

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:

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

FILED IN THE
COURT OF APPEALS
STATE OF COLORADO

JUN 13 2007

Clerk, Court of Appeals

▲ COURT USE ONLY ▲

Case Number: 07 CA 236

OPENING BRIEF OF PLAINTIFFS/APPELLANTS

Submitted this 12th day of June, 2007.

Earl G. Rhodes, #6723
YOUNGE & HOCKENSMITH, P.C.
743 Horizon Court, Suite 200
Grand Junction, CO 81506
(970) 242-2645
ATTORNEYS FOR PLAINTIFFS/APPELLANTS
Lester Sanderson and Joan Sanderson

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii-iv
STATEMENT OF ISSUES PRESENTED	2
1. Whether the trial court committed reversible error by allowing defendant to amend its answer right before trial, by adding a defense of statute of limitations.	2
2. 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 dominant easement causing a continuous unreasonable burden on the plaintiffs' property.	2
3. 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.	
STATEMENT OF THE CASE	3
STATEMENT OF FACTS	7
SUMMARY OF ARGUMENT	10

ARGUMENT	11
1. Standard of Review	11
2. The granting of defendant’s request to amend its answer, which was only nine days in advance of trial, was manifestly unjust	12
3. Defendant’s actions constituted a continuing tort and therefore the statute of limitation’s defense did not apply	14
4. Defendant’s conduct was a proximate cause of Sanderson damages and therefore their damage claim should have been allowed	18
CONCLUSION	21

TABLE OF AUTHORITIES

Cases

<i>Ajay Sports, Inc. v. Casazza</i> , 1 P. 3d 267 (Colo. App. 2000)	13
<i>Akin v. Four Corners Encampment</i> , 2007 WL 1150450 (Colo. App. 2007)	13
<i>Anderson v. Hyland Hills Park & Recreational Dist.</i> , 119 P. 3d 533, 535-36 (Colo. App. 2004)	11
<i>Awanderlust Travel, Inc. v. Kochevar</i> , 21 P. 3d 876 (Colo. App. 2001)	13
<i>Eagle River Mobile Home Park, Ltd v. District Court</i> , 647 P. 2d 660 (Colo. 1982).	12
<i>Hawley v. Mowatt</i> , 2007 WL 1017621 (Colo. App.)	15
<i>Hoery v. United States</i> , 64 P. 3d 214, 218 (Colo. 2003)	14, 15
<i>Kaiser Found. Health Plan v. Sharp</i> , 741 P. 2d 714 (Colo. 1987)	19
<i>Lazy Dog Ranch v. Telluary Ranch Corp.</i> , 965 P. 2d 1229 (Colo. 1998)	6, 7
<i>Lyons v. Nasby</i> , 770 P. 2d 1250 (Colo. 1989).	20

<i>People in the Interest of L.A.C.</i> , 97 P.3d 363 (Colo. App. 2004)	11
<i>Polk v. District Court</i> , 849 P. 2d 23 (Colo. 1993)	13
<i>Rojhani v. Meagher</i> , 2 P. 3d 554 (Colo. App. 2000)	13
<i>Telluride Resort and Spa, L.P. v. Colo. Dept. of Revenue</i> , 40 P.3d 1260 (Colo. 2002)	11
<i>Varner v. District Court</i> , 618 P. 2d 1388 (Colo. 1980)	13
<u>State Statutes</u>	
C.R.S. §§38-41-101 and 102	6
<u>Rules</u>	
C.R.C.P. 16(b)(8)	4, 12
<u>Other</u>	
CJI-Civ. 4 th 18:1	19
CJI-Civ. 4 th 6:8	20
CJI-Civ 4 th 9:18	19
CJI-Civ 4 th 9:19	19
<i>Prosser and Keeton on The Law of Torts</i> § 13 (5 th ed. 1984)	15
<i>Restatement of Property</i> , 3 rd ed.	6

Plaintiffs-Appellants, LESTER SANDERSON and JOAN SANDERSON, by and through their attorneys, Younge & Hockensmith, P.C., hereby file their Opening Brief:

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the trial court committed reversible error by allowing defendant to amend its answer right before trial, by adding a defense of statute of limitations.

2. 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 dominant easement causing a continuous unreasonable burden on the plaintiffs' property.

3. 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.

STATEMENT OF THE CASE

Plaintiffs-Appellants, Sandersons (“Sanderson”), own 40 acres of real property in the unincorporated area of Montrose County, Colorado, which area is approximately 7.5 miles northwest of the City of Montrose. Vol. II, Sanderson exhibit 9. Vol. II, Sanderson exhibit 14, p. 16. Approximately 10 acres of the Sanderson property is on top of and on the east slope of High Mesa and the rest is rolling meadows to the east of the escarpment of High Mesa. Vol. II, Sanderson exhibit 14, pp. 1-3. Vol. II, Sanderson exhibit 20. There is an historic easement for irrigation water for properties to the east of the Sanderson property, which easement runs from west to east across the Sanderson property. Vol. II, Sanderson exhibit 10 and Vol. II, Sanderson exhibit 5. This easement has been in place for many years and existed when the Sandersons purchased the property in 1978. Vol. II, Sanderson exhibit 7 and 8. J. Sanderson testimony, Vol. IV, pp. 18-19. Until 1988, the historic easement went to the south of the Sanderson home, directly down the escarpment and contoured to the north along the base of the escarpment. Vol. II, Sanderson exhibit 6.

In the spring of 1988 and without permission from Sanderson, Howard Heath, the predecessor-in-interest to the Defendant-Appellee (“Defendant”), changed the alignment of the irrigation ditch so that the Heath irrigation water

went through an underground pipeline across the northwest corner of the Sanderson property, where Sanderson had planted an orchard. J. Sanderson testimony, Vol. IV, pp. 40-41; pp. 48. Vol. II, Sanderson exhibit 20. Vol. II, Sanderson exhibit 2, p. 4 The pipeline day lighted on the edge of High Mesa, which is an area prone to landslides and it is very sensitive due to the amount of underground water in the area. Vol. II, Sanderson exhibit 14, p. 4. The digging of the trench and the poorly constructed pipeline changed the underground movement of water, there was more water under the Sanderson property than before, which caused the hillside to slide away. T. Griepentrog testimony, Vol. IV, p. 133. Vol. II, Sanderson exhibit 14, p. 9.

On February 28, 2006, Sanderson 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 proper location of defendant's easement. Vol. I, pp. 010-013; pp. 016-019. Defendant was served with a summons and amended complaint on April 23, 2006. Vol. I, p. 205. Sanderson also filed a trespass claim against the defendant for damages based upon the damage to their property from the relocation of the pipeline. Vol. I, pp. 016-019. Defendant filed an answer to the amended complaint on June 5, 2006, but did not assert the affirmative defense of statute of limitations. Vol. I, pp. 027-029. In accordance with C.R.C.P 16(b)(8), the

defendant was required to amend its answer not later than October 4, 2006. The parties made necessary disclosures, in which Sanderson referenced damage to their property. Vol. I, pp. 039-043. On July 13, 2006, the parties conferred with the trial court and set the matter for trial to begin not later than October 25, 2006. Vol. I, p. 044. The parties represented that the matter was ready to go to trial. The parties then stipulated to a continuance of the trial date, and the trial was re-set for December 20, 2006. Vol. I, pp. 048-050. Defendant did not make any motion to amend its complaint until November 17, 2006. Vol. I, pp. 069-070. Sanderson opposed the motion to amend. Vol. I, pp. 089-097. On November 28, 2006, the court allowed defendant to amend its answer and assert the affirmative defense of statute of limitations. Vol. I, p. 085. This was done before Sanderson could respond to the motion, an error which the court later acknowledged. Vol. I, pp. 106-108 and Vol. I, p. 123. After a hearing, and only nine days before trial, the trial court again ordered that defendant could amend its answer by asserting a statute of limitations defense. Vol. I, p. 123. A trial management order was signed on November 28, 2006. Vol. I, pp. 081-084.

On December 20, 2006 and December 21, 2006, trial was held in this matter. Vol. I, p. 127, pp. 128-129. Both sides presented witnesses and exhibits. On the afternoon of December, 21, 2006, the parties rested and the trial court

issued on oral ruling from the bench. Vol. I, pp. 202-209. At the court's direction a written order was prepared and signed by the court on January 2, 2007. Vol. I, pp. 128-129.

The trial court first found that Mrs. Sanderson was the most credible witness and that the pipeline was installed in the spring of 1988. Vol. I, pp. 128-129. The trial court found that Sanderson had not given consent to move the pipeline and that the eighteen-year statute of limitation on adverse possession had not run. C.R.S. §§38-41-101 and 102. The Court granted a permanent injunction against the defendant on the basis that the new location of the pipeline has caused significant continuing damage to the Sanderson property, and therefore was an unreasonable burden on the Sanderson property. Vol. I, pp. 128-129. The court's legal analysis was that an owner of an easement may make reasonable use of the easement, "but may not cause unreasonable damage to the servient estate." The court cited *Restatement of Property*, 3rd ed., and *Lazy Dog Ranch v. Telluary Ranch Corp.* 965 P. 2d 1229 (Colo. 1998). The court made a specific finding that the extent of the damage to the Sanderson property made the use of the easement unreasonable. *Id.*, p. 39, ll. 4 and pp. 22-25 through p. 40, ll. 1-3. Vol. I, pp. 203-209.

The Court ordered that the pipeline be moved back to the historic easement, which avoided the sensitive hillside in question. Vol. I, pp. 128-129.

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. *Id.* The court also found that Sandersons' claims were barred by the two-year statute of limitations, and that the presence of defendant's pipeline on the Sanderson property did not constitute a continuous tort. *Id.*

Sanderson filed a timely Notice of appeal with this court. Vol. I, pp. 155-166. Defendant has now moved its pipeline back to the historic easement and capped the pipeline at issue in this case. Defendant filed a cross-appeal, but that appeal has now been withdrawn. Vol. I, pp. 174-179.

STATEMENT OF FACTS

Sanderson owns the hillside in question, which is an escarpment on the eastern edge of High Mesa. Vol. II, Sanderson exhibit 14, pp. 1-3. High Mesa slopes to the east and has numerous agricultural uses on it. *Id.* The geologic composition of the hillside is gravel on top of shale. *Id.* Thus, water moves freely underground through the gravel and on top of the shale. *Id.* P. 4. The escarpment has slumped to a point of equilibrium, which was established a long time ago. T.

Griepentrog testimony, Vol. IV, p. 132, ll. 5-24. This escarpment area is very sensitive to loose water, and any variation from historic use can cause the escarpment to move. Vol. II, Sanderson, exhibit 14, p. 4. When water moved through the historic easement, there was no damage to the Sanderson property. Vol. II, Sanderson exhibit 4, 7/9.

Before 1988, the hillside in question was dry; now it has a grove of trees on it, which are nourished by the loose water from the pipeline. Vol. II, Sanderson exhibit 15, 1/15. Vol. II, Sanderson exhibit 15A. J. Sanderson testimony, Vol. IV, pp. 49-51. This was established by both testimony of Mrs. Sanderson, which the court found to be most credible, and by aerial photographs from government agencies. In 1988, Howard Heath built the pipeline without the benefit of any engineering. H. Heath testimony, Vol. IV, pp. 198-199. The wet area extends into the neighboring property on the north, Mr. Steffens' property. He testified the property had significantly changed since 1988 and has become much wetter. C. Steffens testimony, Vol. V, pp. 10-11.

According to the testimony of Tom Griepentrog, the pipeline was not constructed the way it should have been. T. Griepentrog testimony, Vol. IV, pp. 136, ll. 3-18. Just the presence of the trench for the pipeline was a cause of concern, since it cut through underground rock formations which moved water

from High Mesa to the escarpment. T. Griepentrog testimony, Vol. IV, pp. 121-123. Also, the pipeline broke on numerous occasions over the years, which sent loose water into the sub-soil. The documented dates of the breaks are 1994, 1995, 2003, and 2006. J. Sanderson testimony, Vol. IV, pp. 54; Vol. II, Sanderson exhibit 12. In 1994, a major crack in the ground appeared in the area of the pipeline which required Mr. Sanderson to use a bulldozer to push dirt up against the hill. J. Sanderson testimony, Vol. IV, p. 54, ll. 11-25, p. 55, ll. 1-5. The pipeline broke in 1995, and a Mr. King was sent in by the defendant to dig it up. J. Sanderson testimony, Vol. IV, p. 71. Vol. III, dexhibits B and C. After that, there were breaks in the pipeline every year, sometimes every two or three years. J. Sanderson testimony, Vol. IV, p. 72. Some of the repairs done by the defendant were improper, which resulted in more breaks. J. Sanderson testimony, Vol. IV, pp. 73-74. T. Griepentrog testimony , Vol. IV, pp. 136. Vol. II, Sanderson Exhibit 3, 8/9. Vol. II, Sanderson exhibit 15, 5/15, 10/15. The most recent break was 2006. J. Sanderson testimony, Vol. IV p. 76. Vol. II, Sanderson exhibit 8/9. Because of the presence of the defective pipeline, the ground in the orchard is sinking, which requires Sanderson to continually bring in dirt to keep the surface flat for irrigation. J. Sanderson testimony, Vol. IV, p. 76, ll. 13-19. Vol. II, Sanderson exhibit 15, 11/15. There is also a large depression in the ground

between the Sanderson property and the Steffens' property where the pipeline day lights. J. Sanderson testimony, Vol. IV, p. 77.

From the time of its installation in 1988, the Sanderson property sustained damage from underground free flowing water. J. Sanderson testimony, Vol. IV, pp. 50-52. Because of the relocation of the pipeline, a portion of the Sanderson property has slid off towards the east. The affected area is about 150 by 150 feet. J. Sanderson testimony, Vol. IV, p. 45, ll. 1-9; T. Griepentrog testimony, Vol. IV, pp. 131-132. Vol. II, Sanderson exhibit 16. A. Soucy testimony, Vol. IV, p. 168. The court found based on competent testimony that the cost of repair to this portion of the property was \$96,000.00. A. Soucy testimony, Vol. IV, pp. 162-163; p. 169.; Vol. II, Sanderson exhibit 16.

SUMMARY OF ARGUMENT

The trial court committed reversible error by allowing defendant to amend its answer to assert an affirmative defense of statute of limitations. This was done after defendant certified that the case was ready for trial, after the deadline for amendment of pleadings had past, and only nine days before trial. The trial court found that the burden of the easement on the servient estate was unreasonable because the pipeline was located in a sensitive geologic area and was poorly constructed without being properly engineered. The trial court entered a

mandatory injunction, which ordered defendant to move the pipeline back to the historic easement location. In spite of this, the trial court found that defendant's action was not a continuous tort, and denied plaintiffs' request for damage relief, even though the court found that Sanderson had presented competent evidence of damages. The trial court's ruling on one hand granting a mandatory injunction but also finding the defendant's conduct was not a continuous tort was inconsistent and reversible error. The trial court also denied plaintiffs' damages because the court found that plaintiffs had not proven a sufficient proximate cause between the fact of damages and the actions of the defendant. This was also reversible error.

ARGUMENT

1. Standard of Review

This appeal raises both issues of pure law and mixed issues of fact and law for this court's review. The appellate court is to defer to the trial court's credibility determinations and will not disturb its findings unless they are not supported by the record. *People in the Interest of L.A.C.*, 97 P.3d 363 (Colo. App. 2004). As to questions of law, the appellate court review is *de novo*. *Telluride Resort and Spa, L.P. v. Colo. Dept. of Revenue*, 40 P.3d 1260 (Colo. 2002).

In this case, all of Sanderson's arguments raise questions of law. The first argument as to amending the pleadings requires consideration of the trial court's

reasons for granting the same, but the determinative issue is Colorado law as to undue delay in requesting an amendment. The second argument involves review of numerous factual issues, but ultimately requires a determination of law as to application of the continuous tort doctrine. The third issue as to causation is a purely legal issue as to proof of proximate cause.

2. The granting of defendant's request to amend its answer, which was done only nine days in advance of trial, was manifestly unjust.

Sanderson served the amended complaint on defendant on April 23, 2006. Said complaint included reference to damages and a prayer for monetary relief. There can be no question that defendant was on notice of the damage claim from the date of service. The case was at issue on June 5, 2006, from which date the Rule 16 deadlines were determined. Not later than October 3, 2006, C.R.C.P. 16(b)(8), "All motions to amend pleadings... shall be filed." In this case, defendant represented that it was ready for trial on July 13, 2006, when this matter was set for trial. No request to amend was made until November 17, 2006, and the order allowing the amendment did not occur until December 11, 2006, only nine days before trial.

Rule 16(b)(8) has changed the historic view of amendment of pleadings. Before this amendment of the pleadings was to be freely given so that the ends of

justice could be met. *Eagle River Mobile Home Park, Ltd v. District Court*, 647 P. 2d 660 (Colo. 1982).

This lenient policy, however, is not without limits. *Polk v. District Court*, 849 P. 2d 23, at 25 (Colo. 1993). Leave to amend may be denied where, for example, the moving party has unduly delayed in seeking the amendment, the opposing party would be prejudiced if the amendment were permitted, or the amendment would be futile...

Varner v. District Court, 618 P. 2d 1388, 1390 (Colo. 1980); *Ajay Sports, Inc. v. Casazza*, 1 P. 3d 267, 273 (Colo. App. 2000); quote from *Akin v. Four Corners Encampment*, 2007 WL 1150450 (Colo. App. 2007).

After the deadline of C.R.C.P. 16 (b)(8), Sanderson had a right to rely upon the presumption in favor of the Case Management Order. *Awanderlust Travel, Inc. v. Kochevar*, 21 P. 3d 876 (Colo. App. 2001); *Rojhani v. Meagher*, 2 P. 3d 554 (Colo. App. 2000). The fact that Sanderson had obtained an opinion as to damages was to be anticipated from the start of the case and certainly from July 6, 2006, when Sanderson filed their Disclosure Certificate indicating this would be done. In addition, it is obvious that Sanderson suffered prejudice when this last minute order was entered against them. The pre-trial order had already been entered and Sanderson's list of witnesses and exhibits were fixed. Under these circumstances, the trial court abused its discretion by allowing defendant to amend its answer.

3. Defendant's actions constituted a continuing tort and therefore the statute of limitation's defense did not apply.

Colorado law is well settled that both nuisance and trespass causes of actions can be of a continuing nature. The trespass claim continues if the defendant causes something harmful to be placed on the plaintiff's property and defendant fails to remove the harmful condition or stop the invasion of plaintiff's property. A continuing tort occurs as long as the condition continues to cause the plaintiff's harm. *Hoery v. United States*, 64 P. 3d 214, 218 (Colo. 2003). "Under Colorado law, a tortfeasor's liability for continuing trespass and nuisance creates a new cause of action each day the property invasion continues." *Id.* At 223.

In *Hoery*, the Supreme Court reviewed a situation where a homeowner brought action under the Federal Tort Claims Act against the United States, alleging that negligent release of toxic chemicals from an air force base into the ground, which contaminated homeowner's nearby property. In reaching its conclusion, the court determined that defendant's conduct constituted a continuing trespass under Colorado law, and therefore the statute of limitations had not run on plaintiff's claim. After reviewing the elements of trespass and nuisance, the court delineated the basis of a continuing trespass, which is an exception to defense of the statute of limitations. The court said:

But in cases, for example, when the defendant erects a structure or places something on or underneath the plaintiff's land, the defendant's invasion continues if he fails to stop the invasion and to remove the harmful condition. In such a case, there is a continuing tort so long as the offending object remains and continues to cause the plaintiff harm. See W. Page Keeton et al., *Prosser and Keeton on The Law of Torts* § 13 (5th ed. 1984.)

In the context of trespass, an actor's failure to remove a thing tortiously placed on another's land is considered a "continuing trespass" for the entire time during which the thing is wrongfully on the land. Restatement (Second) of Torts §161 cmt. B. Until the thing tortiously placed on the land, or underneath the land, is removed, then liability for trespass remains. See 75 Amer. Jur. 2d Trespass § 26 (2002)....

For continuing intrusions-either by way of trespass or nuisance-each repetition or continuance amounts to another wrong, giving rise to a new cause of action. See Fowler V. Harper et al.; *The Law of Torts* § 1.7 (3d ed. 1996). The practical significance of the continuing tort concept is that for statute of limitations purposes, the claim does not begin to accrue until the tortious conduct has ceased. Hoery at pg. 218

Hoery has been cited with approval in *Hawley v. Mowatt*, 2007 WL 1017621

(Colo. App.), where the court considered the distinction between damages for a continuing tort and those for a permanent tort.

It is to be noted that the court in *Hoery* made a distinction between continuing torts and permanent torts and included within the latter category, "irrigation ditches." The court said that unique fact situations, including irrigation ditches and railroads, continuing damage is expected, but because the activity is socially useful, no exception to the running of the statute of limitations applies.

This exception to the continuing tort doctrine does not apply here because the offending instrument here, “the pipeline,” was not intended to leak, like an above ground ditch. Secondly, the pipeline was not within the historic easement, and thus had no right to be there.

Before 1988, the hillside in question was dry and stable. Vol. II, Sanderson exhibit 3, 1/5, 2/15. J. Sanderson testimony, Vol. IV, pp. 49-50, 51. After the defendant put the poorly constructed pipeline through the sensitive geologic area, the area became wet and started to slide. J. Sanderson testimony, Vol. IV, pp. 50-51. In addition, the pipe has been breaking on a continuing basis from 1994 through the present.

Mr. Griepentrog is a very experienced soils engineer, and he was recognized by the court and defendant’s counsel as an expert in his field. Vol IV, p. 116. Mr. Griepentrog engaged in several scientific tests, which provided a basis for his opinions. First, he dug test holes to see if there was water near the surface. Vol. II, Sanderson exhibit 13. One of the these test holes was in the orchard area, and it was dry. Vol. II, Sanderson exhibit 13, p. 1 and Vol. II, Sanderson exhibit 14, p. 8. Mr. Griepentrog also provided a soils report which described the general area and specific topography at issue in this case. Vol. II, Sanderson exhibit 14, pp. 1-4. Mr. Griepentrog pointed out that introducing soil moisture or disrupting the

existing pattern of surface or sub-surface water flow would impair slope stability. Sanderson exhibit 14, p. 4. In his summary in the soil report, Mr. Griepentrog pointed out: "Management of groundwater will be essential to the long-term performance of the foundation soils." Vol. II, Sanderson exhibit 14, p. 9.

Mr. Griepentrog testified that "mismanagement of water is the prime culprit in creating slope instability." T. Griepentrog testimony, Vol. IV, p. 125, ll. 11-20. Mr. Griepentrog testified that the pipeline was not properly constructed or designed. T. Griepentrog testimony, Vol. IV, pp. 129, ll. 20-25, p. 130, ll. 1-14. Breaks in the line had occurred over a long period of time. T. Griepentrog testimony, Vol. IV, p. 130, ll. 17-25, p. 131, ll. 1-14. Although historically, the hillside had reached equilibrium, the introduction of water into the hillside had caused it to fail, which process is continuing and ongoing. T. Griepentrog testimony, Vol. IV, p. 132, ll. 2-24. Mr. Griepentrog testified it was the presence of the pipeline which caused the soil disturbance. T. Griepentrog testimony, Vol. IV, p. 133, ll. 1-10.

Shortly after the pipeline was installed in 1988, the Sanderson property began showing evidence of damage from loose underground water. Crevices and sinkholes appeared and then an area of 150 by 150 feet begin to slump away from the hillside. This was all due to the presence of a poorly constructed pipeline,

being put through a sensitive geologic area. The trial court found that there was so much damage that the existence of the easement on the Sanderson property was unreasonable. At the time of trial the pipeline was still in operation and still causing damage to Sanderson. Under these conditions, the trial should have found that a continuing tort existed, and not have dismissed Sanderson's damage claim.

4. Defendant's conduct was a proximate cause of Sanderson damages and therefore their damage claim should have been allowed.

The court ruled that Sanderson's damage claim could not stand since Sanderson had not proven a sufficient factual nexus between the condition of the pipeline and the damage to their property. The trial court was not very articulate about this, and said:

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.

Court Order of January 2, 2007, Record at 129.

Defendant has presented evidence as to other sources of water, other than the leaking pipeline. But the premise of the trial court injunction ruling was that

the servient estate was so damaged by the presence of the pipeline, that the defendant's use of Sanderson property was unreasonable. Thus, the trial court agreed with Sanderson that loose water from the pipeline and water channeled to the wet hillside by the path of the pipeline was the cause of Sanderson's damages. Explicit in the court's ruling is the finding that defendant's pipeline was the cause of Sanderson's damages.

The trial court's ruling is inconsistent with the law of Colorado as to causation of damages. The elements of trespass include causation: CJI-Civ. 4th 18:1, Trespass-elements of liability (3). However, there is no instruction specifically as to trespass claims as to causation. CJI-Civ 4th does contain specific causation instructions as to negligence claims. CJI-Civ 4th 9: 18 and 9:19 are directly on point. CJI-Civ 4th 9:18 states:

The word "cause" as used in these instructions means an act or failure to act which in natural and probably sequence produced the claimed injury. It is a cause without which the claimed injury would not have happened.

CJI-Civ 4th 9:19 states:

More than one person may be responsible for causing damages. If you find that the defendant was negligent and that his negligence caused the damage to the plaintiff, it is not a defense that some third person's negligence might also have been a cause of the damages.

It is unknown what the trial court was relying upon in denying Sanderson's claim for damages based upon causation. It is clear under Colorado law that a plaintiff does not have to prove causation with exactitude. In *Kaiser Found. Health Plan v. Sharp*, 741 P. 2d 714 (Colo. 1987), the court held that cause need not be proven with absolute certainty, nor need defendant's conduct be proven the only cause. Further, the court has held that evidence of proximate cause is sufficient. *Lyons v. Nasby*, 770 P. 2d 1250 (Colo. 1989).

Colorado jury instructions go further and put the burden on the defendant to prove its conduct is only a percentage of the harm to the plaintiff. See CJI-CIV4th 6:8. Thus, it was defendant's burden to prove that it was not responsible for all of Sanderson's damages.

The trial court acknowledged in its order that Sanderson's expert, Mr. Griepentrog, had testified that the poor construction and condition of the pipeline was a significant contributing factor to the instability of the hillside. This meets the proximate cause test. There is substantial evidence in the record that before the pipeline was illegally installed, the hillside was dry. Given the above, the Sanderson's evidence meets the test of Colorado law as to causation.

CONCLUSION

In this case so long as the defendant used the historic easement, there was no damage to Sanderson's property. As soon as defendant's predecessor-in-title, Mr. Heath, without permission or engineering assistance, constructed a poorly built a pipeline through a sensitive geologic area, Sanderson's property sustained damages, which continue through today. The trenching for the pipeline, its poor construction, and continuing breaks, have resulted in a landslide on the escarpment, the cost of restoration is at least \$96,000.00. Since defendant had no right to move the pipeline off the historic easement, and since the poor construction and inappropriate placement of the pipeline was an unreasonable burden on the servient estate, the trial court should have held that defendant's conduct was a continuing trespass, as to which the two-year statute of limitations should not apply. The trial court also was in error, when nine days before trial, it allowed defendant to assert the statute of limitations defense, without good cause. The trial court was also in error when, without legal basis, it held that Sanderson had not proven cause between the unreasonable conduct of defendant and damage to their property.

For the above reasons, the trial court denial of Sanderson's claim for damages should be reversed, and the matter should be remanded back to the trial court for a new trial as to the damage issues.

Respectfully submitted this 12th day of June, 2007.

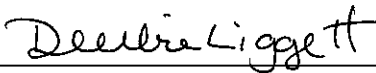


Earl G. Rhodes, #6723
Attorneys for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on the 12th day of June, 2007, a true and correct copy of the foregoing **OPENING BRIEF OF PLAINTIFFS/APPELLANTS** was served by U.S. Mail, postage prepaid, addressed to the following:

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



Debbie Liggett