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No. 714414

**IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION I**

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

Plaintiffs/Appellants,

v.

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

Defendants/Respondents.

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 COURT OF APPEALS
 DIVISION I
 SEATTLE, WA
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(Proof of Service Included)

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I. INTRODUCTION

Try as he might, Blue cannot escape *Forbus v. Knight*, 24 Wn.2d 297, 163 P.2d 822 (1945). *Forbus* cannot be distinguished from this case.

The uphill Defendants also cannot support the summary judgment granted to them below. The law clearly imposes a duty on the uphill Defendants to maintain the sewer pipe, and there is no dispute that they all failed to maintain it. The uphill Defendants used the shared sewer line without maintaining it, and in so doing they damaged the Donners.

II. ARGUMENT AND AUTHORITY

A. Donners' Claims Against Blue are Governed by *Forbus*

1. Easement Law Does Not Override *Forbus*

Blue correctly states the law that easement owners generally have the duty to maintain the easements that benefit their dominant estates. (Resp't Blue's Br. 5-6.) Of course, property owners likewise have a duty to maintain their own property owned in fee simple. *See 1519-1525 Lakeview Blvd. Condo. Ass'n v. Apartment Sales Corp.*, 144 Wn.2d 570, 580, 29 P.3d 1249 (2001) ("Owners may avoid liability by exercising reasonable care to protect third parties from danger and by performing regular inspections and maintenance.")

In *Forbus*, the clogged side sewer line was entirely within the boundaries of the plaintiff's property. The trial court's ruling against *Forbus* rested on the same rationale advanced by Blue here: "the fault lay entirely with the appellant, in that she failed to cement the joints of her

lateral sewer and that such failure was the sole proximate cause of the willow roots entering the sewer pipe.” *Forbus v. Knight*, 24 Wn.2d 297, 305, 163 P.2d 822 (1945). In other words, the trial court reasoned that because the plaintiff had a duty to maintain her own property, the adjoining landowner could not be held liable. The Supreme Court rejected that view in *Forbus*. Blue’s argument here is no different than the trial court’s rationale that was rejected in *Forbus*. The general obligation on property owners to maintain their property, whether that property is owned in fee simple or is in the form of an easement, does not shield a neighboring “owner of the offending agency” from liability if the offending agency damages their neighbor’s property.

Blue mischaracterizes the issue of duty. The issue is not whether Blue had a duty to “maintain the easement.” (Resp’t Blue’s Br. 5.) The issue is whether Blue had a duty to prevent Blue’s tree from damaging Donners’ property. If Blue had broken the sewer line through excavation or drilling, Blue would unquestionably be liable for any resulting sewer backup damage on the uphill properties, because Blue owes a duty not to damage the sewer pipe within the easement area on the Blue property. The issue is whether Blue breached that duty by allowing his tree to damage the line. *Forbus* compels an answer in the affirmative.

Blue’s out-of-state cases holding that there is no duty on the part of a servient property owner to clear vegetation that infringes on an easement are not applicable, and do not reflect the law in Washington. In

Washington, a servient owner does have a duty to remove trees that interfere with the rights of easement owners. *See Sunnyside Valley Irr. Dist. v. Dickie*, 111 Wn. App. 209, 221, 43 P.3d 1277 (2002) (affirming order requiring servient owner to remove trees interfering with easement).

2. *Forbus* is Controlling Authority

a. The Duty Language in *Forbus* is Not Dicta

If an issue is presented to the court and is essential to the judicial decision, the court's discussion is not considered to be dicta. *Pierson v. Hernandez*, 149 Wn. App. 297, 305, 202 P.3d 1014 (2009). When a party "urged disposition" of an issue, the opinion discussing the issue is not dicta. *Id.*

In *Forbus*, the trial court's "second memorandum" decision was technically under review, but it was discussed at length to frame the central issue that clearly was before the court, which was whether the adjoining landowner could be liable for damage caused by his encroaching tree roots.

While Blue is correct that no published Washington case has cited the holding in *Forbus* that an adjoining landowner is liable for damage caused by encroaching roots from his trees, that does not mean that *Forbus* is not good law. The holding in *Forbus* has been followed by other courts. *See D'Andrea v. Guglietta*, 208 N.J.Super. 31, 36, 504 A.2d 1196, 1198 (N.J. Super. Ct. App. Div. 1986) (following *Forbus*); *Norwood v. City of New York*, 95 Misc.2d 55, 58, 406 N.Y.S.2d 256, 258 (N.Y. Civ.

Ct. 1978) (following *Forbus*). *Forbus* is good law and has been recognized as such by many courts.

b. *Forbus* Applies to this Case

Although the defendant in *Forbus* intentionally planted the tree that caused the root intrusion into his neighbor's sewer pipe, that distinction is unimportant in the context of urban land in close proximity to other properties. Property owners in urban areas are generally charged with maintenance obligations for all trees that could cause damage to their neighbors, whether cultivated or naturally occurring. *See Lewis v. Krussel*, 101 Wn. App. 178, 186, 2 P.3d 486 (2000) ("In general, the owner of land located in or adjacent to an urban or residential area has a duty of reasonable care to prevent defective trees from posing a hazard to others on the adjacent land.") Furthermore, the rule as stated in *Forbus* makes no distinction between cultivated and naturally occurring trees: "It is the duty of the one who is the owner of the offending agency to restrain its encroachment upon the property of another" *Forbus*, 24 Wn.2d 297 at 313. Blue's property is a small city lot on a busy street in Mercer Island. There is no reason to regard Blue's trees as less potentially harmful than the tree at issue in *Forbus*.

3. Blue's Policy Arguments Are Unpersuasive

Blue's suggestion that sewer easements would never be granted if Blue is held liable in this case are overblown. (Resp't Blue's Br. 10.) A servient owner granting a sewer line easement could easily include language to release them of liability for root intrusion. Blue's predecessor

granted an easement without including any such release. It is not unfair to hold Blue, a voluntary purchaser of the Blue property, responsible for the risks assumed by Blue's predecessor.

B. Uphill Defendants Owed An Affirmative Duty to Maintain

Based on a narrow reading of the Restatement (Third) of Property, the uphill Defendants argue that none of them had a duty to maintain the shared sewer line that they all use to dispose of their waste water. The uphill Defendants insist that their duty is limited to reimbursing the expenses that were incurred by whoever volunteers to maintain the shared sewer line. This remarkable proposition would lead to the conclusion that no one has any duty to affirmatively maintain the shared sewer line that the uphill Defendants all depend upon for the enjoyment of their property. The uphill Defendants fail to cite a single case supporting their untenable position. The law clearly imposes an affirmative duty to maintain on the beneficiaries of a shared sewer line.

1. The Common Law Establishes a Duty to Maintain

Numerous courts have found that the beneficiaries of sewer and drainage easements have a duty to maintain the related improvements to prevent injury to the downstream servient property owners. *See Powers v. Grenier Const., Inc.*, 10 Conn.App. 556, 560, 524 A.2d 667, 669 (1987) ("The duty of maintaining [a drainage] easement so that it can perform its intended function rests on the owner of the easement absent any contrary agreement. The owner must maintain the easement so as to prevent injury to the servient estate.") (citation omitted). In the context of sewer and

drainage easements, the duty applies even if the beneficiary is unaware of any defect in the system:

The authorities show that in the case of a dominant and servient estate in the matter of a drain and of sewage, it is the duty of the owner of the dominant estate and easement at his own risk and without regard to his actual negligence or to his knowledge of any defect in the sewer or drain, to keep it in repair, and as Lord Denman said in one of the cases below cited, to keep the sewage from passing from his own premises to the plaintiff's premises otherwise than along the accustomed channel.

Murtha v. O'Heron, 178 Ill.App. 347, 354 (Ill. App. Ct. 1913). *See also Powers*, 524 A.2d at 669 (“[O]ur examination of the pleadings in this case convinces us that this action is based on a breach of the duty to repair the drainage easement, rather than one founded on negligent installation.”)

The affirmative duty to maintain a shared sewer or drainage easement applies to all beneficiaries, even if there are multiple beneficiaries. *See Schilson v. Weinberg*, 24 Ill.App.3d 967, 971-72, 322 N.E.2d 201, 203-04 (Ill. App. Ct. 1975) (recognizing affirmative duty of tile drain easement owner to “keep it in repair” even where servient owner also used drain and citing *Murtha v. O'Heron*, 178 Ill.App. 347 (Ill. App. Ct. 1913)).

The uphill Defendants cite only one case, *Borgel v. Hoffman*, 219 Pa.Super. 260, 280 A.2d 608 (1971), in which a court held that multiple shared easement beneficiaries do not share a common duty to maintain the easement. In *Borgel*, the plaintiff was injured when she fell on a shared

driveway that was defective. She sued only the owner whose property was immediately adjacent to where she fell. That owner in turn sued some of his neighbors. In holding that each homeowner only owed a duty to maintain that portion of the driveway adjacent to their property, the court recognized that it was departing from the general rule imposing that duty on the beneficiaries. The court did so only because of the difficulty in determining how close a home would need to be to equitably impose the duty:

While we recognize the general rule, as already stated, regarding the obligation of a dominant tenant to keep in repair an easement which is used and enjoyed for the dominant estate alone, it must be recognized that this general rule is simply an application of the broader rule that the duty of repair should fall where reason, convenience, and equity require it to fall. Where, as in this case, an easement in a driveway is owned and utilized by many abutting property owners, it would be most unreasonable, inconvenient and inequitable to hold each dominant tenant liable for a defect in the driveway no matter how far removed from that dominant owner's property. It would be equally unreasonable, inconvenient and inequitable to hold only those dominant owners whose properties are close to the defect liable therefor, since we would then have to answer the question, 'How close is close?'

Borgel, 280 A.2d at 610. The considerations in *Borgel* do not apply here. All of the uphill Defendants benefit equally from using that portion of the sewer line on the Donners' property. There is nothing inequitable about imposing an equal duty on all of them to maintain the shared sewer line that they depend upon.

2. Donners are Servient Owners in Relation to the Uphill Defendants

The uphill Defendants wrongly characterize the Donners' property as "dominant." While the Donners' property is dominant as to the Blue property, the Donners' property is clearly servient as to the uphill Defendants. In the context of a sewer or drainage easement, the downhill properties are deemed to be servient as to the all of the uphill properties. *See Johnson v. City of Winston-Salem*, 239 N.C. 697, 704, 81 S.E.2d 153, 158 (1954) ("Each of the lower parcels along the drainway was servient to those on higher levels in the sense that each was required to receive and allow passage of the natural flow of surface water from the higher land.")

The fact that the blockage occurred on the Blue property does not change the relationship between the Donners' property and the uphill properties. Although the blockage occurred further down the line, the uphill Defendants nonetheless owed a duty to the Donners to ensure that their waste water discharges did not harm the Donners' property. While the ultimate cause of the injury to the Donners' property was the blockage on the Blue property, the uphill Defendants also caused injury to the Donners' property by discharging their waste water into the blocked pipe, which then forced its way into the Donners' basement. The harm to the Donners resulted from uphill Defendants' use of the easement in discharging their waste water onto Donner's property.

3. The Restatement Does Not Shield Defendants From Liability

The uphill Defendants construe the Restatement like a statute. It is

not a statute. The comments to the Restatement (Third) of Property § 4.13 make clear that “[t]he rules stated in this section apply only as an aid to determining the intent or expectations of the parties . . . and to supply terms omitted by the parties in creating a servitude.” Restatement (Third) of Property (Servitudes) § 4.13 cmt. a (2000).

a. The Uphill Defendants Have “Control” of the Shared Sewer Line.

The uphill Defendants misstate the law in arguing that because they lack “control,” section 4.13(1) cannot apply. (Resp’ts Rieke and Robertson’s Br. 16.) All beneficiaries of a drainage easement have the “control” necessary to maintain and repair as a matter of law. *Baskin v. Livers*, 181 Wash. 370, 374-75, 43 P.2d 42 (1935) (“Does this right to so maintain the pipe line carry with it as a necessary incident the right to go upon respondents' land for the purpose of making necessary repairs? We think it does. What seems to be the well-settled general rule is well stated as follows: ‘The owner of the dominant estate may do whatever is reasonably necessary to the enjoyment of the easement and to keep it in a proper state of repair, provided it is done without imposing unnecessary inconvenience on the owner of the fee, and the extent of the easement is not thereby enlarged.’”) (citation omitted); *Hughes v. Boyer*, 5 Wn.2d 81, 90, 104 P.2d 760 (1940).

Indeed, it is precisely because the uphill Defendants had control as a matter of law that they can be liable for the Donners’ damages. *See Friends of the Sakonnet v. Dutra*, 749 F.Supp. 381, 395 (D.R.I. 1990)

(“As demonstrated above, [the beneficiary] and its predecessors-in-interest retained control of the failed sewerage system and had the correlative duty to maintain the system. Any nuisance that the failed system has created is the responsibility of [the beneficiary] and its predecessors-in-interest.”); *Sutera v. Go Jokir, Inc.*, 86 F.3d 298, 304-05 (2d Cir. 1996) (“[T]he imposition of a duty on an owner depends on whether—in light of the rights granted under the easement, as well as the activities undertaken pursuant to those rights—the dominant owner has sufficient control to warrant treatment as a landowner for tort purposes.”)

b. Section 4.13(1) Can Apply Even With Multiple Beneficiaries.

The comment to section 4.13(1) pertaining to multiple beneficiaries clarifies that an easement beneficiary “does not have an affirmative duty to make repairs” in multiple-beneficiary situations where that beneficiary does not have the requisite control to make the repairs:

However, the affirmative duty to make repairs extends only to portions of the servient estate or of the improvements used in enjoyment of the easement that are under the beneficiary's control. If the servient estate is being used by the servitude owner in common either with holders of other similar servitudes or with the owner of the servient estate, the owner of the servitude does not have an affirmative duty to make repairs, but does have a duty to contribute to the reasonable costs of repairs or maintenance undertaken by others.

Restatement (Third) of Property (Servitudes) § 4.13 cmt. B (2000). The examples used immediately following in Comment B further reinforce the point that control is the fundamental issue:

- O, the owner of Blackacre, acquired an easement to build a road across Whiteacre to provide access to a public highway. Whiteacre is used as a cattle ranch. When O built the road, O cut the Whiteacre fences and installed cattle guards where the road entered and exited Whiteacre. The road is not used to serve Whiteacre. Because O has control of the road, O has a duty to maintain the cattle guards to prevent unreasonable interference with use of Whiteacre as a cattle ranch.
- 2. Same facts as Illustration 1, except that O acquired an easement to use an existing road across Whiteacre, which was also used by the owner of Whiteacre. In the absence of other facts or circumstances, O does not have a duty to maintain the cattle guards because O is not in control of the road. Under the rule stated in § 4.10, O would have the right to make repairs to the cattle guards, and, under the rule stated in subsection (3), O would have the duty to contribute to costs reasonably incurred by the owner of Whiteacre for maintenance and repair of the road.
- 3. Irrigation Company ships water through a canal located on Whiteacre pursuant to an easement for canal purposes. Irrigation Company has control of the canal and owes a duty to the owner of Whiteacre to maintain and repair the canal to avoid unreasonable interference with the enjoyment of Whiteacre and to avoid liability on the part of the owner of Whiteacre to third parties for injuries suffered on account of the condition of the canal.

Restatement (Third) of Property (Servitudes) § 4.13 cmt. B (2000)

The law does not impose a duty that cannot be carried out.

However, that is not the case here, where the uphill owners had control of the sewer pipe as a matter of law. *Baskin*, 181 Wash. 370 at 374-75; *Hughes*, 5 Wn.2d at 90. There is no reason why multiple beneficiaries who all have the legal right of control should not also have a joint duty to maintain.

c. Section 4.13(4) Does Not Limit Liability

Defendants read section 4.13(4) to limit their liability. It does not. Section 4.13(4) clarifies that easement beneficiaries must contribute to maintenance costs. It does not purport to limit their liability, and should not be read as doing so. Nor does section 4.13(4) state that there is “no duty to inspect, repair or maintain” as the uphill Defendants suggest. (Resp’ts Rieke and Robertson’s Br. 15.) Section 4.13(4) does nothing more than supply a missing term to provide for contribution to maintenance expenses.

C. Defendant Spring’s New Causation Argument Should be Rejected

Defendant Spring’s motion for summary judgment did not refer to the easement applicable to his property, and he therefore did not present any evidence or argument in his motion that he had not used the shared sewer pipe. CP 35-40. Indeed, when confronted with the applicable easement and its indemnity language in the Donners’ opposition papers (CP 181), Spring declined to address it even in his reply. CP 221-225.

Now, for the first time on appeal, Spring implies that the indemnity clause in his easement was not triggered because the Donners have not proven that Spring caused their damage. (Resp’t Spring Br. 6-7.) Had Spring actually addressed the indemnity provision below, there would have been an opportunity for the Donners to clarify this issue. Spring should not be allowed to make an entirely new argument on appeal.

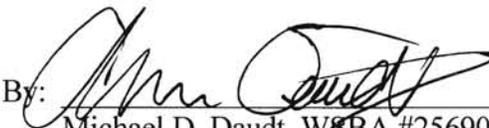
Spring admitted that he had done no maintenance on the sewer line. CP 60-62. As discussed above, Spring's breach of the duty to maintain, coupled with his use of the sewer pipe, is enough to trigger the indemnity provision.

III. CONCLUSION

Blue is liable to the Donners under *Forbus*. The uphill Defendants owed a duty to maintain the sewer pipe, and their breach of that duty damaged the Donners' property. The Donners' respectfully request that this Court reverse and remand.

DATED this 11th day of August, 2014.

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

DATED this 11th day of August, 2014.



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