

71441-4

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NO. 71441-4-I

COURT OF APPEALS, DIVISION I

STATE OF WASHINGTON

NEIL DONNER and KIYOMI G. DONNER,

Appellants,

v.

JAMES M. BLUE, as trustee for Northwest Neurological Surgery Trust;
JOHN RIEKE and GENE E. ROBERTSON, husband and wife;
JAMES C. and JANE H. HAWKANSON, husband and wife;
JOHN E. SPRING; SHANE and DANA KIM, husband and wife,

Respondents.

1/14/11 10:00 AM
COURT OF APPEALS
DIVISION I
CLERK
JAMES M. BLUE

**BRIEF OF RESPONDENTS
SHANE KIM AND DANA KIM**

Wood Smith Henning & Berman, LLP
Gordon G. Hauschild, WSBA #21005
520 Pike St., Ste. 1205
Seattle, WA 98101
206-204-6800
ghauschild@wshblaw.com

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I. INTRODUCTION

Appellants Neil and Kiyomi Donner list two appeal issues which relate to respondents Kim: (1) Did the Kims have a duty to maintain and repair the common sewage line? (2) Did a breach of duty by Kim give rise to valid claims for breach of easement, negligence, nuisance, trespass and injunctive relief? The answers are a "qualified no" to the first issue, and a simple "no" to the second.

The Kims acknowledge a duty to pay their share of repair costs to fix the blocked/broken line, commonly used by all respondents (except Blue), and have tendered that share to the Donners' attorney. But the appellants' asserted "duty to maintain" is a nebulous concept in this case, and appellants have never proposed any standard by which to define or apply that duty. Nor have they offered any evidence of a trade standard, or even a recommendation, for inspecting sewer lines at any particular frequency in order to detect developing problems. Perhaps this is because the need for inspection may depend on many various factors; perhaps this is because there is no need for inspection until a problem arises. It is clear that there is no legal standard that has been cited by appellants. This makes a determination of whether a breach has occurred problematic -- unless the Court is inclined to legislate from the bench and create a

maintenance schedule, applicable to the universe of persons in Washington whose homes are connected to a common sewer line.

In the absence of a specific legal duty, the only duty that can be applied is a common law duty of reasonable action under the circumstances. This requires some showing of knowledge of facts that give rise to a duty to act as a reasonable person would under similar circumstances. But since appellants have shown no knowledge (on the part of any user) of the impending obstruction of the common sewer line by tree roots on the Blue property, they cannot show that the normal discharge of household waste water into the common sewer lines by any of its users violated any duty or constituted any breach. Nor can they establish that any respondent committed nuisance or trespass.

II. ISSUES PRESENTED AS TO RESPONDENTS KIM

1. Did the Kims have a legal duty to inspect portions of the common line not on their property, before the occurrence of the backup which damaged the Donners' property?

2. In the absence of any showing of duty or breach on the parts of the Kims, can they be held liable to appellants for resulting/consequential damages caused by the sewer line blockage on the Blue property, whether sounding in tort, trespass, nuisance or breach of easement?

3. Is the liability of the Kims limited to their share of the cost to repair the sewer line?

III. STATEMENT OF THE CASE

There is no dispute that the root intrusion that damaged the common sewer line was on property owned by respondent Blue. *Appellant's Brief*, p. 3. Appellants assert that the root intrusion could have been detected well before it caused a backup of waste water into the Donner home. *Id.* Implicit in this assertion is the fact that if the root intrusion could have been detected by any one of the "uphill" users of the line, it could as easily have been detected by the Donners. The Donners are the furthest "downhill" user, closest to any obstruction occurring between the Donner connection and the public main. Yet, the Donners claim that all of the other users of the line, but not the Donners themselves, had some ephemeral duty to inspect the line – and not only those portions on their own property, but the portions on the Donner and Blue properties as well. When all of the users of the line continued to use it as they had for years without incident, and the root blockage caused a backup into the nearest home, the Donners concluded that this somehow constituted an intentional or negligent tort against them.

The trial court correctly ruled that there was no duty to inspect the line, and no reason to know of any impending back up until it actually

occurred; therefore the Donners had no remedy for any damages other than recovery of all but their own share of the cost to repair the root damage to the line. There is no logical or legal reason for this court to create a new duty to inspect sewer lines; there is certainly no reason to create a duty to inspect, and impose it on all users except the Donners, merely because they suffered damages when the line backed up into their home.

III. ARGUMENT

a. Incorporation of briefs of other appellants.

RAP 10.1(g) permits one of multiple respondents to adopt by reference any part of the brief of another respondent. RAP 10.1(g)(2). Respondents Kim believe that their position is substantially identical to other "uphill" respondents, with the possible exception of respondents Spring, who are subject to a different express easement document. That different document may or may not be deemed to impose different indemnity obligations upon the Springs. Otherwise, the positions of the respondents are believed to be the same, other than respondent Blue, whose position as a "downhill" property and a non-user of the common sewer line (a burdened landowner only, enjoying no benefit from any of the easements) makes his appeal issues different. Accordingly, the Kims adopt by reference the arguments offered by the other similarly situated

respondents (Rieke, Robertson, Hawkanson, and, excepting for the indemnity issue, Spring).

b. Standard of review is *de novo*.

An appellate court reviews a summary judgment order *de novo*. *Cook v. USAA Casualty Ins. Co.*, 121 Wn.App. 844, 847, 90 P.3d 1154 (2004). Where there are no disputed material facts, the question is whether judgment is appropriate as a matter of law. *Id.* The appellate court engages in the same inquiry as the trial court. *City of Port Orchard v. Dept of Retirement Sys.*, 112 Wn.App. 811, 813, 50 P.3d 682 (2002).

c. Appellants conceded that there is no duty to inspect.

At oral argument on the summary judgment motion, plaintiffs made an interesting concession:

The fault – Mr. Trabolsi began by saying, well, no party is at fault. And that's true. There is no fault in the conventional negligence sense at all – at issue here. The issue is not fault for inspection, there is no - - or lack of inspection, there is no authority addressing the inspection issue at all.

VRP 32-33. Appellants' counsel went on to say,

[T]ruthfully, I think I would have to concede that as a general sort of - - if you look at how people normally operate, people don't normally ... scope the sewer line. That's not part of sort of the normal home-owner maintenance that we are all accustomed to doing.

VRP 34. So there is no appeal issue regarding a duty to inspect, or breach of that duty. The Donners have conceded that there is no authority

imposing a duty upon the Kims, or anyone else, to have a camera inspection of the line performed, as a preventative maintenance measure or otherwise.

This concession obviates any duty at all, including the portions of the line that pass under a given homeowner's property, or of the portions that pass under another's land. This is not to say that the parties could not agree to the type, scope and frequency of "maintenance" to perform on the line. See, e.g., *Buck Mtn. Owner's Assn. v. Prestwich*, 174 Wn.App. 702, 714, 308 P.3d 644 (2013). Even absence an express agreement, the court has equity power to require contribution to maintenance or repair costs. *Id.*, at 715-16. It did so here, requiring each user to pay its share of the cost to repair the blocked portion of the line. CP 251-54. This is the limit of the duty upon the Kims, and appellants have made no showing otherwise.

d. There can be no duty to maintain without a duty to inspect.

Appellants phrased the issue as one of "duty to maintain: Who had that duty and to whom was that duty owed?" VRP 33. They couched that duty as being a duty to run a cutter down the line, to cut the intruding tree roots. But appellants stop short in stating that this duty raises the questions "who had that duty and to whom was that duty owed?" They omit the question, "When does a duty arise?"

Having conceded that there was no duty to inspect, appellants would yet impose in retrospect a general duty to take action to keep the line clear, even without any knowledge that any action was needed. But without an inspection, or some knowledge that the line was becoming blocked, no duty to act arose. The trial court recognized this:

In this case, I think there was a duty to maintain, a duty to repair, but there was no knowledge on the part of anyone as to any problem calling for action consistent with that duty. There is no indication ... that the maintenance requirement placed on these parties either by common law or by the easement that that encompassed a duty to inspect for hidden unknown dangers.

VRP 43. This answers the question of when a duty to act arises. And appellants made no showing of any knowledge that would give rise to a duty.

e. Appellants misconstrue duties between servient and dominant users.

Appellants claim that each upstream user of the common line is a dominant estate and the Donners are a servient estate, such that upstream users must pay the Donners for damages from the backup of sewage into their home. *Appellant's Brief*, 9-10. Appellants cite to *Restatement (3d) of Property (Servitudes)*, § 4.13 (2000), for this proposition. Theirs is a skewed view of § 4.13 and the relationship between the parties.

Section 4.13 describes the duty of a beneficiary of an easement to

repair and maintain "the portions of the servient estate and the improvements used in the enjoyment of the servitude that are under the beneficiary's control" The sewer line as it runs under the Blue property falls within this section. But the Donners' home does not. In the spot where the obstruction to the line occurred, all users of the line are dominant estates, and Blue's property is the servient estate. The portion of the line where the obstruction occurred is within the control of all of the beneficiaries of the easement on the Blue property, to an equal degree. That is, each has an equal right to access for maintenance and repair, subject to duties to return the premises to their previous condition. But none of the uphill users had any easement rights in, or derived any benefit from, or had any duty to maintain or repair, any portion of the Donner's line from its connection to the common line up into their home.

Put simply, under § 4.13, the duty of any user to repair the common line ends where another user's connection departs the common line and runs to that user's home. The Kims had no duty to maintain or repair the Donner's own connection, or the damage to their home, because under § 4.13 those are neither "used in the [Kims'] enjoyment of the servitude" nor "under the beneficiary's control."

Nowhere in any of the authorities cited by Donner is there any discussion of any duty to repair or maintain the individual line of another

user, or to compensate another user for damage not occurring within the prescribed easement. Rather, the case law indicates that without a showing that the respondents exerted some control over the instrumentality or conditions that caused the damage, they cannot be held liable for that damage. See, e.g., *Parks v. W. Wash. Fair Ass'n*, 15 Wn.App. 852, 857, 553 P.2d 459 (1976).

f. Claims for nuisance, trespass and breach of easement fail for similar reasons.

The absence of a legal duty, and the lack of knowledge, or reason to know, of the impending or occurring damage, are fatal to the breach of easement, nuisance and trespass claims asserted by the Donners, just as they are fatal to the negligence claim.

In support of the breach of easement claim, appellants make the conclusory assertion that "the uphill Defendants failed to fulfill their duties" to maintain the line. *Appellant's Brief*, p. 12. However, where appellants have offered no authority establishing such duty, their conclusory assertion fails to constitute grounds to reverse the trial court.

Similarly, appellants assert that the uphill respondents committed nuisance or trespass based on "an intentional or negligent intrusion onto or into the property of another." *Id.*, p. 13. But once again, they have failed to show that any respondent used their household water abnormally, or

with any knowledge that it would back up into the Donner home. In fact, the Donners admitted that there was no condition that caused the backup other than the intrusion of tree roots into the line, on the Blue property. CP 53 (Interrogatory No. 7, and answer). There is absolutely no showing that the Kims did or could have done anything to cause or allow (or to prevent) the natural growth of tree roots on the Blue property. Nor is there any showing that the Kims did anything at all beyond normal and ordinary use of their household water and drains, to "cause" the damage suffered by the Donners. This is simply a case in which the Donners have been damaged, and they blame anyone but themselves. But the mere occurrence of damage does not permit an inference of negligence. *Marshall v. Bally's Pacwest Inc.*, 94 Wn.App 372, 388 (1999). More is required, but appellants have not provided more.

If appellants' negligence claim fails due to absence of any knowledge requiring respondents to act to avoid harming the Donners, their claims of negligent trespass or negligent nuisance must fail for the same reason. And if there is a lack of knowledge that is fatal to a *negligent* trespass or nuisance claim, then there can certainly be no *intentional* trespass or nuisance claim.

g. Claim for injunctive relief fails.

The Donners failed at the trial court to offer any basis for

injunctive relief, and also failed to specify exactly what relief they sought. CP 203-13. Rather than clarify what they were seeking in their briefing to this Court, they simply argue that respondents "presumably have no intention of contributing toward maintenance" and then cite to a case that has nothing to do with whether there is a duty to contribute toward repair of the damaged sewer line. *Appellant's Brief*, p. 15. This section, brief as it is, is disingenuous to the extreme. None of the respondents, to the knowledge of the Kims, deny a duty to pay a share of the repair cost (whether denominated "repair" or "maintenance"), and in fact all agreed to quantify their contributions in the order on summary judgment entered in the trial court. CP 251-54. The Kims have tendered that amount to the Donners, and that payment has not been returned or rejected. To the extent that appellants contend that the respondents do not intend to comply with the trial court's order to pay a share of the repair cost, the contention is specious.

To the extent that section IV.E.5 of the Appellants' Brief seeks any injunctive relief other than payment of a share of the repair cost, it should be rejected for failure to request any specific relief or demonstrate grounds for it. RCW 7.40.020 addresses the grounds for issuance of injunctive relief. The Donners failed at the trial court to make any showing of the need for an injunction, or what that relief should consist of, and they have

repeated that failure in their Appellants' Brief. The trial court properly declined to order any injunctive relief.

IV. CONCLUSION

Appellants failed at the trial court, and fail here, to establish any duty on the part of any user of the common line to inspect the line or take any act to maintain the line before the backup of sewage into the Donner home. They make no showing of any knowledge, or reason to know, of any impending blockage of the common line under the Blue property. They make no showing that the "upstream" users knew of any blockage as they used their household water in the normal course, or that waste water was backing up into the Donner home. Lacking any such showing, there was no duty on the part of the Kims, or any respondent, to act to find or remove the blockage, or to stop using their household water to avoid having it back up into the Donner home.

These facts are fatal to each of the claims asserted. Whether for negligence, nuisance, trespass or breach of easement, the absence of any knowledge of a problem, combined with the total absence of any legal duty to proactively inspect the inside of the sewer line, made dismissal on summary judgment appropriate. The order of the trial court should be affirmed.

Respectfully submitted on this 8th day of July, 2014.

Wood, Smith, Henning, and Berman, LLP



Gordon G. Hauschild, WSBA #21005
Attorneys for Respondents Kim

520 Pike St., Ste. 1205
Seattle, WA 98101
206-204-6800