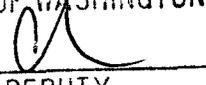


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STATE OF WASHINGTON

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No. 48075-1-II

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

Ted Spice,

Appellant,

vs.

Bryan Bartleson and Dorothy M. Bartelson,

Respondents

APPELLANT'S REPLY BRIEF

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RCW 64.04.0104

I. ARGUMENT

Bryan Bartelson¹ (“Bartelson”) mistakenly asserts that he possesses an easement allowing for “common utilities” because a maintenance order contains an apparently passing reference to “common utilities.” Respondent’s Br. 5. The controlling easement is the roadway easement burdening the Spice Parcel and benefitting the Five Acre Parcel. CP 298-301² (“the Roadway Easement”). That *actual easement* indicates the extent to which Ted Spice (“Spice”) has permitted Bartelson a non-possessory interest in Spice’s property. The Roadway Easement grants 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” Spice’s property. It does not grant an easement for utilities. The intent of the parties, the history of the case, the language of the Roadway Easement and the language of the Maintenance Order (CP 226-241) all indicate that there was never any easement provided to Bartelson for common utilities.

¹ The case caption and numerous documents spell Mr. Bartelson’s name differently as Bartleson (including his own declaration). However, the easements and depositions spell as “Bartelson,” which appears to be correct.

² Several reciprocal easements of identical language are actually present. However, relevant to this appeal is only the Roadway Easement and Road Maintenance Order benefitting Bartelson’s properties.

In essence the entirety of Bartelson's argument is that a single phrase in a paragraph for the recitals of the Maintenance Order that contains the phrase "common utilities" means that the Roadway Easement should be interpreted to mean that Bartelson can install or maintain whatever utilities he pleases within the road easement area. The entirety of the phrase relied upon reads: "Access to the Owners' properties is to be over and through a road easement . . . The Road shall include all and any amenities within the easement areas such as paving, gravel, landscaping, common utilities, fences, etc." CP 226. Spice maintains that the phrase does not affirmatively grant *any* rights. At most the reference could, but shouldn't be, read as recognizing that there are amenities granted. That does not mean that an easement has been created by that recognition or even that an easement is recognized. Amenities could be a reference to some revocable license.

Bartelson's other arguments³ on appeal mirror those below. First, he asserts that there is no damage from constructing a water pipe underneath the land of another. Second, that when one has an easement for one purpose then trespass from the dominant estate holder is thereafter legally impossible because the servient estate

³ For no relevant reason Bartelson has elected to disparage Spice as a "litigious fellow." Respondent Br. 4 n. 1. This ad hominem attack is irrelevant to whether or not Bartelson has committed a trespass.

holder could never demonstrate exclusive possession over the servient estate.

A. The evidence, viewed most favorably to Spice, indicates that the waterline was installed within the Roadway Easement after the 2008 Litigation

The parties disputed below and here whether the offending waterline was installed before or after the conclusion of previous litigation between the parties in Pierce County Superior Court (08-2-11200-0) (“2008 Litigation”). Although the existence of the waterline for a period of time may be relevant for determining whether an adverse possession claim can be met, it does not seem to have any legal significance as to whether the waterline exceeds the Roadway Easement.

Nevertheless, the evidence presented at summary judgment must be viewed in a light most favorable to the non-moving party. Yakima Fruit & Cold Storage Co. v. Central Heating & Plumbing Co., 81 Wash.2d 528, 530, 503 P.2d 108 (1972). Spice presented significant evidence that the waterline was installed subsequent to the 2008 Litigation as previously outlined. See Br. of Appellant 4-5. Spice also presented to the trial court testimony of Dorothy Hansen, the personal representative of Bartelson’s predecessor in interests, that indicates there was no discussion of how Bartelson could obtain water to Five Acres. CP 34:20 – CP 36:22. Ms.

Hansen testified that she hired Northwest Plumbing for that work. CP 31:14-25. That Northwest Plumbing bid indicates that they were capping off and removing an existing “T” line, which would feed into each of Bartelson’s *two* duplexes as opposed to a line that could feed *three* units. See CP 40. Furthermore, Bartelson admits that he installed a new waterline to replace the prior piping in 2011 or 2012 CP 61:21 to 62:4, 64:11-16.

Bartelson by contrast claims that after water was shut off to his property in the 2008 Litigation that he “poked around” his property and found a working water spigot. Resp. Br. 5. Bartelson, in his deposition, claimed, without any explanation, that “certainly the original trial court [in the 2008 Litigation] did not envision our having to cut off all water to our property, hence the inclusion of ‘common utilities’ within the road easement.” CP 43:13-16. In other words, Bartelson asserts that there were always multiple water lines from differing locations servicing his Five Acre Parcel. It doesn’t make sense for the original title holder to all the properties to lay two separate and unrelated water lines to the one Five Acre Parcel. Indeed, when Bartelson purchased Five Acres the seller specifically indicated that the only utility available to Five Acres was electricity, and not water. CP 76. Indeed the “Request/Response for closing utility bill” even crosses out the section for water. CP 78. Spice’s

position is more believable: Bartelson installed a new water line based on his mistaken belief that he had the right to do so.

Bartelson's position that he only needed to turn on a control valve and be blessed with water cannot be true. Bartelson, in his March 6, 2015 deposition admits that there is one line that services 11323 duplex and that is "the one that also services the five acres." CP 62:22 to 63:2. That there is a valve on that line CP 50:15-19. He then claims that all he had to do was turn that line on to get water. CP 66:6-14. However, as the one line to the one valve also services the Bartelson duplex, and that the Bartelson duplex always had water, he could not have turned it on, as that would imply it was turned off. Since the Bartelson duplex *had* water (CP 31:1)⁴, the line was, at all relevant times, always already on. Spice's position that a new line was installed is the correct factual position.

B. Bartelson has not been granted an all-purpose easement over Spice's 11319 Parcel

Interpreting an easement is a mixed question of law and fact.

Sunnyside Valley Irrigation Dist. v. Dickie, 149 Wn.2d 873, 880, 73 P.3d 369 (2003). The intent of the parties, or in this case the court in the 2008

⁴ Although Ms. Hansen testifies that "everything had water" the context indicates that she is referencing the houses and the duplex, but not Five Acres. This is further evidenced by Ms. Hansen, as personal representative, sold Five Acres she indicated that Five Acres did not have water. CP 76.

Litigation, "is a question of fact and the legal consequence of that intent is a question of law." Sunnyside, 149 Wn.2d at 880.

An easement is an interest in land that must comply with the statute of frauds (RCW 64.04.010) and requires "words which clearly show the intention to give an easement . . . sufficient to effect that purpose, providing the language is sufficiently definite and certain in its terms." Beebe v. Swerda, 58 Wash.App. 375, 379, 793 P.2d 442 (1990) (internal citations omitted). The intention of the parties is generally of "paramount importance." Wash. State Grange v. Brandt, 136 Wn. App. 138, 145, 148 P.3d 1069 (2006).

The Maintenance Order, as mentioned in App. Br. 13, merely addresses the liability and maintenance concerns of the Roadway Easement. The recitals in the Maintenance Order could not more clearly state what its purpose is and what the intent of the parties was. "The Owners [Spice and Bartelson] wish to use the Road and to provide for future maintenance and repair of the Road and to share the cost of such maintenance and repair . . . The Owners further wish to minimize their potential liability exposure for injuries occurring on the property of, or caused by the negligence of, the other Owners. To address these concerns, the Owners wish to enter into this Order." CP 227. The Maintenance Order is titled "Road Maintenance Order" not "Maintenance Order and Utilities

Easement” or anything of the sort. The Maintenance Order recites that each party is affirming the existence of easements “for ingress, egress.” CP 228. Furthermore, as the maintenance order describes possible work to be done on the road it only describes work relating to curbing, sidewalks, paving, etc. and does not have any words that would imply an intent or recognition of construction of anything other than a roadway for ingress and egress. See CP 227-28.

Again, as previously briefed, the trial court in the 2008 Litigation “Amended Order RE: Joint Easement” also stated that Spice’s “properties will not be subject to any claim for easement for water, or water rights for the benefit of the Bartelson property.” CP 191. It further provided that Spice is “hereby allowed to cap off *any* water lines currently servicing [Spice’s properties at 11305 and 11319 58th St. Ct. E.] . . . that extend onto the Bartelson [5 Acre] property.” *Id.*

Although the trial court erroneously suggested that the 2008 Litigation had no bearing on the instant dispute, the trial court decision was still based on the easements from that case. RP 26:6-23. Spice maintains that the controlling law of the case derives from the 2008 Litigation, and that Bartelson has ignored the directives from that case.

Bartelson does not dispute this language or respond to or in any way address the intent of the parties. Bartelson sees the word “common

utilities” and assumes an easement exists from then on out. Bartelson instead responds significantly to an argument *not* made by Spice, that water is not a common utility. Resp. Br. 13-15. Of course water is a common utility, and Spice does not argue to the contrary.

Bartelson attempts to disparage Spice’s position as an interpretation of “convenience” by claiming that “Spice believes that the [Road Maintenance] Order only prevents Mr. Bartelson from placing a water line in the road, not him [Spice].” Resp. Br. 14. However, the transcript cited to merely indicates that Spice does not know whether the “easement language prevents” Spice himself from running water across the road to the portion of his property south of the road. CP 24:5-20. The phrasing of the questioning and the answers reference suggest some misunderstanding by both participants. An easement does not restrict anyone’s use regarding owned real property. An easement permits someone other than the title holder to do something with his land. A restrictive covenant may prevent the title holder from some particular use. Here, Spice probably can utilize his own property subject to the Road Easement for installation of a waterline for himself, but that doesn’t seem to have an obvious relevance to whether Bartelson can utilize Spice’s property for the same use based on the existence of the Roadway Easement.

A unique fact of this case is that there is an actual transcript relating to the parties intent in ending the 2008 Litigation resulting in the Roadway Easement and Maintenance Order. CP 281-284. In that discussion concluding there is no mention of an easement for Bartelson for utilities. There is no discussion that even hints at Bartelson obtaining a utility easement. There is a reference to Spice's utility easement "correcting the northern to eastern" to make "just one little word change." CP 283:1-9. The easement is in reference to CP 197-201 and provides a water line easement between the Bartelson duplex properties and the Spice properties for the benefit of Spice burdening Bartelson.

Also persuasive to the parties' intent is what happened after the 2008 Litigation ended. Bartelson acknowledges that almost immediately after that case ended he capped off water. Resp. Br. 5. He then brought in portable toilets. If he believed he had the right to bring water to his property through the easement and that water always existed then there would be little need for portable toilets for extended periods.

Because Bartelson has no easement for water the installation, maintenance, or expansion of water pipelines on or through Spice's property interferes with Spice's right to exclusive possession of his property. That Bartelson has been granted permission to *use*, but not

possess, a section of Spice's property for ingress and egress does not deprive Spice of his right to exclusive possession.

C. Spice has demonstrated damages

Bartelson insists that there is no damage resulting from the installation and maintenance of a pipe through Spice's 11319 Parcel. Bartelson cites to Grundy v. Brack Family Trust, 151 Wn. App. 557 (2009) as "instructive." In Grundy the defendant-neighbor raised a seawall, and the trial court found the plaintiff had "only experienced minor water intrusion as a result of the raising of the seawall [,] no flooding . . . [and that] sea spray and splash cause[d] occasional debris and yellowed and dead grass . . . raising of the bulkhead ... has not caused a significant injury or appreciable harm [nor did it] . . . proximately cause a significant compensable injury" Id. at 568. That finding of fact was unchallenged. Id.

The issue in Grundy can be more simply stated as whether an oceanfront property that received "minor water intrusions" from the neighboring ocean waves deflecting off the defendant's seawall splashing onto the plaintiff's property is a compensable injury. Unsurprisingly, the trial court found that oceanfront property receiving slightly more water from the ocean isn't a significant injury.

More instructional is Kershaw Sunnyside Ranches, Inc. v. Yakima Interurban Lines Ass'n, 126 P.3d 16, 156 Wn.2d 253 (2006). The case was

decided primarily on statutory and Washington constitutional grounds with regard to the “exclusivity” element requiring telecommunication companies to utilize statutory methods under RCW 80.36.040 and not based upon an existing easement. 156 Wn. 2d at 277. The Washington Supreme Court found that the underground placement of a fiber optic cable “constituted a trespass.” Id. It recognized that damages may only be nominal, but reiterated that the “current presence of the lines constitutes a trespass.” Id.

Here, Bartelson has permanently attached a water pipeline beneath the property of Spice. The line itself potentially impedes Spice’s ability to use the area for other uses (e.g. septic system installation). It creates the potential for increased maintenance needs beyond the intended maintenance requirements of the roadway. The water line’s existence may prevent use of the roadway for some normal purpose, which is a factual question that further discovery would answer. When Bartelson installed the line, or re-installed a different type of pipe if Bartelson’s version of the facts is to be believed, there would have been construction necessary in addition to the resulting pipe.

The trial court expressly stated that it was not making a factual determination on whether damages existed. RP 26:15-16. This Court should not, despite Bartelson’s invitation to the contrary, affirm on the

factual determination of damages. Damages in trespass must be determined by a trial of fact, and not on appeal. See Kershaw 156 Wn.2d at 277 (recognizing that the appellate court wasn't in a proper place to make the determination for damages).

Bartelson's position that an underground pipe does not cause damage must be viewed as distinct from whether the easement permits it. If the easement permits it, which it does not, then the trespass claim would fail based upon the exclusivity prong. If a permanent water pipeline installation or the expansion of it does not meet the legal definition of trespass, then it would seem to mean that a person could *always* install such a pipe beneath the property of another with or without an easement.

II. CONCLUSION

The trial court improperly determined that Bartelson possessed an easement for the construction and maintenance of common utilities. That determination was in error. Bartelson does not own such an easement. The intent of the parties during the 2008 Litigation as determined by examining the Maintenance Order, Roadway Easement, the orders from the 2008 Litigation as well as the transcript from the final hearing in the 2008 litigation make clear that there was no intent to compel Spice to grant a water easement or utility easement to Bartelson. Particularly important to both intent of the parties, is the 2008 Litigation "Amended

Order RE: Joint Easement” directing that Spice’s “properties will not be subject to *any claim for easement for water, or water rights,*” and that Spice was “allowed to cap off *any* water lines.” CP 191 (emphasis added).

Absent any such easement Bartelson’s installation of a waterline violates Spice’s right to exclude others from his property. The installation of the waterline *does* cause actual and significant damage to Spice. He provided an estimate of \$9,702 as the value of the alleged easement that Bartelson attempts to simply take. CP 333 (provided on reconsideration). The waterline also limits Spice’s ability to install septic or sewer systems.⁵

Respectfully, Spice requests that the Court of Appeals reverse the trial court decision granting Bartelson’s summary judgment motion and denying Spice’s partial summary judgment motion, and direct the lower court to enter an order granting Spice’s partial summary judgment motion with regard to the trespass elements of exclusivity, intentional act, and reasonable foreseeability.

DATED this May 3, 2016


Jonathan Baner, WSBA #43612
Attorney for Appellant

⁵ Bartelson suggests that Spice cannot raise this point on appeal as it is a new argument. First, it is a purely legal argument relying upon WAC 246-272A-0210 and Pierce County Department of Planning and Land Service July 2013 Water Service Installation Bulletin #44. Second, the trial court expressly stated it was not ruling on the issue of damages and thus making such arguments below would have had no effect.

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CERTIFICATE OF SERVICE

I, Kate Bannister, a person over 18 years of age, served: Court of Appeals division II and to **ANTONI FROEHLING** a true and correct copy of the document to which this certification is affixed, May 3, 2016 via first class mail postage pre-paid. Mr. Froehling was also served via e-mail. I declare under penalty of perjury under the laws of the State of Washington that the forgoing is a true and correct statement. Signed at Tacoma, WA on 5/3/2016.



Kate Bannister, Paralegal