

No. 62911-5-I

COURT OF APPEALS,
DIVISION I
STATE OF WASHINGTON

JOSEPHINE CLIPSE,
Petitioner/Cross-Respondent,

v.

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

and

JOSEPH CLIPSE, Third-Party Defendant.

BRIEF OF RESPONDENTS/CROSS-PETITIONER

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INTRODUCTION

This case involves a property damage claim at a single-family residence in Kent, Washington. Josephine Clipse and Chester (Joe) Clipse, Jr. (the Clipses) initiated this appeal alleging the trial court committed manifest abuse of discretion when it excluded evidence of the King County Project Specifications pursuant to the contractors' Motion in Limine. CP 280-289. Michels Pipeline Construction, Inc. and Pipe Experts, LLC (the contractors) cross-appealed alleging the court misinterpreted RCW 4.24.630. CP 290-292. The trial court made numerous findings of fact and conclusions of law in granting the Clipses' motion for discretionary review. CP 283-289.

On March 12, 2009 Commissioner Neel ruled on the parties' respective Motions for Discretionary Review. Commissioner Neel granted the contractors' Motion for Review under RAP 2.3(b) but "respectfully conclude[d] that certification on [the Clipses' Motion for review] was not warranted." Despite this, Commissioner Neel ruled that the parties "may brief the evidentiary issue."

ASSIGNMENT OF ERROR

1. The trial court erred when it ruled a person can act wrongfully under RCW 4.24.630 without showing intentional and unreasonable conduct.

ISSUE PERTAINING TO ASSIGNMENT OF ERROR

1. Under RCW 4.24.630 does acting wrongfully require a showing of intent, unreasonableness, and lack of authorization?

ADDITIONAL ISSUE

1. Whether the trial court committed a manifest abuse of discretion when it excluded the King County Project Specifications pursuant to the contractors' Motion in Limine?

COUNTER-STATEMENT OF CASE

1. Scope of the Project

This case arises out of a wastewater pipe backup at a single family residence in Kent, Washington. CP 3 at ¶1.1. The plaintiff is Josephine Clipse, a 78-year-old retired widow who has health problems. CP 276 at ¶4; CP 102-103; CP 366 at p. 37, l. 3-8. Her adult son, Joe Clipse, has lived at the residence full time since 1991. CP 286 at ¶4. Joe lives with his mother to take care of her and ensure people do not take advantage of her. CP 105. Joe has a substantial criminal history which includes forgery, theft, unlawful issuance of bank checks, extortion, and welfare fraud. CP 187-219.

King County and the City of Kent hired defendant, Michels Pipeline Construction, Inc., to oversee the installation of new wastewater pipes at approximately 150-160 single-family homes in Kent (hereafter the project). CP 19-20; CP 286. The Clipse home was located in this neighborhood. CP 286 at ¶5.

After being hired by King County, Michels subcontracted the job to defendant Pipe Experts. CP 286 at ¶6. King County knew Pipe Experts was the subcontractor on the job and “definitely” expected Pipe Experts to

go onto private property to complete the project. CP 329-330 at pp. 105-106, l. 23-5. King County also had an inspector, Bruce Herman, at the project to monitor Pipe Experts' work. CP 35-36. Mr. Herman did not have any problems with Pipe Experts' work at the Clipse home. *Id.*

This project involved installing a cleanout pipe into the existing wastewater line. CP 287 at ¶9. A cleanout pipe is a pipe that runs from grade level and intersects with a subterranean wastewater line. CP 362. The installation process involves excavating down to the wastewater line, attaching the cleanout pipe, and then filling in the hole around the newly installed cleanout pipe. *Id.* Before excavation begins the wastewater line must be located. *Id.* This is done by accessing the home and placing a locator into the wastewater pipe. *Id.* Once the locator is inside the wastewater pipe an electric device above ground can detect the precise location of the subterranean wastewater line. *Id.*

2. Contract Specifications

As part of the project a company named Earth Tech prepared a document entitled "General Requirements/Technical Specifications" (contract specifications) for King County. CP 286 at ¶7. The Clipeses claim the contractors violated the contract specifications because they did not secure a "written right of entry agreement" or "side sewer work agreement or city permit." *Brief of Petitioner*, p. 4. Conversely, the

contractors argued the contract specifications were inadmissible under ER 402 and 403. CP 136-137; CP 250-255. The trial court agreed and excluded any evidence of the contract specifications. CP 288 at ¶3. Should this panel agree to review that decision the Clipses must show the trial court's decision was a manifest abuse of discretion.

3. Sequence of Events Surrounding Wastewater Line Backup

Three days prior to any work at the Clipse property, Cory Hale (Pipe Experts Project Superintendent) and his crew visited the Clipse residence to perform preparatory camera work from inside the house. CP 287 at ¶9; CP 386 at p. 115, l. 2-8. Specifically, Pipe Experts accessed the Clipse home in order to locate the Clipses' wastewater line so it could install a cleanout pipe. CP 365-367. Both Josephine Clipse and her adult son, Joe Clipse, were present during this visit and allowed Mr. Hale's crew access to their basement. *Id.*

Subsequent to the camera work Cory Hale again visited the Clipse residence and again explained to Joe Clipse what Pipe Experts planned to do. CP 364 at p. 28, l. 3-22. Mr. Clipse told Mr. Hale "well just do it. It's not a big deal. Just go ahead and do what you've got to do." *Id.* Acting on this instruction Pipe Experts began the process of installing a cleanout pipe at the Clipse residence.

The Clipses claim the first time they learned about this project was *after* Pipe Experts dug a hole in their yard. CP 287 at ¶10; CP 96. The Clipses testified that Joe confronted the contractors after learning they were on the property. CP 27, CP 96. Neither Joe nor his mother told Pipe Experts to stop what they were doing or to fill in the hole. *Id.*

Approximately 2-3 days after Pipe Experts started working at the Clipse residence Joe Clipse claims he discovered a wastewater backup inside his residence. CP 277 at ¶11. Pipe Experts and King County employees immediately responded to the Clipse residence upon learning of the incident. CP 29-33; CP 369-370.

In an effort to determine what caused the backup, Pipe Experts ran a video camera down the cleanout and discovered a small pile of rocks or gravel that was blocking the flow of water. CP 370 at p. 51, l. 13-21. At that time Joe Clipse informed Cory Hale that he had seen kids throwing rocks down the cleanout pipe. CP 369 at p. 46, l. 10-18. Despite repeated requests by Pipe Experts and King County to access the home and survey the alleged damage the Clipses refused to allow anyone into their house. CP 29-33; CP 331. Joe Clipse informed King County that they would be dealing with him throughout the cleanup process. CP 330-331, l. 16-4.

Approximately two weeks after the backup was first reported, Joe Clipse, purporting to be the homeowner, defrauded the owner of Pipe

Experts of \$4,000. CP 33. Pipe Experts has a third-party claim against Joe Clipse for fraud, negligent misrepresentation, negligence, breach of contract, and indemnity. CP 285 at ¶2.

Josephine Clipse alleges only two causes of action against defendant Pipe Experts: (1) it failed to properly install the cleanout section of a pipe connected to the underground sewer pipe on her property; and (2) statutory trespass under RCW 4.24.630. CP 285 at ¶1. Ms. Clipse does not allege breach of contract. *Id.*

ARGUMENT

1. Standard of Review

There are two issues on the appeal and cross-appeal and two separate standards of review. Statutory interpretation is a question of law and the standard of review is *de novo*. *State v. Posey*, 161 Wn.2d 638, 643, 167 P.3d 560 (2007). Thus, the trial court's interpretation of RCW 4.24.630 is *de novo*.

Conversely, a trial court's decision to admit or exclude evidence is subject to a manifest abuse of discretion standard of review. *Fusato v. Washington Interscholastic Activities Ass'n*, 93 Wn.App. 762, 772, 970 P.2d 774 (1999). “[T]he trial court's decision will be reversed only if no reasonable person would have decided the matter as the trial court did.” *State v. Thomas*, 150 Wn.2d 821, 856, 83 P.3d 970 (2004). The Clipses must therefore show no reasonable person would have excluded the

project specifications. Our Supreme Court has addressed this heightened standard of review in cases involving ER 403:

Because of the trial court's considerable discretion in administering ER 403, reversible error is found only in the exceptional circumstance of a manifest abuse of discretion. *State v. Gould*, 58 Wn.App. 175, 180, 791 P.2d 569 (1990); *State v. Gatalski*, 40 Wn.App. 601, 610, 699 P.2d 804, review denied, 104 Wn.2d 1019 (1985). While discretion does not mean immunity from accountability, we see no need or justification for extending the requirement of a balancing on the record to evidentiary objections and claims of error based on ER 403 alone. See *United States v. Dwyer*, 539 F.2d 924, 928 (2d Cir.1976); *Gould*, 58 Wn.App. at 184, 791 P.2d 569. "Such a rule would unnecessarily and unreasonably intrude upon the trial court's management of the trial process." *Gould*, at 184, 791 P.2d 569. While some reference to the ER 403 evaluation in the record is helpful to a reviewing court, we reject the 6-factor test proposed by the Court of Appeals as unworkable and contrary to the purposes of ER 403 and the Rules of Evidence in general.

Carson v. Fine, 123 Wn.2d 206, 226, 867 P.2d 610 (1994).

As discussed above the trial court excluded the contract specifications pursuant to the contractors' Motion in Limine. CP 288 at ¶3. The Clipeses' entire opening brief uses various contractual provisions to support its analysis of RCW 4.24.630.

Before addressing the statutory interpretation issue, this panel should decide: (1) whether to review the trial court's exclusion of the contract specifications and, if so, (2) whether the trial court's exclusion of the specifications was a manifest abuse of discretion.

2. Excluding the Contract Specifications Under ER 402 and ER 403 is not Manifest Abuse of Discretion

Commissioner Neel's March 12, 2009 order concluded certification of this issue was not warranted. In the event this panel disagrees with Commissioner Neel, the contractors submit the following response.

At trial the Clipsees sought admission of the contract specifications between Michels Pipeline and King County "to establish the duty of care defendants owed plaintiff in this lawsuit and its breach of that duty." CP 148. Ms. Clipse claims Pipe Experts: (1) failed to properly install the cleanout pipe; and (2) statutory trespass under RCW 4.24.630. CP 285 at ¶1. These are her only causes of action. ER 402 and ER 403 prohibit introduction of the contract specifications for the reasons set forth below.

A. The Contract Specifications are Irrelevant to Ms. Clipse's Claim That Pipe Experts Improperly Installed the Cleanout Pipe

To succeed on her negligence theory, Ms. Clipse must establish defendant owed her a duty, breached the duty, and the breach of said duty proximately caused her damages. *Pedroza v. Bryant*, 101 Wn.2d 226, 228, 677 P.2d 166 (1984). In her complaint, Ms. Clipse alleged Pipe Experts failed to exercise ordinary care in the installation of a sewer pipe on plaintiff's property and, specifically, "*failed to properly install the cleanout section of pipe* connected to the underground sewer pipe on plaintiff's property." CP 6 at ¶4.5. Ms. Clipse is not claiming breach of

contract or personal injuries. CP 285 at ¶1. The contract specifications are not relevant to show Pipe Experts' alleged failure to properly install the cleanout pipe.

The Clipses' reliance on *Leija v. Materne Brothers, Inc.* 34 Wn.App. 825, 828, 664 P.2d 527 (1983) is misplaced. The *Leija* case involved a plaintiff who filed a breach of contract claim. *Id* at 826. Defendant Materne Bros. entered into a contract with the State of Washington to perform road repair work. *Id.* Plaintiff's husband was killed when his vehicle collided with one of Defendant's machines engaged in road repairs. *Id.* Plaintiff alleged *breach of contract* because the contract between Materne and the State specifically provided:

“[T]he Contractor and his Surety shall be liable for injuries and damages to persons and property suffered by reason of the Contractor's operations of any negligence in connection therewith.”

Id at 528.

The contractor in *Leija* accepted the additional affirmative duty, through contract, to be liable for injuries and damages connected to its own negligence. Obviously, the contract was relevant in that case because it went to the issue of whether the contractor breached the additional affirmative duty/liability under *Leija*'s claim for breach of contract.

The Clipses' arguments to admit the contract specifications fail here because the contract between Michels and the City: (1) does not contain a provision in which Michels (or Pipe Experts) agrees to accept an additional affirmative duty that would result in liability; and (2) Ms. Clipse does not allege breach of contract.

The *Leija* court's reliance on *Kelley v. Howard S. Wright Constr. Co.*, 90 Wn.2d 323, 582 P.2d 500 (1978) is also inapplicable here. The *Kelley* case addressed "the issue of the duty of a general contractor on a multi-employer jobsite to take safety precautions for the benefit of employees of subcontractors working on the site." *Id* at 325. The Clipses do not analogize *Kelley* because that case pertains to safety and the "nondelegable duty of care" on a jobsite that a general contractor owes the employees of its subcontractors.

More analogous to the situation here is *Ward v. Ceco Corp.*, 40 Wn.App 619, 699 P.2d 814 (1985). In *Ward* the foreman of a general contractor sued a subcontractor for personal injuries. Plaintiff claimed the subcontractor proximately caused his injuries due to its failure to install a handrail at the jobsite. In ruling on motions in limine prior to trial the court excluded evidence of the contract between the subcontractor and general contractor. *Id* at 621-622 (emphasis added). The appellate court distinguished the *Kelley* case and affirmed the trial court's exclusion of the

contract under ER 402. The *Ward* court reasoned the admission of the contract would confuse the jury as to the applicable duty owed to plaintiff. *Id* at 629.

The only relevant questions under Ms. Clipse's negligence claim are: (1) whether Pipe Experts properly installed the cleanout; and (2) whether its installation was a proximate cause of Ms. Clipse's damage. The trial court did not commit a manifest abuse of discretion when it excluded the contract specifications under ER 402 and ER 403.

B. The Contract Specifications are Irrelevant and Would Confuse the Issues on Ms. Clipse's Claim Under RCW 4.24.630

Ms. Clipse claims Pipe Experts is liable for statutory trespass under RCW 4.24.630. The duties under this statute are clearly defined – Ms. Clipse must show Pipe Experts “wrongfully” caused damage to her land or personal property. *Wash. Rev. Code* § 4.24.630. The trial court properly excluded the contract specifications under ER 402 and ER 403 because this evidence would have confused the issues and misled the jury by lowering Ms. Clipse's burden under RCW 4.24.630. ER 403 provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Wash. R. Evid. 403 (emphasis added)

In discussing the section emphasized above Professor Tegland notes that “perhaps the most common application of this portion of Rule 403 has been to control the admissibility of evidence that is likely to be *overvalued* by the jury.” *Karl B. Tegland*, 5 Wash. Prac., Evidence Law and Practice § 403.4 (5th ed.) (emphasis in the original). “The dangers of confusion and overvaluation have often led the courts to exclude many other kinds of evidence, including evidence that may be unduly impressive because it sounds too official or too scientific.” *Id.*

Admitting the contract would have imposed a greater duty on Pipe Experts than expressly set forth in RCW 4.24.630. Specifically, Ms. Clipse claims the contract specifications require the contractor to obtain *written* permission before starting any work on the project. Conversely, RCW 4.24.630 only requires “authorization;” it does not require written authorization from the legal owner of the home. The statute provides:

Every person who goes onto the land of another and...*wrongfully* causes waste or injury to the land, or *wrongfully* injures personal property or improvements to real estate on the land, is liable to the injured party for treble the amount of the damages caused by the removal, waste, or injury. For purposes of this section, a person acts "wrongfully" if the person intentionally *and* unreasonably commits the act or acts *while knowing*, or having reason to know, that he or she lacks **authorization** to so act...

Wash. Rev. Code § 4.24.630 (emphasis added).

Admission of the contract would have invited the jury to rewrite RCW 4.24.630. The contractors received verbal authorization to conduct the work on the Clipse property. CP 364-367. Admission of the contract between the City and Michels would have substantially lowered Ms. Clipse's burden of proof as RCW 4.24.630 neither requires written authorization nor does it mandate the authorization come only from the legal property owner.

Furthermore, King County, not Pipe Experts, was responsible for gathering the right of entry forms used for documenting written access. CP 319. The contract specifications state King County "has acquired or is in the process of acquiring right-of entry for access to the work from private property." CP 339 at ¶1.04(A). Perhaps more importantly, written access forms were not required in every circumstance. CP 363 at p. 22, l. 4-21; CP 378-379, at pp. 85-86, l. 24-7. Some homeowners gave verbal authorization to complete the work. *Id.* Nothing in the contract specifications required the contractors to gather the written right of entry forms. CP 286-287 at ¶8. In fact the contract specifications simply identified the anticipated "general sequence of work." CP 286 at ¶8.

Evidence that misleads the jury or confuses issues should be excluded. *Wash. R. Evid.* 403; *see also Public Utility Dist. No. 1 v. int'l Ins. Co.*, 124 Wn.2d 789, 881 P.2d 1020 (1994); *Riggins v. Bechtel Power*

Corp., 44 Wn.App. 244, 722 P.2d 819 (1986) (in a personal injury action arising out of a construction accident, the trial court properly excluded a memorandum concerning safety measures that may have misled the jury into thinking that only one of several defendants had a duty to discover and correct hazards). Finally, Washington courts have excluded evidence of a contract when the duty is set already forth in a statute. *See e.g. Ward v. Ceco Corp.*, 40 Wn.App 619, *supra*. (contract between general contractor and subcontractor not relevant because duty already covered by statute).

The court properly excluded the contract specifications under ER 403 because the jury may have unfairly and mistakenly imposed a contractual requirement on Pipe Experts in lieu of deciding Ms. Clipse's allegations based on the elements set forth in RCW 4.24.630.

Given the foregoing authority the Clipses cannot meet their burden in showing the trial court committed a "manifest abuse of discretion" in excluding the contract specifications under ER 402 and ER 403.

3. The Trial Court Erred When It Did Not Further Reconsider Its Ruling Regarding RCW 4.24.630

The Clipses' opening brief assigns error to the trial court's interpretation of RCW 4.24.630 but fails to specify how or why they believe the trial court erred. This is the first time the Clipses have alleged any error with the trial court's interpretation of the statute. The panel

should disregard the Clipeses' opening brief because they are cross-respondents on the statutory interpretation issue. CP 280-289. Furthermore, issues raised for the first time on appeal should not be considered. RAP 2.5(a). The only issue the trial court certified for review, with respect to RCW 4.24.630, was its denial of the contractors' oral motion for reconsideration during trial. CP 288.

RCW 4.26.630 provides:

Every person who goes onto the land of another and...*wrongfully* causes waste or injury to the land, or *wrongfully* injures personal property or improvements to real estate on the land, is liable to the injured party for treble the amount of the damages caused by the removal, waste, or injury. For purposes of this section, a person acts "wrongfully" if the person intentionally and unreasonably commits the act or acts while knowing, or having reason to know, that he or she lacks authorization to so act...

Wash. Rev. Code § 4.24.630 (emphasis added).

Although Division 2 has indicated this statute is unambiguous the contractors and trial court have varying interpretations of the section defining "wrongfully." The competing interpretations are set forth below with additional punctuation and brackets to emphasize each position:

Contractors' Interpretation:

For purposes of this section, a person acts "wrongfully" if the person intentionally and unreasonably commits the [act(s)] while knowing, or having reason to know, that he or she lacks authorization to so act...

Trial Court's Interpretation:

For purposes of this section, a person acts “wrongfully” if the person intentionally and unreasonably commits the act[;] or [the person] acts while knowing, or having reason to know, that he or she lacks authorization to so act...

The trial court’s interpretation of the statute is incorrect because it eliminates the requirement of “unreasonable and intentional” conduct. CP 288 at ¶2. Furthermore, the sentence defining wrongful conduct does not contain the word “either,” nor does it contain a comma after the word “act.” *Wash. Rev. Code* § 4.24.630. Had the legislature intended this statute to be an “either/or” it would have said so. Typically when a statute is intended as an “either/or” the elements are numbered. There is no numbering in this statute. The drafters of RCW 4.24.630, in addressing the “wrongfully” section, intended it to read as “intentionally and unreasonably commits the act or acts...” The court’s interpretation is improper because the word “acts” is intended as the plural of “act” and not intended as a verb.

Furthermore, a punitive statute like this is intended to punish those who intentionally and unreasonably damage the land of others. The trial court’s interpretation of this statute would impose liability, and a finding of treble damages, on an accidental trespass. A causal or involuntary

trespass does not result in treble damages in any other area of law. *See e.g. Wash. Rev. Code* § 64.12.030.

RCW 4.24.640 was originally enacted because “[v]andalism and dumping, in particular, are increasingly serious problems for landowners.” CP 271-272. This legislative history suggests intent and unreasonableness are required because vandalism and dumping are intentional and unreasonable acts. The trial court erred when it eliminated the “intentional and unreasonable conduct” element.

A. The Trial Court’s Interpretation Transforms RCW 4.24.630 Into Negligence

Applying the trial court’s ruling, this statute would read as follows:

Every person who goes onto the land of another and [knows or has reason to know they lack authority to] injure personal property or improvements to real estate on the land, is liable to the injured party for treble the amount of the damages caused by...injury.

By interpreting the statute as an “either/or” the trial court transforms the statute into a negligence standard. Specifically, the trial court held the contractors are liable for treble damages under RCW 4.24.630 if the Clipses show the contractors “knew or had reason to know” they lacked authority to perform the work. *Id.*

A “knew or should have known” standard is negligence. *See e.g. Wiltse v. Albertson's, Inc.* 116 Wn.2d 452, 459-460, 805 P.2d 793 (1991) (“To prove negligence, the plaintiff must prove that water makes the floor

dangerously slippery and that the owner knew or should have known both that water would make the floor slippery and that there was water on the floor at the time the plaintiff slipped.”); *Taskett v. KING Broadcasting Co.*, 86 Wn.2d 439, 445, 546 P.2d 81 (1976) (“Under the negligence standard, a plaintiff may recover for a defamatory falsehood on a showing that in publishing the statement, the defendant knew or, in the exercise of reasonable care, should have known that the statement was false, or would create a false impression in some material respect.”); and *Maison de France v. Mais Oui!*, 126 Wn.App. 34, 44, 108 P.3d 787 (2005) (“The negligence standard is that the defendant knew or, in the exercise of reasonable care, should have known that the statement was false or would create a false impression in some material respect.”).

This interpretation is contrary to existing case law because RCW 4.24.630 does not apply to negligent conduct. *Borden v. City of Olympia*, 113 Wn.App. 359, 373, 53 P.3d 1020 (2002) *review denied*, 149 Wn.2d 1021, 72 P.3d 761 (2003). In addressing RCW 4.24.630 the *Borden* court held:

[A] claimant must show that the defendant ‘wrongfully’ caused waste or injury to land, and a defendant acts ‘wrongfully’ only if he or she acts intentionally. The evidence here does not support an inference that the City intentionally, as opposed to negligently, caused waste or injury to the [plaintiff’s] land.

Id (emphasis added).

Borden confirms RCW 4.24.630 is not an “either/or” because it requires a showing of intent, unreasonableness, and lack of authority. *Id.*

Additionally, treble damages do not apply to negligence cases. Treble damages are meant to punish and deter wrongful conduct, not negligent conduct. For example, “[t]he purposes underlying RCW 64.12.030’s treble damage provision...are:

[T]o punish a voluntary offender and also to provide, by trebling the actual present damages, a rough measure for future damages, [as well as to] discourage persons from carelessly or intentionally removing another's merchantable shrubs or trees on the gamble that the enterprise will be profitable if actual damages only are incurred.”

Guay v. Wash. Natural Gas Co., 62 Wn.2d 473, 476, 383 P.2d 296 (1963).

It is noteworthy that treble damages are not permitted in timber trespass cases when the trespass is casual or involuntary. *Wash. Rev. Code* § 64.12.040; *Smith v. Shiflett*, 66 Wn.2d 462, 403 P.2d 364 (1965). Likewise, our Supreme Court has held that treble damages, authorized under RCW 64.12.020, are not applicable to a tenant’s “permissive waste,” i.e. damage to the premises resulting from negligence or inaction, even if intentional. *Fisher Properties v. Arden-Mayfair, Inc.*, 106 Wn.2d 826, 852, 726 P.2d 8 (1986).

Washington case law and public policy contradict the trial court's interpretation of RCW 4.24.630 because treble damages are only available in very rare circumstances and never in negligence cases. The trial court erred when it ruled the contractors can be liable under RCW 4.24.630 without a showing of intentional and unreasonable conduct.

B. Ms. Clipse Cannot Meet Her Burden Of Proof On Her RCW 4.24.630 Claim Against Pipe Experts

RCW 4.26.630 requires the Clipses show Pipe Experts (1) went onto the Clipse land; (2) intentionally and unreasonably [wrongfully] injured the land while (3) knowing, or having reason to know, it lacked the authority to do so. The contractors believe the Clipses' RCW 4.24.630 claim fails in its entirety because there is no evidence suggesting the contractors "intentionally and unreasonably" injured the Clipses' land.

In fact, the Clipses concede Pipe Experts did not intentionally and unreasonably cause this wastewater backup. Instead, the Clipses argue the intentional and unreasonable "act" was going onto the land without written permission. This is an incorrect interpretation RCW 4.24.630 because the word "wrongful" does not appear before the first element - going onto the land. If the statute read "every person who [wrongfully] goes onto the land of another..." then the Clipses may have a legitimate argument. But this is not what the statute says. Furthermore, existing case law is contrary to this interpretation of the statute:

For example, in *Colwell v. Etwell*, 119 Wn.App 432, 81 P.3d 895

(2003) Division 3 held:

RCW 4.24.630 is premised upon a wrongful invasion or physical trespass upon another's property, a commission of intentional and unreasonable acts upon another's property, and subsequent destruction of physical or personal property by the invader to another's property...

Id at 441.

These elements (trespass, intentional and unreasonable acts upon the property, and subsequent destruction of property) are exclusive and the Clipeses must prove each one. Simply showing a trespass without permission is not enough for a party to meet its burden of proof under *RCW 4.24.630*.

Standing Rock v. Misich, 106 Wn.App 231, 23 P.3d 520 (2001) provides an example of the nature of the wrongful acts required under *RCW 4.24.630*. In *Standing Rock* an unincorporated association of landowners sued Jim Misich under *RCW 4.24.630* for his removal and destruction of the landowners' gates. *Id* at 237. After weighing the evidence Mr. Misch was found liable under *RCW 4.24.630* and the trial court entered the following Finding of Fact:

Defendant participated in the removal of the gates in a variety of ways. He was present during the removals. He gave rides to other persons to the "gate parties" at which the removals were carried out. He carried tools with him in his truck and made the tools available for use during the

actual destruction. He offered advice and suggestions to those actually performing the destruction as to how best to cut down and/or destroy the gates. He engaged in conversations with other Ponderosa Pines owners regarding whether gates were in existence at any particular time and the need to remove the gates. Also, defendant admitted in his original answer in this matter destruction of the gates.

Id at 242 (internal citations omitted & emphasis added).

Mr. Misch appealed and Division 3's review was limited to determining whether "substantial evidence" supported the foregoing finding of fact. *Id* at 242-243. Mr. Misich's admission in his original answer that he destroyed the gates and eyewitness testimony regarding his involvement convinced Division 3 that substantial evidence supported the trial court's finding of fact. *Id* at 243-244.

The Clipeses argue "[Mr. Misich's] wrongful conduct was his actions that resulted in the removal of the gates at issue, not the actual removal of the gates themselves." *Brief of Appellant*, pp. 15-16. This analysis contradicts the plain language of RCW 4.24.630 and the foregoing case law. A more logical conclusion is that Mr. Misich's conduct (making tools available, offering advice on how to destroy the gates, etc.) demonstrated his continuous removal and destruction of the gates was in fact intentional and unreasonable and, therefore, wrongful under RCW 4.24.630. Division 3 also used Mr. Misich's knowledge of an earlier anti-harassment claim to support the conclusion that he knew or

should have known that he lacked authorization to continually remove the gates. *Id* at 246.

In *Colwell v. Etzwell*, 119 Wn.App 432, Division 3 held RCW 4.24.630 “requires a showing of wrongful (intentional and unreasonable) conduct resulting in some dollar amount of damages. In other words, without a showing of damages the claim has no value.” *Id* at 442 (internal citations omitted). The defendant in *Colwell* removed the culverts he had placed in the road and reconstructed a new gravel road in the same location at his own expense. *Id* at 442. The court, therefore, found plaintiff had no damages and no cause of action under RCW 4.24.630. *Id*.

If the Clipses’ interpretation of the statute is accepted (that they simply must show entry onto the land and digging), then there are no damages. The only alleged wrongful conduct that resulted in damage was digging the hole without written authorization. The hole has already been repaired and replaced, and the cleanout pipe has been installed. Ms. Clipse, like the plaintiff in *Colwell*, does not have any damages related to the wrongful conduct.

Ms. Clipse cannot meet her burden of proof under RCW 4.64.630 because she cannot show Pipe Experts intentionally and unreasonably caused the wastewater backup.

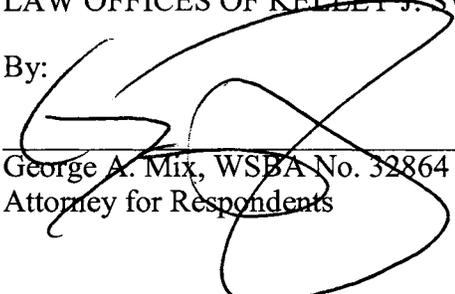
CONCLUSION

Based on the foregoing arguments this Court should find the trial court: (1) did not commit a manifest abuse of discretion in excluding the contract specifications; and (2) erred when it ruled a person can act wrongfully under RCW 4.24.630 without showing intentional and unreasonable conduct. The Court should also dismiss Ms. Clipse's RCW 4.24.630 claim because there is no evidence Pipe Experts wrongfully caused the wastewater backup.

RESPECTFULLY SUBMITTED this 31st day of August, 2009.

LAW OFFICES OF KELLEY J. SWEENEY

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DECLARATION OF SERVICE

I hereby certify that on August 31, 2009, I caused to be served a true and correct copy of the foregoing Brief of Respondents/Cross-Petitioner by the method indicated below, and addressed to the following:

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