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Montrose County District Court The Honorable Judge Dennis Friedrich Case Number 2006 CV 39	▲ Court Use Only ▲
Plaintiffs-Appellants: Lester Sanderson and Joan Sanderson v. **Defendant-Appellee:** Heath Mesa Homeowners Association	**Case No: 07 CA 236**
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ANSWER BRIEF OF DEFENDANT/APPELLEE

Submitted this 13 day of July, 2007.

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1. Whether the trial court committed reversible error by allowing Defendant to amend its answer, by adding the affirmative defense of statute of limitations.

2. Whether the trial court committed error by finding that Defendant's conduct did not constitute a continuing tort.

3. Whether the trial court committed reversible error by denying Plaintiffs' claim for damages.

STATEMENT OF THE CASE

This case involves an irrigation pipeline owned by Defendant which crosses Plaintiffs' property. Plaintiffs, Lester and Joan Sanderson ("Plaintiffs" or "Sanderson"), filed their complaint on February 28, 2006. Plaintiffs alleged that Defendant's pipeline was wrongfully placed on their property; that the pipe had leaked; and that the leak caused damage to Plaintiffs' property. Plaintiffs' Complaint stated five claims for relief: quiet title action, declaratory judgment, trespass, nuisance, and

mandatory injunction. Vol. I, pp. 10-13. Plaintiffs filed an amended complaint on April 23, 2006, alleging the same five claims for relief. Vol. I, pp. 16-19. Defendant, Heath Mesa Homeowners Association ("Defendant"), filed its answer to the amended complaint on June 5, 2006. Vol. I, pp. 27-29. Defendant admitted the existence of the pipeline, but denied Plaintiffs' claims for relief.

Plaintiffs filed their initial Rule 26 Disclosures on July 6, 2006. Vol. I, pp. 39-43. They then filed five supplemental Rule 26 Disclosures (only the first supplemental disclosure appears in the record, at Vol. I, pp. 55-57). The second supplemental disclosure, dated November 1, 2006 (see Defendant's Reply to Plaintiffs' Opposition Brief regarding Amended Answer, Vol. I, pp. 109-110), disclosed Plaintiffs' claim for damages in the amount of $94,965.80.

Defendant then sought leave to amend its answer, Vol. I, pp. 69-70, to add the affirmative defense of statute of limitations. This amendment was opposed by Plaintiffs, but ultimately granted by the Court on December 11, 2006. Vol. I, p. 123.

The case was tried to the Court on December 20 and 21, 2006. At the conclusion of the trial, the Court found that Defendant had an easement to take water across Plaintiffs' property, but had caused unreasonable damage to the servient estate. Vol. V, p. 146, ll. 21-25. Consequently, Plaintiffs were granted an injunction, and

Defendant was ordered to move the pipeline. Vol. V, p. 148, ll. 5-7.

With respect to damages, the Court found that Plaintiffs had not met their burden of proof. Vol. V, p. 154, l. 7. The Court found that, although Defendant's pipeline had caused some of the damage, Plaintiffs had not proved how much of the damage was attributable to Defendant's actions. Vol. V, p. 155, ll. 5-18. The Court further found the damages were barred by the statute of limitations. Vol. V, p. 155, ll. 19-22.

Plaintiffs then filed this appeal. Defendant filed a cross-appeal, but that has since been dismissed at Defendant's request.

STATEMENT OF FACTS

Plaintiffs own 40 acres of real property in Montrose County, Colorado. They purchased the property from Howard Heath in 1978. The Heath property was originally comprised of 160 acres; Heath retained ownership of 120 acres, east of Plaintiffs' property, after the sale to Plaintiffs. Vol. IV, p. 176. Heath currently owns 36 acres, the remainder having been sold to various parties over the years. Vol. IV, p. 176. Heath is the predecessor in interest to the Defendant.

When Plaintiffs purchased the property, there was an historic easement for an irrigation ditch across Plaintiffs' property, for the benefit of the remainder of the Heath

property. Vol. IV, pp. 18-19. This ditch had been in place for many years and remained in its historic location until 1988. Vol. IV, pp. 18-19. Joan Sanderson irrigated her property and that of Howard Heath, using the ditch to transport water for that purpose. Vol. IV, p. 179, ll. 9-12.

In 1987, Plaintiffs and Heath decided to split their water and use separate pipelines for water delivery. Vol. IV, pp. 33-34. Plaintiffs laid their pipeline in the fall of 1987 (Vol. IV, p.36), and Heath's pipeline was laid in the spring of 1988 (Vol. IV, p. 41, l. 2). Heath placed the pipeline in a location other than the historic location of the easement, and Plaintiffs acquiesced in this change of location. Vol. IV, p. 40, ll. 9-18; Vol. IV, p. 105, ll. 3-9. After Heath placed his pipeline, Plaintiffs planted an orchard in the area of the pipeline. Vol. IV, p. 49, ll. 1-2.

The pipeline, as located in 1988, went across the northwest corner of Plaintiffs' property. Vol. II, Plaintiffs' Exhibit 20. It went down a hillside on Plaintiffs' property, then onto property owned by a third party named Steffens, north of Plaintiffs' property. Vol. II, Plaintiffs' Exhibit 20.

In time, the pipe leaked and was repaired by Defendant. There is dispute as to the exact dates. Joan Sanderson testified the first leak occurred in 1994 (Vol. IV, p. 54), while Mark Mercer and Al Miller, members of Defendant, testified the first leak

occurred in 1995 (Vol. V, pp. 81 and 88). Defendant made repairs to the pipeline in 1995. Vol. V, p. 89, ll. 9-21. Further leaks occurred, the most recent being in 2006, and Defendant was able to effect repairs each time. See generally Vol. V, pp. 89-96. The leaks were all at the very edge of Plaintiffs' property, affecting only a portion of the hillside, 150 feet by 150 feet in area. Vol. IV, p. 131, ll. 20-22.

SUMMARY OF ARGUMENT

The trial court did not abuse its discretion by allowing Defendant to amend its answer to assert the affirmative defense of statute of limitations. This matter is within the sound discretion of the trial court.

The trial court did not err in finding there was not a continuing trespass on Plaintiffs' property. The Court properly found that Defendant had an easement to take water across the Plaintiffs' property. The trial court found that Defendant's use of the easement had caused unreasonable damage to the servient estate. Thus, the trial court granted a mandatory injunction requiring Defendant to move its pipeline. This ruling was based on property law, not tort law. There is no inconsistency in the Court granting the mandatory injunction but denying Plaintiffs' damage claim.

Finally, the Court did not abuse its discretion by finding that Plaintiffs had not met their burden of proof with respect to damages.

ARGUMENT

I. The Trial Court Did Not Abuse Its Discretion By Allowing Defendant To Amend Its Answer.

A. Standard of Review

This issue is a question of law. The decision to grant or deny a motion to amend is within the trial court's discretion and should not be reversed without a showing of abuse of discretion. *In re: Estate of Blacher*, 857 P.2d 566 (Colo. App. 1993).

B. Discussion

Plaintiffs served the amended complaint on April 23, 2006. That complaint contained five claims for relief. Vol. I, pp. 16-19. Three of the five claims for relief included the general statement, "As a direct and proximate result of Defendant's conduct, Plaintiffs have been damaged, including consequential damages, economic damages, diminution of value, and other damages which Plaintiffs will prove at trial." Vol. I, pp. 17, 18. Plaintiffs' amended complaint concluded with a prayer for, among other things, "consequential damages as may be proven at trial." Vol. I, p. 19. The amended complaint did not put Defendant on notice as to the specific amount of damages being claimed.

Plaintiffs filed their initial Rule 26 disclosures on July 6, 2006. This initial disclosure contained the following statement as to damages: "Plaintiffs are having their property inspected by an engineer. After this inspection, Plaintiffs will inform Defendant with more specificity of the nature and extent of their damages." Vol. I, p. 41. One week later, the parties held a status conference with the trial judge. At that time, the matter was set for trial to the Court as a second setting on August 31 and September 1, 2006. The first setting was scheduled for October 25 and 26, 2006. Vol. I, p. 44.

Plaintiffs did not disclose the nature and extent of their damages until their second supplemental Rule 26 disclosures, filed November 1, 2006. See Motion for Order Allowing Defendant to File Amended Answer, Vol. I, pp. 69, 70. This filing was well after the trial setting conference held in July 2006. Defendant's Motion to File Amended Answer was filed within 20 days of receiving the disclosure of Plaintiffs' request for damages.

C.R.C.P. 15 governs amended and supplemental pleadings. The rule provides, "A party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." C.R.C.P. 15 (a). This is still the law, even after the adoption of C.R.C.P. 16. See *Civil*

Service Commission v. Carney, 97 P.3d 961 (Colo. 2004). In *Carney*, the court made it clear that C.R.C.P. 15 (a) still governs the amendment of pleadings, regardless of the strictures of C.R.C.P. 16 (b)(8). Indeed, *Carney* involved the amendment of a complaint after remand from the court of appeals to the trial court, a circumstance which is undeniably past the time limits of C.R.C.P. 16 (b)(8).

The Court should grant a motion to amend unless it will result in unavoidable prejudice to the adverse party. *Eagle River Mobile Home Park Limited v. District Court*, 647 P.2d 660 (Colo. 1982). Plaintiffs have not claimed nor demonstrated any prejudice that arose from the amendment of Defendant's answer. They did not request a continuance of the trial date. Indeed, the statute of limitations defense did not require Plaintiffs to present additional evidence, as the applicability of the defense is a question of law. Plaintiffs' opening brief only makes the conclusory statement that "it is obvious" that they suffered prejudice from the amendment. See Opening Brief of Plaintiffs/Appellants, p. 13.

The trial court did not err by allowing Defendant to amend its complaint. There was no prejudice to Plaintiffs. This Court should not reverse the trial court's ruling.

II. The Court Did Not Err In Finding That Defendant's Use Of Its Pipeline Was Not A Continuing Tort.

A. Standard of Review

The question whether placement of Defendant's pipeline constituted a continuing trespass is a question of law. Thus, this Court must review the issue *de novo*. *Telluride Resort and Spa, L. P. v. Colo. Dept. of Revenue*, 40 P.3d 1260 (Colo. 2002).

B. Discussion

In this case, Defendant and its predecessor had an easement for an irrigation ditch to carry water across Plaintiffs' property to Defendant's property. In 1988, Defendant's predecessor switched from an open irrigation ditch to a pipeline to bring the water to his property. The pipeline was not placed in the historic location of the ditch, with the consent of Plaintiffs. Vol. IV, p. 40, ll. 9-18; Vol. IV, p.105, ll. 3-9. The trial court found that the Defendant had an easement to take water across the Plaintiffs' property. Vol. V, p. 146. The Court went on to find that "an owner of an easement may make reasonable use of the easement but may not cause unreasonable damage to the servient estate." Vol. V, p. 146.

"The owner of [an] easement may make any use of the easement

(including maintenance and improvement) that is reasonably necessary to the enjoyment of the easement, and which does not cause unreasonable damage to the servient estate or unreasonably interfere with the enjoyment of the servient estate." *Lazy Dog Ranch v. Telluray Ranch Corp.*, 965 P.2d 1229 (Colo. 1998), citing *Bijou Irrig. Dist. v. Empire Club*, 804 P.2d 175 (Colo. 1991).

Plaintiffs argue that the trial court should have found that a continuing tort existed and that thus the statute of limitations had not run. However, trespass is, by definition, the use of someone else's property without permission. Here, Defendant had an easement across Plaintiffs' property for its pipeline. Defendant was exercising its property rights, not trespassing on another's right. Although the holder of an easement does not hold title to the land over which the easement is exercised, the holder has the right to use the land consistent with the grant of the easement. *Clinger v. Hartshorn*, 89 P.3d 462 (Colo. App. 2003). Since Defendant had the right to use its easement across Plaintiffs' property, there was not a trespass.

It is clear from the oral findings of the trial court that the court relied on property law regarding easements, rather than on tort law regarding trespass. See Vol. V, pp. 142–156. The trial court ruled on two basic and distinct issues. First, alignment of the pipe; secondly, damages. Vol. V, p. 142. The Court then discussed the issue of

pipe alignment at length, using language about easements. Vol. V, pp. 143 – 153. The Court did not find that a trespass had occurred by reason of Defendant's pipeline.

The Court then turned to the issue of damages and found that the statute of limitations had run. Vol. V, p. 155. The applicable statute is C.R.S. §13-80-102 (1) (a), which adopts a two-year statute of limitations for all tort actions, "including but not limited to, actions for negligence, trespass . . . ."

The Court did not err in finding that the statute of limitations had run. A cause of action for trespass for escaped water accrues when the damage from the water is visible. *Hickman v. North Sterling Irrigation District*, 748 P.2d 1349 (Colo. App. 1987); *Middelkamp v. Bessemer Irrigating Company*, 46 Colo. 102, 103 P. 280 (1909). This rule was not changed, but was explained and recognized by, *Hoery v. United States*, 64 P.3d 214 (Colo. 2003). There, the Court stated, "Colorado law recognizes the concepts of continuing trespass and nuisance for those property invasions where a defendant fails to stop or remove continuing, harmful physical conditions that are wrongfully placed on a plaintiff's land. The only exception is a factual situation – such as an irrigation ditch or a railway line – where the property invasion will and should continue indefinitely because defendants, with lawful authority, constructed a socially beneficial structure intended to be permanent." *Hoery* at 220.

Here, the pipeline is analogous to and serves the same purpose as an irrigation ditch. Thus, the concept of continuing tort does not apply. The statute of limitations ran two years after the seepage from the pipeline was first visible. By Plaintiffs' own admission, the seepage was visible in 1995. Thus, the applicable two-year statute of limitations expired in 1997. Plaintiffs could not sue for damages after that date.

III. The Trial Court Did Not Commit Reversible Error By Denying Plaintiffs' Claim for Damages.

A. Standard of Review

The question whether Plaintiffs met their burden of proof with respect to the causation issue is a question of fact for the trial court. Its findings should not be reversed unless clearly erroneous and not supported by the record. *Bockstiegel v. Board of County Com'rs of Lake County*, 97 P.3d 324 (Colo. App. 2004).

B. Discussion

To collect damages, Plaintiffs must show their damages were caused by a tortious act of Defendant. See *City of Westminster v. Centric-Jones Constructors,* 100 P.3d 472 (Colo.App. 2003). It is the Plaintiffs' burden of proof to itemize their damages and explain how the Defendant's actions were responsible for those damages.

Here, Plaintiffs submitted only a bill for restoring the entire hillside, not the portion which Defendant's pipeline affected.

The trial court, in its oral findings, stated, "Clearly, in order to get the property back to the way it was is going to cost some money; however, is that necessarily the fault entirely of the Defendants? I don't think so. I think there has been some natural slippage in this and it's not all due to the pipe. The pipe certainly has caused some damage, to what extent hasn't been shown." Vol. V, p. 154, ll. 15-20. In other words, the Court found that leaking from the pipeline was a cause of Plaintiffs' damages; it did not find that the leaking pipeline was the cause of Plaintiffs' damages.

Plaintiffs, in their opening brief, cite the Court to several civil jury instructions. First, they refer to the elements of trespass, CJI-CIV. 4th 18:1. This instruction does not apply in this case because the trial court did not find that a trespass had occurred.

Next, Plaintiffs refer to CJI-CIV. 4th 9:18 and 9:19. These two instructions are found in Chapter 9, dealing with negligence claims. Again, this is not a case of negligence.

Plaintiffs argue that, "a Plaintiff does not have to prove causation with

exactitude." Plaintiffs cite two cases for this proposition, *Kaiser Found. Health Plan v. Sharp,*741 P.2d 714 (Colo. 1987) and *Lyons v. Nasby,* 770 P.2d 1250 (Colo. 1989). However, these are negligence cases, and thus, do not provide guidance in this matter.

Plaintiffs claim that it was the Defendant's burden of proof to show it was not responsible for all of Plaintiffs' damages. Plaintiffs cite another jury instruction for this proposition, CJI-CIV. 4th 6:8. That jury instruction, titled "Aggravation of pre-existing condition," has no relevance to this case. Moreover, even assuming the trial court had found a trespass, comparative negligence is not a proper issue for consideration on a trespass claim. *Burt v. Beautiful Savior Lutheran Church of Broomfield,* 809 P.2d 1064 (Colo. App. 1990).

In sum, Plaintiffs cite no authority for their argument that Defendant should be liable for the full amount of damage, regardless of the lack of proof that Defendant was liable for the full amount of damage. The trial court found, with ample support in the record, that Plaintiffs did not meet their burden of proof with respect to damages. This finding of fact may not be reversed. *Bocksteigel, supra.* Plaintiffs did not prove how much of the damage was caused by Defendant. Accordingly, the Court did not err by refusing to award damages to Plaintiffs.

CONCLUSION

For the reasons stated above, there was no error in the trial court rulings. The Court acted within its discretion by granting Defendant's motion to amend its answer. The trial court was correct in finding that a continuing trespass did not occur and consequently, the statute of limitations had run. Finally, there was insufficient evidence presented by Plaintiffs to support an award of damages.

Defendant requests that the trial court's order be affirmed in all respects. Defendant notes that a remand for a new trial as to the damage issues is not appropriate as Plaintiffs have had their chance to present their evidence on the issue. See Plaintiffs' opening brief, page 22.

Respectfully submitted this 13th day of July, 2007.

CLAY AND DODSON, P.C.

By _____
Aaron R. Clay

CERTIFICATE OF MAILING

I hereby certify that I have this 13TH day of July, 2007, placed in the United States mail with proper postage attached a copy of the foregoing Motion, and addressed as follows:

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