as opposed to *exclusively* negligent, does not bar Mr. Cooperrider's right to rely on the res ipsa loquitur doctrine. "Prosser and Keaton claim that the advent of comparative fault should logically eliminate the element of the absence of the plaintiff's contribution to the accident from the doctrine, unless the plaintiff's negligence appears to be the sole proximate cause of the event." Tinder, 84 Wn. App. at 195 n.4, *citing* Prosser & Keaton on The Law of Torts, Res Ipsa Loquitur TUR § 39, at 254 (1984). Here, while the City's counsel argued that Mr. Cooperrider was negligent for failing to turn off the already turned-off water, Mr. Cooperrider is arguing that the City either negligently turned on the water or negligently allowed a third party to turn it on after having failed to remove the water meter at his request and thus allowed water to flow into Mr. Cooperrider's pipes. Even if there was some contributory negligence on the part of Cooperrider, that negligence could not be the sole proximate cause of the event.

Certain aspects of the analysis of the second element still remain. The Tinder court, referring to the second element, states "Exclusive

control does not mean actual physical control, but rather refers to the responsibility for the proper and efficient functioning of the instrumentality that caused the injury.” 84 Wn. App. at 795 (*citing United Mut. Sav. Bank v. Riebli*, 55 Wn.2d 816, 821, 350 P.2d 651 (1960)).

Here, the City undisputably has the responsibility for the proper and efficient functioning of its water system, particularly the City’s side of the meter and the City’s shut-off valve. Therefore, the second and third elements of the doctrine of *res ipsa loquitur* are fulfilled.

The Trial Court, however, erred in adhering to the requirements of the third element of *res ipsa loquitur*, despite the advent of comparative fault and the merger doctrine. The Court said, “I guess I also have a problem with the *res ipsa* when he [Mr. Cooperrider] knew that the City didn’t pull the meter.” Report of Proceedings at 26:20-22. The trial court should have applied the merger doctrine as stated in Marshall and Tinder. Even if the trial court were correct in adhering to the requirements of the third element of *res ipsa loquitur*, it still applied the wrong standard. “[A] *res ipsa loquitur* instruction should not be denied to a plaintiff when all of the elements for application of the doctrine are present although there is evidence offered to explain the incident.” Pacheco, 149 Wn.2d at 440;

Brown v. Dahl, 41 Wn. App. 565, 582, 705 P.2d 781 (1985) (citing ZeBarth v. Swedish Hosp. Med. Ctr., 81 Wn.2d 12, 499 P.2d 1 (1972)).

Mr. Cooperrider can show all of the elements for application of the doctrine, even though the City alleges that the incident can be explained by Mr. Cooperrider's failure to protect against the already shut-off water. Therefore, the trial court erred in not finding that an inference of *res ipsa loquitur* was permissible.

Such a presumption is appropriate in this case, where the City is arguing that Plaintiff's claims fail because he cannot identify exactly who restored water flow to the house. The City's acts and omissions after Cooperrider took the necessary steps to terminate water service and have the meter removed permit an inference of negligence. The fact that the City's own billing records show that a Restoration fee was charged after Cooperrider requested termination of service only support the inference of negligence. A presumption of negligence is also appropriate because utilities have statutorily imposed duties, such as those in RCW 80.28.010(2) and (8), requiring that every "water company shall furnish and supply such service, instrumentalities and facilities as shall be safe, adequate and efficient, and in all respects just and reasonable." The Court

of Appeals held that the doctrine of *res ipsa loquitur* was applicable to claims against a water company arising out of broken water lines in Metropolitan Mortg. & Securities Co., Inc. v. Washington Water Power 37 Wash.App. 241, 679 P.2d 943(1984). The same standard should apply to the City of Ocean Shores in this case, as the water purveyor, to explain the defect in its system that allowed water to intrude into Plaintiffs' property when that water should not have been flowing.

Since the trial court erred in not finding that an inference of *res ipsa loquitur* was permissible, it also erred in granting the City's motion for summary judgment. "If the plaintiff demonstrates that it is entitled to rely on the *res ipsa loquitur* doctrine, then the defendant is entitled to summary judgment only if the evidence presented by the defendant destroys all reasonable inferences of negligence." Marshall, 62 Wn. App. at 259 (*citing* Prosser & Keaton, at 261; Central Wash. Bank v. Mendelson-Zeller, 113 Wn.2d 346, 353, 779 P.2d 697 (1989)). Here, the City has not presented evidence that is capable of destroying all reasonable inferences of negligence. Summary judgment was simply inappropriate.

C. **Questions Regarding the City's Negligence and Trespass and Mr. Cooperrider's Contributory Negligence are Questions of Material Fact**

1. **Cooperrider made a showing of the City's negligence sufficient to raise questions of material fact**

Even without relying on the doctrine of *res ipsa loquitur*, Mr. Cooperrider can make a showing of the City's negligence and trespass sufficient to raise questions of material fact; the trial court should therefore have not granted the City's motion for summary judgment.

Negligence is the breach of a duty that proximately causes injury. A.C. v. Bellingham School Dist., 125 Wn. App. 511, 516, 105 P.3d 400 (2004). Negligence is further described as the failure to act reasonably under the circumstances. *Id.*, quoting ESCA Corp. v. KPMG Peat Marwick, 135 Wn.2d 820, 828, 959 P.2d 651 (1998). The elements of the tort of negligence are set out in more prosaic form by our Supreme Court. A plaintiff must establish four elements: "(1) the existence of a duty...; (2) breach of that duty; (3) resulting injury; and (4) proximate cause between the breach and the injury." Hutchins v. 1001 Fourth Ave. Assocs., 116 Wn.2d 217, 220, 802 P.2d 1360 (1991).

Here, the City had a duty to comply with its own code provisions regarding the supply of water to Ocean Shores residents. It also had a statutory duty to do so in a safe, just and reasonable manner. "Every...water company shall furnish in supply such service,

instrumentalities and facilities as shall be safe, adequate and efficient, and in all respects just and reasonable.” RCW 80.28.010(2). The City had a duty to provide adequate security measures for its water meter boxes to prevent unauthorized tampering. The City’s defense rests partially on its assertion that the City’s shutoff valve is completely unprotected, and thus any person could have tampered with it.

The City breached that duty by failing to follow its own code provisions when it unreasonably refused to remove Mr. Cooperrider’s water meter pursuant to his written request and the payment of the required fee. Pursuant to Ocean Shores Municipal Code (“OSMC”) 13.06.230, a “Customer may request removal of the water meter to a connected lot by notifying the city in writing of that request at least five working days in advance of the desired removal date. The city shall read the meter for a final bill on the date of removal...[which] shall be due and payable upon presentation of the final billing.” *See* First Cooperrider Dec., Exhibit B. The City’s charge to remove a water meter at the request of the property owner is \$41.50. OSMC 13.12.100 (M). Mr. Cooperrider, during the course of his dispute with the City, exchanged several letters with the City asking to terminate his contract with the City and to

disconnect his City-provided water services. In his letter of October 30, 2001, James M. Sanders, Sr., the Utility Billing Supervisor, explained to Mr. Cooperrider that the City would continue to bill Mr. Cooperrider at a base rate each month for water services, despite Mr. Cooperrider's non-consumption of water, unless Mr. Cooperrider had his water meter removed. He quoted to Mr. Cooperrider the water meter removal fee of \$41.50. *See* Thomas Declaration, Exhibit 2, CP 72.

After the unsuccessful resolution of his small claims matter against the City, Mr. Cooperrider decided to take Mr. Sanders's advice. On August 26, 2000, Mr. Cooperrider wrote to the City. He asked the City to "disconnect immediately the water services" and stated that the "disconnect fee of \$41.50 (see § 13.12.100 M) is enclosed." *See* Thomas Declaration, Exhibit 6, CP 81. Therefore, while Mr. Cooperrider did not use the words "water meter removal," he did request it in writing and referenced the water meter removal fee section of the City's municipal code. Particularly in light of Mr. Sanders's letter to Mr. Cooperrider suggesting water meter removal, the meaning of Mr. Cooperrider's request was abundantly clear. Furthermore, it was in accordance with OSMC 13.06.230; it was in writing. Though Mr. Cooperrider attempted to pay off

his unpaid bills by paying additional moneys in addition to the \$41.50 water meter removal fee, he was not required to do so before the City would remove the meter. OSMC 13.06.230 instead required that the City calculate moneys owed as of the date of the removal of the water meter and bill the customer accordingly. The money owed by the customer would then become due. The Code does not state that a meter will be removed only upon payment of all outstanding charges.

However, the City did not remove Mr. Cooperrider's water meter. Instead, the City's attorney, Jo-Ellen Thomas, wrote a letter to Mr. Cooperrider. She stated, "I have reviewed your letter of August 26, 2002, and frankly, it makes no sense. We understand that you wish to terminate your water service, but once again, you do not attempt even a basic compliance with our municipal code." *See* Thomas Dec., Exhibit 7, CP 83. She sent him a form to fill out – the written form that the City had prepared in order to *facilitate* its customers' compliance with the "in writing" requirements of OSMC 13.06.230 – that was not actually required by the City's code. She also informed him that the money he had paid was insufficient. *See* Thomas Dec., Exhibit 7, CP 83. Recall that the City's municipal code did not require payment in full before the City would

remove the water meter. Therefore, presumably acting in accordance with Ms. Thomas's advice, the City itself did not comply with its own code when it refused to remove Mr. Cooperrider's water meter. It breached its duty to comply with its own code and violated RCW 80.28.010(2) when it did not act in a just and reasonable manner.

This failure to remove the water meter was the proximate cause of Mr. Cooperrider's injury; but for the existence of the water meter – allowing the water to be turned on (whether by the City or an unknown third party) – water would not have flowed into Mr. Cooperrider's pipes and been present during the cold spell that caused the water to freeze and Mr. Cooperrider's kitchen pipe to burst.

Finally, the City did not act reasonably under the circumstances. The City's refusal to remove Mr. Cooperrider's water meter seems to be a deliberate and willful misunderstanding of Mr. Cooperrider's written request in his letter of August 26. The City was annoyed with Mr. Cooperrider, who had been a thorn in the City's side since at least October 1, 2001. *See* Thomas Declaration, Exhibit 1, CP 69. However, the City seemed to wish to play tit-for-tat with Mr. Cooperrider, instead of complying with its own code and ridding itself of the nuisance of Mr.

Cooperrider in one fell swoop. By willfully misunderstanding Mr. Cooperrider's written request, and by insisting that Mr. Cooperrider pay an additional \$147.90 (money that was not required by the municipal code prior to removal) before it would remove his water meter, the City instead breached its duty to Mr. Cooperrider, a breach that ultimately led to the flooding of Mr. Cooperrider's house and significant damage to his floors, walls, and furniture.

The City argues that it would not have turned on Mr. Cooperrider's water service, since Mr. Cooperrider was behind in his payments to the City. It further argues that an unknown third person must have turned on Mr. Cooperrider's water service, and that therefore Mr. Cooperrider cannot possibly show that the City is liable for the flooding of Mr. Cooperrider's house. Washington courts have held that "[w]hether an act may be considered a superseding cause sufficient to relieve a defendant of liability depends on whether the intervening act can reasonably be foreseen by the defendant; only intervening acts which are *not* reasonably foreseeable are deemed superseding causes." Cramer v. Dep't of Highways, 73 Wn. App. 516, 521, 870 P.2d 999 (1994); Anderson v. Dreis & Krump Mfg. Corp., 48 Wn. App. 432, 442, 739 P.2d 1177 (1987).

Here, the City has shown that both water valves for Mr. Cooperrider's house – one “turn-off” valve that a customer can turn off to stop the flow of water in the case of a broken pipe, etc., and one City valve used when the City (using a particular tool) connects or disconnects service – are located in a utility box that is accessible to the public. *See* Marche Declaration, CP 25. Therefore, it is reasonable for the City to foresee that a third person could access the utility box for Mr. Cooperrider's house and turn the water on using a tool to turn the City valve. In fact, this is the City's position in defense of this matter. They allege that an unknown third person turned on the water for Mr. Cooperrider's house during July, 2003. The City assessed a penalty of \$59.00 against Mr. Cooperrider for the unauthorized water turn-on. *See* Marche Declaration Exhibit 3, CP 36. Since such an act was foreseeable, it cannot be a superseding cause. Where the defendant's negligence was superceded by the action of the plaintiff or a third party as a matter of law, a trial court may grant summary judgment for the defendant. Where the court cannot make such a conclusion the issue is properly submitted to the jury. Cramer, 73 Wn. App. at 521; Smith v. Acme Paving Co., 16 Wn. App. 389, 396-97, 558 P.2d 811 (1976). Here, since there was no superceding cause, the trial

court erred in granting summary judgment for the City.

Even if the valve was tampered with, as the City alleges, “an intervening criminal act may be found to be reasonably foreseeable and, if so, liability may be predicated thereon.” Palin v. General Construction Co., 47 Wn.2d 246, 250, 287 P.2d 325 (1955)(evidence of party failing to lock or protect a valve, allowing third party tampering, held to be sufficient basis for finding of negligence). The Palin case is on point, and seriously hinders the City’s defense argument that its unprotected valve boxes could have been tampered with by anyone.

In Palin, the Trial Court found that “under the facts it was reasonably foreseeable that some unauthorized person might open the newly installed exposed and unlocked valve.” Palin, 47 Wn.2d at 250. The Court went on to state that “[w]e believe that the trier of the facts could have found either way on the issue of negligence, and that it could justifiably conclude that the newly installed, exposed, and ‘readily opened’ gate valve should either have been locked or the respondent informed of the situation and given an opportunity to protect his property.” Palin, 47 Wn.2d at 250.

The City is liable for failing to properly protect the valve. The

City knew the property owner wanted the meter disconnected, knew the property was vacant, knew that there had been prior tampering, and knew the meter was not locked or secured. The fact that this City meter was turned on and it resulted in flooding was foreseeable.

2. **Cooperrider Also Raised Genuine Issues of Material Fact As To Whether the City Trespassed**

The City acted negligently. Mr. Cooperrider has fulfilled the showing of the four elements of the tort of negligence sufficiently to raise questions of material fact. The trial judge should not have granted the City's motion for summary judgment.

Furthermore, Mr. Cooperrider can show that the City's actions constitute trespass under either of two theories. A trespass is an intrusion into the property rights of another that interferes with the other's right to exclusive possession of its property. Phillips v. King County, 136 Wn.2d 946, 958, 968 P.2d 871 (1998). A person trespasses when he or she "(a) enters land in the possession of the other, or causes a thing or a third person to do so, or **(b) remains on the land, or (c) fails to remove from the land a thing which he is under a duty to remove.**" Bradley v. Am. Smelting & Refining Co., 104 Wn.2d 677, 681-82, 709 P.2d 782 (1985)

(quoting Restatement (Second) of Torts, § 158 (1965)) (emphasis added).

A party is liable for trespass if he or she intentionally or negligently intrudes onto the property of another. Mielke v. Yellowstone Pipeline Co., 73 Wn. App. 621, 624, 870 P.2d 1005 (1994); Restatement (Second) of Torts §§ 158, 165, 166 (1965). The owner of an easement trespasses if he or she misuses, overburdens, or deviates from an existing easement.

Mielke at 624.

“[A]n easement does not shield the holder from an action for trespass where there is evidence of misuse, overburdening or deviation from the easement. The 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.’ An intentional or negligent intrusion onto the property of another that interferes with the other's right to exclusive possession is a trespass.

Fradkin v. Northshore Utility Dist., 96 Wash.App. 118, 123, 977 P.2d 1265 (1999) (citations omitted).

In this case, Mr. Cooperrider demanded that the City remove the water meter from his property and terminate the City's water service. Mr. Cooperrider's written request was accompanied by payment as described in the City Code for removal of the water meter. Despite demand and payment by Mr. Cooperrider, the City willfully refused to remove the

meter until Mr. Cooperrider paid additional sums. As a result, the City intentionally intruded and remained unlawfully on Mr. Cooperrider's property. Under the Bradley standard, the City both remained on Mr. Cooperrider's land and failed to remove from the land a thing which the City was under a duty to remove. Bradley v. Am. Smelting & Refining Co., 104 Wash.2d at 681-82. This is a trespass.

Even if the City claims rights under an easement to provide water service, an easement does not shield the holder from an action for trespass where the easement holder has misused or deviated from the terms of the easement. Fradkin, 96 Wash.App. at 123. The City trespassed by remaining on the property after Mr. Cooperrider took all of the actions he was required to undertake to have the meter removed. "The 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.'**" Fradkin, 96 Wash.App. at 123 [emphasis added]. The City's failure to remove the meter here was just such an "unprivileged remaining" and constitutes a trespass. Upon a showing of trespass, Mr. Cooperrider is entitled to be compensated for the damages arising out of that trespass. Here, the City's own declarations

establish that it refused to remove the water meter after Mr. Cooperrider's request. It was inappropriate for the Trial Court to grant summary judgment in favor of the city.

Alternatively, the City committed trespass when the water flowed into Mr. Cooperrider's pipes. Recall that Mr. Cooperrider requested, pursuant to the City's municipal code, that the City remove its water meter, and that the City refused to do so. It was the presence of the water meter that allowed the water to enter. If the meter had been removed and the water connection severed, as Mr. Cooperrider demanded, the water would not have gone into his pipes and there would have been no flooding and no water damage. With regard to cases – like this one, where water is the thing that trespassed on Mr. Cooperrider's land – which could sound either in trespass or in nuisance, our Supreme Court held that the proper rule should be:

One who recklessly or negligently, or as a result of an extra hazardous activity, enters land in the possession of another or causes a thing or third person so to enter is subject to liability to the possessor if, but only if, his presence or the presence of the thing or the third person upon the land causes harm to the land, to the possessor thereof or to a thing or a third person in whose security the possessor has a legally protected interest.

Bradley, 104 Wn.2d at 790, *quoting* Restatement 2nd, Torts § 165, p. 390;

see also 35 Wash.L.Rev. 474 (1960); 46 Wash.L.Rev 47, 114-16 (1970).

In order to recover in trespass for this type of invasion, a plaintiff must show (1) an invasion affecting an interest in the exclusive possession of his property; (2) an intentional doing of the act that results in the invasion; (3) reasonable foreseeability that the act done could result in an invasion of plaintiff's possessory interest; and (4) substantial damages to the *res*. Bradley, 104 Wn.2d at 691 (footnotes omitted).

Here, the water invaded Mr. Cooperrider's pipes, affecting his interest in the exclusive possession of his property. The City intentionally failed to remove the water meter, the removal of which would have prevented the water from entering his pipes. It was reasonably foreseeable that the City's failure to remove the water meter could result in water entering Mr. Cooperrider's pipes. Finally, there was substantial water damage to the *res*, Mr. Cooperrider's house. Therefore, Mr. Cooperrider can make out an alternative case for trespass based on the water in his pipes. The Trial judge erred in granting summary judgment to the City.

D. Since Mr. Cooperrider's Contributory Negligence Was a Question for the Trier of Fact, the Trial Court Erred in Granting Summary Judgment

It appears that the Trial Court and the City's counsel thought that

Mr. Cooperrider was contributorily negligent for failing to protect against the already turned-off water, using the customer valve, before he left for Virginia. *See, e.g.*, discussion between the trial court and the City's counsel, Report of Proceedings at 11:3-17; *see also* trial court's statement at RP 26:20-22. This was the reason that the trial court found that *res ipsa loquitur* did not apply. "In 1981, Washington adopted contributory fault as a method of apportioning damages as between a negligent plaintiff and a negligent defendant." *Geschwind v. Flanagan*, 121 Wn.2d 833, 837, 854 P.2d 1061 (1993); *see* RCW 4.22.005. Thus, contributory negligence on the part of a plaintiff does not bar recovery, but can reduce recovery.

It is important to note that contributory fault applies as between a negligent plaintiff and a **negligent** defendant. The reasoning behind contributory fault does not apply to intentionally caused damages. "Under Washington's statutory scheme, fault includes 'acts or omissions...that are in any measure negligent or reckless' as well as the 'unreasonable assumption of risk' and the 'unreasonable failure to avoid an injury.'" RCW 4.22.015. Intentional torts are not included in that definition. Here, Mr. Cooperrider can make out a case that the City was negligent and can also make out a case that the City committed trespass. Trespass is an

intentional tort. In the event that Mr. Cooperrider is indeed contributorily negligent for failing to turn off his already turned-off water, his recovery would only be reduced as against the City's negligence, not against the City's trespass.

In any event, the very fact that there questions as to whether or not Mr. Cooperrider was contributorily negligent means that the Trial Court should have sent the case to the trier of fact instead of granting summary judgment. "The further issue, whether the negligence or the contributory negligence of the parties to the accident was the proximate cause of the accident, is a question of fact." Young v. Caravan Corp., 99 Wn.2d 655, 662, 663 P.2d 834 (1983) (*partially superseded* by statute on issue of negligence per se, Schooley v. Pinch's Deli Market, Inc., 134 Wn.2d 468, 951 P.2d 749 (1998)). The trial court therefore erred in granting the City's summary judgment motion. It should have sent the question of Mr. Cooperrider's contributory negligence to the trier of fact as well as the question of the City's negligence, the City's trespass, and whether Mr. Cooperrider was entitled to an inference of *res ipsa loquitur*.

E. Cooperrider's Claims for Excessive Billing Should Not Have Been Dismissed

Cooperrider alleged that he was overbilled the city after he

requested that the meter be removed, and that the City wrongfully collected these overbillings at the closing of the sale of Cooperrider's property in August, 2004.

On the page labeled "PAGE 11" of the billing record provided in the Marche Declaration, Exhibit No. 3, CP 47, the entry dated 8/18/04 shows that the city charged \$1,406,72 for utilities at closing, which is shown as including:

WATER BASE 171.39	SEWER BASE 675.35
STORM DRAIN 77.92	INTEREST 11.48
PENALTY 109.22	OTHER (unauthorized turn-on) 59.00
WATER CONS 302.36	

Approximately \$532.75 ($\$171.39 + \$59.00 + \302.36) are attributable to water charges that accrued from the time the City refused to remove the meter (not including penalties and interest). Cooperrider is entitled to reimbursement of these charges.

RCW 35.21.290 (as well as Ocean Shores Municipal Code 13.06.510) permit no more than four month's charges against the property for water services as lien. The Statute reads: "Cities and towns owning

their own waterworks, or electric light or power plants shall have a lien against the premises to which water, electric light, or power services were furnished for four months charges therefor due or to become due, but not for any charges more than four months past due...." RCW 35.21.290.

The water service billings collected by the City at closing were improper because they were incurred after the City's refusal to remove the water meter. The charges are also excessive because the City is only permitted by statute to assert a lien against property for four months of unpaid service.

There are specific statutes governing the provision of water service, which are contained in RCW 80.28.010. The relevant portions are excerpted below:

- (1) All charges made, demanded or received by any ... water company for water, or for any service rendered or to be rendered in connection therewith, shall be just, fair, reasonable and sufficient.
- (2) Every ... water company shall furnish in supply such service, instrumentalities and facilities as shall be safe, adequate and efficient, and in all respects just and reasonable.
- (3) All rules and regulations issued by any... water company, affecting or pertaining to the sale or distribution of its product, shall be just and reasonable.

RCW 80.28.010 [emphasis added]. Assessing fees for years after the Customer has demanded that service be terminated and the metering device removed is not reasonable.

F. Summary Judgment was Improper Because There was Evidence in the Record Which, Construed in the Light Most Favorable to the Non-Moving Party, Supports Cooperrider's Claim That the City Turned the Water on after Cooperrider Requested Removal of the Meter

In its Motion for Summary Judgment, CP 15, the City alleged that Cooperrider could not prove that the water was turned on by the City. This is irrelevant, since Plaintiff's trespass and negligence claims are based primarily on the City's refusal to remove the water meter, which fact is clearly demonstrated by the correspondence, the billing record (there is no entry for the water removal fee of \$41.50) and the fact that Cooperrider's home was damaged by water after the removal request. The inference that the City turned on the water is also supported by the third paragraph of the letter dated October 30, 2001, (see Thomas Exhibit No. 2, 1st attachment, CP 72) wherein Mr. Sanders explains a service restoration charge of \$53.50 causes the supply side of the meter to be turned back on in accordance with its standard practice, in accordance with OSMC §13.12.100(F).

The City's records show that the Cooperrider was billed the fee for reconnecting his water service after his August 28, 2002 payment and request for termination of water service. On August 28, 2002, the same day the City Attorney wrote to Cooperrider informing him of the City's refusal to remove the meter, the City's billing records indicate that Cooperrider was assessed a charge of \$53.50 under the "Other" category. *See* First Cooperrider Declaration, Exhibit D. This is the same amount described in the Ocean Shores Municipal Code §13.12.100 for restoration of service after discontinuation for failure to pay water charges. Cooperrider's service had already been terminated months earlier for non-payment, so this \$53.50 charge was not a disconnection fee.

It appears that on May 21, 2002, when Mr. Cooperrider's water service was disconnected for non-payment, the City assessed a \$53.50 reconnection fee in anticipation of the day it would restore water service. Since a portion of Cooperrider's August 28, 2002 check was applied to that very reconnection charge, it is permissible to infer that the service was restored in will disregard of Mr. Cooperrider's written request.

Municipal Code §13.12.100(f) describes the fee assessed for restoration of water service after discontinuance for non-payment:

§13.12.100

- F. Restoration of service after water service has been discontinued by the city for violation of ordinance or for failure to pay water charges:
1. During regular business hours, fifty-three dollars and fifty cents
 2. During other than regular business hours, seventy-one dollars;

Furthermore, it appears from the City's billing records and from Ms. Thomas' letter of August 28 that the money paid by Cooperrider and earmarked specifically for meter removal was instead applied towards his outstanding utility bill, which included charges for water, sewer, and storm sewer assessments. As noted above, the City had no basis to deny Cooperrider's request due to his outstanding account balance. Further, the City had no basis to assess a Restoration fee in contradiction to Cooperrider's express wishes.

Assessing the Restoration fee and applying Cooperrider's funds towards it implies that the City took steps to restore the flow of water to Cooperrider's house; otherwise there would be no basis for the charge. Taking these facts in the light most favorable to Cooperrider, Summary Judgment in favor of Ocean Shores was improper even under the City's

standard because there were genuine issues of material fact regarding whether the City turned on the water.

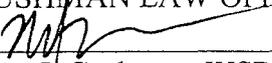
IV. CONCLUSION

Cooperrider requested that the City terminate water service to his property and remove the meter, tendering a check for the removal fee. The City cashed Cooperrider's check, yet wrongfully refused to remove the meter until all outstanding utility fees (including non-water related fees) were paid in full. The City then assessed a Restoration charge for restoring water to the house. Because the meter was still in place, Cooperrider's property was damaged after the water was turned on. Cooperider was also damaged by the assessment of fees that would not have been due if the meter had been removed, as requested. The City's refusal to remove the meter and terminate water service constitutes trespass and negligence. The City cannot assert the defense that only an unknown 3rd party is liable because the City had a duty to remove the meter and to assure that it acted with reasonable care in the provision of water services. The City also had a duty to adequately secure its facilities, which it failed to do in this case, and Cooperrider was damaged, either by the City's negligence in turning on the water when he had asked that it be disconnected and the City's own

policy precluded reconnection when there were outstanding fees, or by the City's negligence in failing to secure its water purveying facilities against tampering committed by 3rd parties. The doctrine of *res ipsa loquitur* was also applicable and should have prevented summary judgment in favor of the City.

Respectfully Submitted this 23 day of March, 2007

CUSHMAN LAW OFFICES, P.S.



Nate J. Cushman, WSBA #34944

