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Court of Appeals, State of Colorado
2 East 14th Avenue,
Denver, Colorado 80203
(303) 837-3785

Montrose County District Court
The Honorable Judge Dennis Friedrich

Case Number 2006-CV-39

Plaintiffs-Appellants: Lester Sanderson and
Joan Sanderson

v.

Defendant-Appellee: Heath Mesa Homeowners
Association

Attorneys for Plaintiffs/Appellants:

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FILED IN THE
COURT OF APPEALS
STATE OF COLORADO

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Clerk, Court of Appeals

▲ COURT USE ONLY ▲

Case Number:

NOTICE OF APPEAL

Plaintiffs-Appellants, LESTER SANDERSON and JOAN SANDERSON,
by through their attorneys, Young & Hockensmith, P.C., hereby submit their
Notice of Appeal.

Trial Court: Montrose County District Court

Trial Judge: The Honorable Judge Dennis Friedrich

Trial Court Number: 2006-CV-39

NATURE OF THE CASE

A. NATURE OF THE CONTROVERSY

Plaintiffs-Appellants, Sandersons, own 40 acres of real property in the unincorporated area of Montrose County, Colorado. Approximately 10 acres of the Sanderson property is on top of and the east slope of High Mesa and the rest is rolling meadows to the east of the escarpment of High Mesa. There is an historic easement for irrigation water which runs from west to east across the Sanderson property. In the spring of 1988 without permission from the Plaintiff-Appellants, Howard Heath, the predecessor-in-interest to the Defendant-Appellee, changed the alignment of an irrigation ditch so that the Heath irrigation water now went through an underground pipeline across the northwest corner of the Sanderson property. This pipe daylights on the edge of High Mesa, which is an area prone to landslides and it is very sensitive as to the amount of underground water in the area. From the time of its installation in 1988, the pipe leaked and beginning in 1994, this pipe broke and water ran into the surrounding soil. Because of the broken pipe, a portion of the Sanderson property has been damaged by earth movement and slid off towards the east. The pipe has been breaking from 1994

through the present on a continuous basis and the release of water has caused continuing damage on the Sanderson property.

Plaintiffs-Appellants, Sandersons, filed a declaratory judgment action as well as a quiet title action to have the Court declare the rights of the parties as to the underground pipe. Sanderson also filed a trespass claim against the Defendant-Appellee for damages based upon the location and the leaking pipe. The Court granted a permanent injunction against the Defendant-Appellee on the basis that the pipe has caused significant damage to the Sanderson property and therefore was an unreasonable burden on the Sanderson property. The Court ordered that the pipeline be moved back to the historic easement, which avoided the sensitive hillside in question.

The Court denied Sandersons' request for money damages even though their evidence of cost of repair was reasonable, on the basis of lack of proof of percentage of causation from the pipeline as opposed to other sources of water. The court also found that Sandersons' claims were barred by the two year statute of limitations, and that Defendant-Appellee's conduct did not constitute a continuous tort.

B. DECISION BEING APPEALED AND BASIS FOR APPELLATE JURISDICTION

Plaintiffs-Appellants appeal the Montrose County District Court's Order, dated December 22, 2006. This Court has jurisdiction to hear this appeal pursuant to C.A.R. 3.

C. WHETHER THE ORDER RESOLVED ALL ISSUES PENDING BEFORE THE TRIAL COURT.

The District Court's Order of December 22, 2006 resolved all issues pending before the Court in Montrose County District Court Case Number 2006-CV-39. The Court has directed the parties to work on an easement agreement, but the Court characterized its order of December 22, 2006, as a final order. There is an outstanding motion for costs at this time.

D. WHETHER ORDER IS FINAL

The Montrose County District Court's Order of December 22, 2006, is a final order.

E. DATE OF ORDERS

The Montrose County District Court Order was entered on January 2, 2007, *nunc pro tunc*, to December 22, 2006.

F. GRANT OF EXTENSIONS FOR POST-TRIAL RELIEF

There have been no extensions requested or granted to file a motion for post-trial relief.

G. POST-TRIAL MOTIONS

There were no post-trial motions.

H. DATE OF DENIAL OF POST-TRIAL RELIEF

No post-trial motions were filed.

I. EXTENSION OF TIME TO FILE NOTICE OF APPEAL

There have been no extensions requested or granted to file a notice of appeal.

ADVISORY LIST OF ISSUES ON APPEAL

As of the date of this Notice of Appeal, Plaintiffs-Appellants intend to raise the following issues on appeal:

1. Whether the Trial Court was in error in not finding the Defendant's conduct constituted a continuing tort, when the Court found that a mandatory injunction should enter in favor of the Plaintiffs and against the Defendant because of the continuous damage caused by the pipeline on Plaintiffs' property.
2. Whether the Trial Court was in error in denying Plaintiffs' damages because the Trial Court asserted that the Plaintiffs had not proven a close enough nexus between the activity of the Defendant and the damage caused to the Plaintiffs' property, even though Plaintiffs proved that water released from

defendant's pipe was a significant contributing factor to the damage of their property.

TRANSCRIPT OF DISTRICT COURT PROCEEDINGS

A transcript of proceeding is necessary to resolve this appeal. The Court Reporter's name is Christine McKinney. It is anticipated that the transcript will be approximately three hundred and fifty pages in length.

PRE-ARGUMENT CONFERENCE

A pre-argument conference is not requested.

TRIAL CONFERENCE

The following counsel appeared in the Trial Court proceedings:

Attorneys for Plaintiffs-Appellants:

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APPENDIX

1. Montrose County District Court Order dated December 22, 2006.

DATED this 1st day of February, 2007.



Earl G. Rhodes, #6723

Jeffrey A. Wells, #34132

Attorneys for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on the 1st day of February, 2007, a true and correct copy of the foregoing **NOTICE OF APPEAL** was served by Federal Express, postage prepaid, to the following:

Colorado Court of Appeals
2 E. 14th Avenue
Denver, CO 80203
(Original plus 5 copies)

Aaron R. Clay, Esq.
Clay & Dodson, P.C.
415 Palmer Street
P.O. Box 38
Delta, CO 81416
(Attorney for Appellee)

Advisory copy:

Clerk of the Montrose County District Court
Montrose County Justice Center
1200 N. Grand Avenue Bin A
Montrose, CO 81401


Debbie Liggett

APPENDIX NO. 1

<p>DISTRICT COURT, MONTROSE COUNTY, COLORADO Court Address: 1200 N. Grand Avenue Montrose, CO 81401 Phone Number: (970) 252-4300</p> <p>LESTER SANDERSON and JOAN SANDERSON, Plaintiffs,</p> <p>v.</p> <p>HEATH MESA HOMEOWNERS ASSOCIATION, Defendants.</p> <p>Attorney for the Plaintiffs:</p> <p>Earl G. Rhodes, No. 6723 YOUNGE & HOCKENSMITH, P.C. 743 Horizon Court, Suite 200 Grand Junction, CO 81506 Phone Number: (970) 242-2645 Fax Number: (970) 241-5719 E-mail: earl@youngelaw.com</p>	<p>EFILED Document CO Montrose County District Court 7th JD Filing Date: Jan 2, 2007 2:30PM MST A COURT USE ONLY Filing ID: 15320465 Review Clerk: Donna Sloan</p> <p>Case Number: 2006 CV 39</p> <p>Division:</p> <p>Courtroom:</p> <p>E-FILED In The Combined Court JAN 02 2007 Seventh Judicial District</p>
<p>ORDER OF COURT AND JUDGMENT</p>	

This matter came on for trial on December 20 and 21, 2006. Plaintiffs were present in person and represented by counsel, Earl G. Rhodes of Young & Hockensmith, P.C. Defendant was present by its representative, Mr. Alan Miller and by counsel Aaron Clay. The Court heard two days of testimony. The Court announced its oral ruling on the afternoon of December 22, 2006. The Court hereby incorporates herein its oral statements as to findings of fact and conclusions of law.

Therefore, the Court enters its order as follows:

1. The Court hereby finds that the subject underground irrigation pipe was installed in the spring of 1988. Therefore, the 18 year period of adverse possession against the Plaintiffs has not run.
2. The Court finds that the subject pipeline has caused significant damage to the

Plaintiffs property and because of this is an unreasonable burden upon the Plaintiffs' property and therefore must be moved. Therefore, a mandatory injunction shall enter in favor of the Plaintiffs and against the Defendant which requires that the pipe be moved to the historic north ditch location on the Plaintiffs property, to a point where it intersects the Steffen's easement, as such location was identified in Plaintiffs' Exhibit D-1 *OK*

The parties shall enter into an easement agreement, which shall be approved by the Court.

3. The Court finds that Plaintiffs have shown that their property has been damaged by the pipeline and there is evidence of the reasonable cost of repair. However, the Court hereby finds that the Plaintiffs have not proved causation of their damages with sufficient specificity in order for the Court to award damages. The Court hereby relies upon a Colorado construction defect case which held that it was the Plaintiffs burden to prove that all of the alleged damage was due to defendant's conduct. Although Plaintiffs' expert, Mr. Griepentrog, testified that the construction and condition of the pipeline was a significant contributing factor to the instability of the hillside, this was not adequate proof of causation of damages since there are other potential sources of water in the area which could have been the cause of damages to the Plaintiffs' property. The Defendant is not responsible for Plaintiffs' damages under these circumstances.

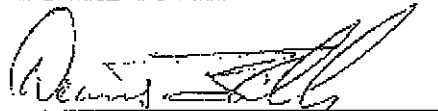
4. The Court hereby adopts the arguments of the defendant and asserts that Plaintiffs claims are barred by the statute of limitations. The Court hereby finds that there was no continuing tort under the circumstances of this case.

ORDER AND JUDGMENT

The court concludes that judgment shall enter in favor of Plaintiffs and against Defendant for a mandatory injunction to move the subject pipeline. Plaintiffs claims are otherwise denied. ~~The Plaintiffs are entitled to recover their costs.~~ *OK*

January 21, 2007 *OK* Nunc pro tunc to December 22, 2006.

BY THE COURT



Judge