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No. 714414-1

COURT OF APPEALS FOR DIVISION I
STATE OF WASHINGTON

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

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, a single person; SHANE KIM and DANA KIM, husband and wife and the Marital community thereof,

Respondents

**BRIEF OF RESPONDENT JAMES M. BLUE AS TRUSTEE FOR
 NORTHWEST NEUROLOGICAL SURGERY TRUST**

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FILED
 DIVISION I
 COURT OF APPEALS
 STATE OF WASHINGTON
 SEP 11 2009 PM 3:22

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I. ISSUE PRESENTED ON APPEAL AS TO THIS RESPONDENT

Does the owner of a servient estate owe any duty to the owner of a dominant estate to maintain an easement to prevent tree roots from blocking the dominant property's sewer line?

II. COUNTER-STATEMENT OF THE CASE

Respondent James M. Blue, as Trustee for Northwest Neurological Surgery Trust, (hereinafter referred to as "Blue") is the owner of an undeveloped parcel of land on Mercer Island, Washington. Clerk's Papers (hereinafter "CP") at pages 148, line 26 through page 149, line 3. There are no structures on the Blue property and only naturally growing trees and foliage exist on it. CP page 149, lines 4-8.

A sewer line easement runs across the Blue property. Because the Blue property is burdened by this easement, it will sometimes be referred to herein as the "servient" property or estate. The appellants, Neil and Kiyomi Donner (hereinafter referred to as the "Donners") are one of the beneficiaries of this easement as are the properties owned by the remaining

respondents. The Donner property will sometimes be referred to as the “dominant” property.

All of the other parties to this case except Blue own single family residences which are located uphill from the Blue property and each of them use the sewer easement to transfer sewage from their properties, through the Blue property, to the city sewer line which exists in the street in front of the Blue property. The Blue property does not use or benefit from the existence of this sewer line at all. CP page 149 lines 16-18. None of the documents which created the rights of the other parties to use this sewer easement impose any burden on the Blue property to maintain the easement in any fashion. See the documents referenced in appellants’ brief at page 4.

Sometime during the week of July 30, 2012 the subject sewer line became blocked causing sewage to back up into the Donners’ residence. For purposes of this appeal and the underlying motion in the trial court, it may be assumed that this blockage occurred within the boundaries of the easement area on the Blue property and was caused by tree roots growing

from trees located on the Blue property. CP page 139 lines 21-26. There was no evidence presented to the trial court that suggested these roots originated from anything but natural vegetation.

The Donners concede that this blockage and the resultant damage could have been detected and prevented by them if they had ever conducted a routine inspection of the sewer line. Donners' brief at page 3-4. There is no evidence in the record which suggests that the Donners or any of the other parties to this appeal ever undertook any inspection or maintenance of the sewer line and easement.

The trial court dismissed the claims against respondent Blue on summary judgment.

III. STANDARD OF REVIEW

An appellate court reviews a summary judgment order de novo, engaging in the same inquiry as the trial court. *Anderson v. Weslo, Inc.*, 79 Wn. App. 829, 833, 906 P.2d 336 (1995). Summary judgment should be granted where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Kuhlman v. Thomas*, 78

Wn. App. 115, 119, 897 P.2d 365 (1995). The court considers the facts in the light most favorable to the nonmoving party and summary judgment should be granted if reasonable minds could reach but one conclusion.

Kuhlman v. Thomas, 78 Wn. App. 115, 119-120, 897 P.2d 365 (1995).

IV. SUMMARY OF BLUE'S ARGUMENTS

As the servient estate owner, Blue had no duty to maintain the dominant estate's sewer easement to keep it free from encroaching roots. The duty to maintain the easement belongs solely to the Donners and the other beneficiaries of the easement.

The case of ***Forbus v. Knight***, 24 Wn.2d 297, 163 P.2d 822 (1946) relied on by the Donners is factually and legally distinguishable from this matter and it is simply not applicable. It did not involve an easement or the maintenance obligations attached thereto. Furthermore, the language from ***Forbus*** the Donners rely on is mere dicta.

The case of ***Sunnyside Valley Irr. Dist. v. Dickie***, 111 Wn.App. 209, 43 P.2d 1277 (2002) correctly states the law but is again factually and legally distinguishable from this matter and does not aid the Donners.

V. ARGUMENT

A. Blue Owed No Duty to the Donners.

The Donners' contention in this case is that Blue owed them a duty to keep naturally growing tree roots from invading a sewer line in an easement the Donners were the beneficiaries of. No case in this or any other jurisdiction has been identified by any of the parties that ever imposed such a duty on a servient estate owner.

The initial problem with the Donners' contention is that it attempts to shift their burden to maintain the easement onto Blue. This is completely contrary to the established common law rules regarding maintenance of easements.

It is well settled that:

"It is not only the right, but the duty of the owner of an easement to keep it in repair. The owner of the servient tenement ordinarily is under no duty to maintain or repair it."

25 Am.Jur.2d, *Easements and Licenses*, §82 (emphasis added). See also, the Restatement of the Law, *Servitudes*, (Third) §4.13 on the duty to repair

and maintain an easement.

The Donners' obligations are actually greater than just maintenance of the easement. They would also be responsible for any damage which resulted from their failure to do so. At common law:

“The owner of an easement is responsible for any damage resulting from a failure to maintain or repair the easement”

28A CJS., *Easements*, §229. The Donners expressly acknowledged the above rule in their brief. See the Donners' brief at page 11.

If upheld, the Donners' position would turn the law of easements on its head and completely reverse the common law rules as they relate to the maintenance responsibilities of the parties to an easement such as this. As the above authorities show, the Donners had not only the right, *but also the duty*, to inspect and maintain the sewer line. Conversely, Blue had no right or duty to inspect or maintain the sewer line at common law and nothing in the easement documents altered his common law rights or duties.

B. ***Forbus*** Is Not Controlling.

The Donners cite only two cases from this or any other jurisdiction in support of their contention that respondent Blue is liable to them under the facts presented here. Both cases are easily factually and legally distinguishable and have no application to this matter.

The Donners first suggest ***Forbus v. Knight***, 24 Wn.2d 297, 163 P.2d 822 (1946) controls the outcome of this dispute. Blue must respectfully disagree.

In ***Forbus***, the plaintiff and defendant were adjacent landowners. Over time, roots from a tree planted by the defendant's horticulturist (who also landscaped the plaintiff's yard) allegedly invaded the plaintiff's property and blocked her sewer line. ***Forbus*** did not involve easement rights or responsibilities at all which is what is involved in this appeal. Rather, it involved the potential liability of the owner of a landscaping tree for damage it caused to an adjoining landowner.

Courts across the country had looked at fact patterns similar to the one presented in ***Forbus*** and have developed at least four different

approaches to resolving the issues presented in them. Those approaches have been variously identified as the “Massachusetts rule”, the “Hawaii rule”, the “Restatement rule” and the “Virginia rule.” Scholarly discussions of these rules and their differences can be found in cases such as *Herring v. Lisbon Partners*, 2012 N.D. 226, 823 N.W.2d 493 (2012); *Lane v. W.J. Curry*, 92 S.W.3d 355,(Tenn., 2002); and *Melnick v. C.S.X. Corp.*, 312 Md. 511, 540 A.2d 1133 (1988). Under some variations of the rules, when a plaintiff’s adjoining property is invaded by a tree or its roots from the neighboring property, their only remedy is self help to remove the trees or roots which encroach onto their property. Under other rules, some burden is placed on the owner of the tree to remove the offending or encroaching portions of the tree. But none of these rules have ever been applied to situations involving an easement. They have only been applied when a tree or root encroached onto the adjacent property of another. No doubt the reason for this is that easements are governed by their own separate and distinct body of case law and involve separate rights from outright ownership of land.

The Donners attempt to analogize this case to *Forbus* by stating that their "...property rights were invaded by the offending tree roots in exactly the same way as they would have been had the roots first migrated across the property boundary before invading the sewer line...." Donner brief at pages 7-8. What they don't address is the fact that the property rights allegedly being invaded are different.

An easement is merely a right granted to one party to use the property of another party for a specific purpose. While it is considered a "property" right, there is no transfer of title to the easement area but there is a transfer of the maintenance obligations. Different rules apply than when dealing with the rights of adjacent landowners which was the issue in the *Forbus* case. The Donners simply ignore those rules.

As noted above, at common law, the right and *duty* to maintain an easement is on the dominant estates, not a servient estate such as Dr. Blue's estate here.

"Absent an agreement to the contrary, the obligation to repair and maintain and easement is on the easement holder."

Bruce & Ely, *The Law of Easements and Licenses in Land*, 2013 Thomson Reuters. See also, *Rayonier v. United States*, 225 F.2d 642, (9th Cir., 1955) and *Arnhold v. United States*, 225 F.2d 650 (1955).

Thus, the easement property right granted to the Donners came with an obligation, and that obligation was to maintain it. That is the burden the law imposes on them in exchange for the benefit of getting to use a portion of the Blue property for their own benefit.

In a situation involving adjacent parcels of property, it is clear that each owner has a duty to maintain their own property so as not to harm the other. But in an easement situation, the burden of maintenance of the easement area is shifted from the fee owner of the land to the easement beneficiary. Indeed that is no doubt part of the incentive in many cases for the fee owner to grant an easement in the first place. Why would anyone grant another person the right to run a sewer line under their property if by doing so, it meant they now had a new duty to keep the sewer line clear of roots? It would be far easier to simply deny an easement to a person seeking it. The law recognizes that in order to get the benefit of the

easement, the dominant estate must take on the burden of maintenance or many useful easements would never be granted. Thus, in a case like this, it is up to the beneficiary to maintain the easement area so their sewer line is not harmed. That is what distinguishes this case from *Forbus*.

Tellingly, the Donners have expressly acknowledged their own duty to maintain the sewer easement stating in their trial court opposition brief that an "...easement beneficiary has both the right and the duty to maintain the easement." CP page 209, lines 17-18.

Because this rule is so well established, none of the parties to this appeal cited a single case to the trial court in which a court held that a servient estate can be liable to the dominant estate when the dominant estate has failed to maintain an easement.

Several cases from other jurisdictions have discussed in general terms the lack of any duty on the servient owners to cut back or remove trees or foliage that might restrict or infringe on an easement and have held that there is no such duty.

In *Smith v. Muellner*, 283 Conn. 510, 932 A.2d 382, 393-394

(2007) the court noted that:

“Moreover, the plaintiff (servient estate owner) had no duty to keep the right-of-way clear by removing the chestnut tree and naturally occurring overgrowth.”

This case also determined that the “...failure to remove naturally occurring vegetation from the right-of-way was not actionable...” *Smith*, at page 394.

In *Suits v. McMurtrey*, 97 Idaho 416, 546 P.2d 62 (1976), the court held that the servient estate owner was under no duty to remove a tree which was interfering with the dominant estate owner’s use of the easement.

“However, the district court did err by ordering the McMurtreys to remove a portion of a tree which interfered with the Suits’ use of the easement. The McMurtreys, whose estate (the reserved property) was subservient to the easement held by the Suits, do not have the duty to maintain the easement.”

In *Schwartz v. Murphy*, 74 Conn. App. 286, 296-298, 812 A.2d 87, 93-94 (2002) the court held that the plaintiff had a view easement but the defendant, the servient estate owner, was under no duty to trim an

existing hedge or tree to maintain it and that doing so was the responsibility of the easement owner.

As if the above were not enough to show that *Forbus v. Knight*, 24 Wn.2d 297, 163 P.2d 822 (1946) is not controlling, there is the additional matter that the language relied on by the Donners is nothing more than dicta. The actual holding in *Forbus* was that the trial court's findings were not supported by the evidence:

“We have then a judgment which is founded expressly upon certain erroneous findings and conclusions, rested in turn, upon a memorandum decision likewise erroneous in point of fact. The error contained in the first memorandum decision was thus projected through the findings into the judgment and, so far as the cognizable record shows, was never eradicated. The judgment has no stable foundation on which it can rest and therefore, cannot be upheld.”
Forbus at page 312.

The *Forbus* court went on to state in the *dicta* the Donners rely on here that:

“It is not the law that the owner of premises is to be charged with negligence if he fails to take steps to make his property secure against invasion or injury by an adjoining landowner. It is the duty of the one who is the owner of the offending agency to restrain its encroachment upon the

property of another, not the duty of the victim to defend or protect himself against such encroachment and its consequent injury.”

The court expressly recognized this statement as dicta when it also stated:

“However, since the matter of the second memorandum decision is not properly before us, we shall not discuss at further length the law involved therein...” *Forbus* at page 313.

The quoted dicta in the opinion was triggered by a comment made by the trial judge in his second memorandum decision. The trial judge apparently held that the plaintiff’s damages were the result of her own failure to properly cement the joints in her sewer line to keep the roots from invading it. However, the statement the Donners rely on here was not the basis for the Supreme Court’s reversal of the trial court in *Forbus* which is why it is mere dicta. Tellingly, the quoted dicta from *Forbus* has not been cited in any published Washington appellate decision in the 68 years since the statement was made.

Even though the statement in *Forbus* is dicta and the facts are

distinguishable, the Donners have latched upon it to attempt to impose liability on Blue. But more important than whether or not the statement is dicta, or even represents a correct statement of the law in Washington in that factual setting, that case did not involve an easement or the rights and obligations of the dominant and servient estates which is what is involved in this case. Thus, *Forbus* simply has no application here.

C. *Sunnyside* Is Not Controlling.

The second case cited by the Donners in their brief as arguably imposing some duty on Blue is *Sunnyside Valley Irr. Dist. v. Dickie*, 111 Wn.App. 209, 43 P.2d 1277 (2002). Although not referenced in the Donners' brief, the Court of Appeals decision was later affirmed by the Washington Supreme Court in *Sunnyside Valley Irr. Dist. v. Dickie* 149 Wn.2d 873, 73 P.2d 873 (2003). One has to read both opinions to get a clear picture of what the factual background of the case was.

Sunnyside involved a claim by a servient estate that the easement owner was improperly expanding previously granted access rights to widen an easement for purposes of servicing an irrigation ditch. The

easements involved were granted in documents filed in 1908, 1912, and 1925. The lateral ditch involved was constructed sometime between 1905 and 1923. The servient estate was agricultural land on which the servient estate owner grew cherry trees, *all of which were planted or replanted after construction of the ditch*. In the early years, the ditch was serviced and maintained using methods which allowed the servient estate to use part of the easement area to grow some cherry trees close to the ditch without interfering with the maintenance of it. However, later more efficient methods and equipment to maintain the ditch were developed but they could not be used without utilizing a wider access area. This meant that some cherry trees and sprinklers installed near the ditch by the servient estate owner, *after the ditch* was constructed, now had to be moved to allow for the full use of the easement. The courts held that the easement owner had the right to the wider easement access area so that the more efficient maintenance methods could be used. As a result, the trial court ordered the servient estate owner to remove some trees and sprinklers he had placed in the easement area close to the ditch because

they blocked the wider access. This order was affirmed on appeal. While this ruling is fully in compliance with easement law, it does not aid the Donners here.

It is well settled under easement law that a servient estate owner may use all of his land, including the easement area, as long as his use of the easement area does not interfere with the proper enjoyment of the easement. *Thompson v. Smith* 59 Wn.2d 397, 407-408, 367 P.2d 798 (1962). Thus, the owner of the servient estate in *Sunnyside* could use the easement area to grow cherry trees as long as it did not interfere with the dominant estate's ability to maintain the ditches. However, if a servient estate owner constructs, installs or plants something in an easement area that does interfere with the reasonable enjoyment of an easement, then it is proper for the court to order the servient estate owner to remove it. *Thompson*, supra. Thus, it was proper for the court in *Sunnyside* to order the servient estate owner to remove the cherry trees he planted in the easement area as well as the sprinklers he installed once they were interfering with the reasonable enjoyment of the easement in that case. But

respondent Blue has not planted or installed anything in the easement area in this case. Nor does he make any use of the easement area. Those simple facts completely distinguish this case from *Sunnyside*. A different rule might apply here if Blue had planted trees in the easement area after the sewer line was installed and those trees grew and blocked the line, but that is not what occurred here. Thus, *Sunnyside* provides no support to the Donners.

VI. CONCLUSION

In this case, the Donners consistently assert two separate points. First, they acknowledge that their damages could have easily been prevented by a routine inspection of the sewer line in question. See the Donners' brief at pages 3-4. They actually state that: "Had there been any inspection by the Defendants over the past several years, the developing root blockage would have been detected and addressed before it caused the sewage backup into the Donners' home." See the Donners' brief at page 14. They also acknowledge that "The owner of an easement is responsible for any damage resulting from a failure to maintain or repair an

easement....” See the Donners’ brief at page 11. While asserting these points, they fail to even briefly acknowledge that *they* are one of the owners of the easement in question and Blue is not. Thus they, and not Blue, had the duty to inspect the sewer line and maintain it free from obstructions and they, not Blue, are responsible for any damages that resulted from their own failings in inspecting and maintaining the sewer line.

If the owners of an easement can shift their own duty of maintenance onto the servient estate as Donners urge here, one can easily see that property owners will become very reluctant to grant easements to others in the future. Why would one ever grant a sewer easement to another party if 30 or so years later they could be held liable when the sewer line backed up because the easement owner never inspected or maintained it? In addition, to hold as the Donners argue would be to alter the responsibilities and expectations of parties to an untold number of existing easements and would be a radical departure from the common law related to maintenance of easements. No case from this or any other

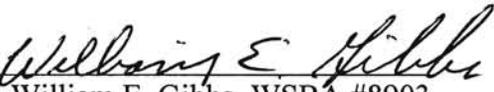
jurisdiction has been brought to the court's attention by any of the parties that would justify such a significant departure from the long understood obligations of parties to an easement and such a departure is certainly not justified here.

At least as to Blue, the trial courts dismissal should be affirmed.

He simply owed no duty to the Donners in this case.

Respectfully submitted this 30th day of May, 2014.

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By: 
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CERTIFICATE OF SERVICE

I, William E. Gibbs, declare under penalty of perjury under the laws of the State of Washington that a copy of this document was personally served on the offices of Michael Daudt and served by email and regular mail on May 30, 2014. The mailed copies went to the following addresses in a properly stamped and addressed envelope to the following:

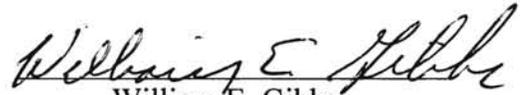
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