

FILED IN THE
COURT OF APPEALS
STATE OF COLORADO

Court of Appeals, State of Colorado
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Denver, Colorado 80203
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JUL 31 2007

Clerk, Court of Appeals

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

▲ COURT USE ONLY ▲

Case Number: 07 CA 236

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REPLY BRIEF OF PLAINTIFFS/APPELLANTS

Submitted this 30th day of July, 2007.

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Plaintiffs/Appellants (“Sanderson”) by and through counsel of record hereby file their Reply Brief in support of their appeal as follows:

INTRODUCTION

Sanderson owns real property which is the servient estate as to an historic easement for an open irrigation ditch, the dominant estate, which only served the Heath property, and is now owned by the defendant. (Vol. I, pp. 010-013, pp. 016-019; Vol. I, pp. 123-124). Sanderson sued for trespass to real property because Defendant’s underground, closed irrigation pipe, which was not on the historic easement, continually broke apart and leaked large amounts of water. (Vol. I, pp. 010-013; pp. 016-019). (Sanderson testimony, Vol. IV, pp. 50-52). Sanderson presented evidence that the trench for the new pipeline location cut across an underground seep, and channeled water to the location of the Sanderson’s damaged property. (Sanderson exhibit 2, exhibit 14, p. 4/15). (Griepentrog testimony, Vol. IV, pp. 122-123). A portion of a hillside (150 by 150 feet) on Sanderson’s property has now fallen away from the rest of the hillside because of these leaks and the cost of repair is about \$100,000.00. (Vol. I, p. 37; Vol. I, pp. 128-129; Vol. I, p. 38; Sanderson testimony Vol. IV, p. 45, ll. 1-9; Griepentrog testimony, Vol. IV, pp. 131-133; Soucy testimony, Sanderson exhibit 14, p. 9; Vol. II, exhibit 16. Soucy testimony, Vol. IV, pp. 162-163, 168).

Until 1988, the historic easement starts on the west side of the Sanderson property, goes down the escarpment to the south of the Sanderson residence, and contoured to the north along the base of the escarpment. (Vol. I, pp. 37-40; Vol. II, Sanderson exhibit 6). There was no damage to the Sanderson property so long as the ditch was within the boundary of the historic easement. In the spring of 1988, Defendant's predecessor in interest, Mr. Heath, with no express permission or money payment to Sanderson, changed the location of the pipeline to an area several hundred yards to the north, so that he shortened the distance for a new, buried pipeline to bring irrigation water to his property. (Vol. IV, Sanderson testimony, pp. 38, 40-41; p. 48, Vol. II, Sanderson exhibit 20; Vol. II, Sanderson exhibit 2, p. 4). The pipeline was built with hard plastic material to prevent it from leaking and the connections were designed at the ends not to leak. In fact, because Heath ran the pipeline through a sensitive geologic area, without the benefit of any engineering, and Heath built and repaired the pipeline in a shoddy fashion, the pipeline broke and leaked continually over an eleven year period of time. (Vol. I, p. 36. T. Griepentrog testimony, Vol. IV, pp. 136, ll. 3-18.; Vol. IV, pp. 121-123; Sanderson testimony Vol. IV, p. 72; Sanderson exhibit 2). Sanderson did not know the cause of the leak because the pipeline was underground. The broken pipeline let loose large amounts of water underground,

which damaged Sanderson's property. (Vol. I I, pp. 128-129. Sanderson testimony, Vol. IV, pp. 54; Sanderson exhibit 12. T. Griepentrog testimony, Vol. IV, pp. ____).

The trial court found that the eighteen-year statute of limitation on adverse possession had not run against Sanderson . (Vol. I, pp. 128-129; Vol. I, pp. 204-205). The trial court made an express finding that a trespass had occurred because of water leaking from the pipeline. (Vol. I, p. 38). The trial court granted a mandatory injunction against the defendant and ordered the defendant to cease using the pipeline and return its pipeline back to the historic easement across the Sanderson property, which avoided a sensitive geologic area, where Sanderson's damage had occurred. (Vol. I, pp. 128-129; Vol. I, pp. 36-40). But the trial court denied Sanderson's request for damages based upon the defense of statute of limitations. *Id.* Sanderson asserts that defendant's conduct constitutes a continuing tort, as to which the statute of limitations has not run. (Vol. I, pp. 120-121).

Sanderson presented direct, circumstantial, and expert testimony that the damage to a portion of their property was due to the re-location, shoddy construction, and shoddy repair of the pipeline. (Vol. II, Sanderson exhibit 4 (8/9), 15, (1/15); Vol. II, Sanderson exhibit 4, (8/9), and exhibit 15A. J.

Sanderson testimony, Vol. IV, pp. 49-53, 73-74; T. Griepentrog testimony, Vol. IV, pp. 121-122, 136). The trial court ordered a mandatory injunction to return the pipeline back to the historic easement. (Vol. I, pp. 128-129). The trial court found that Sanderson's damages were reasonable. *Id.* But the trial court adopted the argument of defendant, asserted just before trial, that Sanderson's damage claim was barred by the applicable statute of limitations. *Id.*

SUMMARY OF ARGUMENT

The trial court abused its discretion when it allowed defendant, eleven days before trial to amend its answer to assert a statute of limitations defense. Defendant was on notice from the time of the service of the complaint that a damage claim was being made. The trial court found that defendant's conduct constituted a trespass against Sanderson. Under the circumstances of this case, defendant's conduct was a continuing tort as to which the statute of limitations did not end until 2007, when the offending pipeline was removed. The record is clear that Sanderson presented sufficient evidence of causation, and the trial court so found, in order to support an award of damages in this case.

ARGUMENT

- 1. The trial court abused its discretion when it allowed defendant to amend its answer only 11 days before trial.**

There is a liberal policy of amendment of pleadings, and it encourages the courts to look favorably on requests to amend. *Eagle River Mobile Home Park, Ltd, v. Dist. Court*, 647 P. 2d 660, 662 (Colo. 1982); accord *Polk v. Denver District Court*, 849 P. 2d 23,25 (Colo. 1993). This lenient policy, however is not without limits. *Polk, supra*, at 25. 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. *Polk, supra*, at 25-26; *Varner v. Dist. Court*, 618 P. 2d 1388, 1390 (Colo. 1980); *Ajay Sports, Inc. v. Casazza*, 1 P. 3d 267, 273 (Colo. App. 2000); *Akins v. Four Corners Encampment*, ____ P. 3d ____, 2007 WL 1150450, Colo. App. April 19, 2007 (No. 05Ca1228).

Colorado operates on a notice pleading standard. Sandersons' amended complaint and initial disclosure was more than sufficient to put the defendant on notice of a money damage claim. A review of C.R.C.P. Rule 26 demonstrates that the time to amend is tied to the at-issue date and the date of disclosure of exhibits and expert testimony rises out of the trial date, so that the right to amend is not dependent upon the specification of exhibits or witnesses for trial. It is clear that defendant waited too long to amend its answer.

2. The trial court committed reversible error when it dismissed Sandersons' damage claims based upon the defense of the statute of limitations.

The trial court's ruling in favor of the Sandersons as to their claim for a mandatory injunction is consistent with Colorado law as to the duty of the ditch owner not to damage the property of the servient estate owner. Ditch owners have a duty to maintain, use, and manage their ditches to prevent damage to the property of others. *See C.R.S. §§ 7-42-108, 37-84-101, 37-84-107.* A remedy against the ditch owner is a claim for trespass. *Roaring Fork Club, L.P., v. St. Jude's Company*, 36 P. 3d 1229 (Colo. 2001) and *East Meadows Company, LLC v. Greeley Irrigation Company*, 66 P. 3d 214 (Colo. App. 2003).

A trespass is a physical intrusion upon property of another without permission of the person lawfully entitled to possession of such property. *Burt v. Beautiful Savior Lutheran Church*, 809 P. 2d 1064 (Colo. App. 1990). The trial court made an express finding that a trespass had occurred in this case, because of leaking water. (Vol. I, p. 207). In addition, there was no permission given to move the pipeline, except under duress, and the time for adverse possession had not run at the time Sanderson filed suit. (Vol. I, pp. 128-129; Vol. IV, Sanderson testimony pp. 38-40). Defendant had no right to operate outside of the historic easement.

The trial court found that the pipeline was not engineered for the sensitive geological area that it went through. (Vol. I, pp. 205-209). Mr. Heath, the defendant's predecessor, did a poor job of building the pipeline and constant repairs were necessary. (Trial court findings, Vol. I, p. 205-209; Sanderson testimony, Vol. IV, p. 54; pp. 72-76; Sanderson testimony, Vol. IV, pp. 54; Sanderson exhibit 12). The placement of the pipeline outside of the historic easement, its shoddy construction, and continual leaking of water from it over an eleven year period were clearly unlawful intrusions onto the property of the servient estate.

Given that a trespass occurred in this case, the remaining question is whether the trespass was a continuing tort. The language of *Hoery v. United States*, 64 P. 3d 214, 218 (Colo. 2003) clearly suggests that it is. In order for this court to rule in the Sandersons favor, the court must first conclude that the closed irrigation pipeline that Heath put across the Sanderson property is not an irrigation ditch, which the Supreme Court clearly said was a public policy exception to the continuous tort doctrine. An irrigation ditch by its very nature is expected to leak water. It has earthen walls and is open to the air. An underground irrigation pipeline is designed and constructed to be impermeable, so that the maximum amount of water is delivered to the end delivery point. It is made of steel or hard

plastic, and its joints are designed not to not leak water. Once this court concludes under the facts of this case that the underground pipeline does not come within the social policy exception for irrigation ditches, then the facts of this case fit the description of a continuous tort.

Hoery involved the underground movement of pollution. This case involved the underground movement of water. The circumstances surrounding defendant's pipeline constituted a trespass, which was an invasion of the servient estate. Clearly, the continual release of water from the pipe was in invasion of the servient estate interest. Addressing exactly this type of situation, the court in

Hoery 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

All of the elements of a continuous tort are present in this case. The pipeline was built outside of the historic easement, without consent of the servient estate owner. The pipeline's poor construction and improper location constituted a continuing injury to the condition of the servient estate, and it caused damage on a continuous basis for eleven years. Under these conditions, the statute of limitations did not begin to run until the spring of 2007, when the defendant, under court order, moved the pipeline back to the historic easement.

A recent case, *Hawley v. Mawatt*, 160 P. 3d 421 (Colo. App. 2007) contains a discussion of the differences between a continuing tort and a permanent tort. In *Hawley*, landowners sued a neighbor for trespass, claiming that neighbor's landscaping improvement encroached on their property. For purposes of its damage analysis, the court distinguished continuing trespasses from permanent trespasses. The court said:

the damages recoverable on a trespass claim depend in part on whether the claim alleges a 'continuing trespass'-that is, a property invasion in which the offending party fails to removed continuing harmful physical conditions that are wrongfully placed on the land of another-or a 'permanent trespass,' which refers to a property invasion such as an irrigation ditch or a railway line that 'will and should continue indefinitely because defendants, with lawful authority, constructed a socially beneficial structure intended to be

permanent’.” *Hoery v. United States*, 64 P. 3d 214, 218-21 (Colo. 2003).
Hawley at 424.

In the instant case, the historic easement was a permanent trespass, and the closed pipeline is the continuing trespass. The evidence supports and the trial court found that the closed pipeline was a “continuing harmful physical condition.” Defendant had no right to be outside the historic easement, as to this, the trial court specifically found that the time for adverse possession had not run.

3. Sandersons presented sufficient evidence to prove that defendant’s defective pipeline and leaking water was the cause of Sandersons’ damages.

The best evidence of the quality of Sandersons’ proof of damages is the trial court’s ruling. It found that the pipeline was poorly built, was not engineered as it should have been, and went through a sensitive geologic area. (Vol. I, p. 205-208. Vol. I, pp. 128-129). The trial court concluded that the damage to the Sanderson property was so significant that defendant had breached its obligations to the servient estate. *Id.* The trial court then ordered that the pipeline be moved so that the damage to the servient estate would cease. (Vol. I, pp. 128-129). Explicit in this order is the trial court’s finding that the presence of the pipeline, and its repeated breaks and leaks, was the cause of the damage to the Sanderson property. Sandersons presented expert testimony which addressed this same issue. Mr.

Griepentrog was a stipulated expert in the field of geotechnical engineering. He testified that mismanagement of water is the prime culprit in creating slope instability. (Griepentrog testimony, Vol. IV, p. 125). He further testified that the pipeline was neither designed nor constructed properly. (Griepentrog testimony, Vol. IV, pp. 130-131). He then opined that the breaks in the pipeline introduced water into the slope area and contributed to the instability, which resulted in slope failure. (Griepentrog testimony, Vol. IV, p. 129-132). Finally, Mr. Griepentrog answered directly the causation question and attributed the slope movement to the breaks in the pipeline. (Griepentrog testimony, Vol. IV, p. 133). Therefore, there was substantial evidence that the pipeline was the cause of the damage on Sandersons' property, sufficient to both support a claim for damages and to require the court to enter a mandatory injunction in Sandersons' favor.

Defendant argues that Sandersons' damage claims should be denied since Sanderson allegedly offered an estimate to fix the whole hillside, not just the affected area. (Answer Brief at p. 13). This is not true. Both Sanderson exhibit 16, regarding the estimate and the testimony of Alan Soucy make clear that the restoration project is for the affected area only and not for the whole hillside. (Soucy testimony, Vol. IV, pp. 167-168). This buttresses the argument that there is

a direct correlation between the defective pipe and the damage to the Sanderson property.

Defendant further argues that Sandersons have not cited persuasive authority for the concept of causation in a trespass case. Other than show that Sandersons' cases are based on negligence and not trespass, defendant has not cited any persuasive authority either. Sanderson asserts that the concept of legal cause is the same whether the claim arises in the trespass context or in negligence. "Cause" is defined as "that cause, which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury and without which the result would not have occurred." *Ballentine's Law Dictionary*, 3rd Ed.

Sanderson presented substantial evidence that the defective pipeline was the cause of the earth movement on their property. The photographs taken before 1988 and at present, as well as the aerial photographs, prove this. (Sanderson exhibit 15, (1/15) (3a/15, 3b/15); and Sanderson Exhibit 15 (5/15), which shows the pipe being reduced from 10" to 8" on the steepest part of the hillside, which caused friction, and leakage). The trial court's ruling on the mandatory injunction is consistent with this testimony. Defendant attempted to persuade the court of other causes, but the testimony was general and not specific. It was rebutted by the testimony presented by Tom Griepentrog, Sanderson's expert, which

demonstrated that watering the orchard was not the source of the water causing the damage. (Sanderson exhibit 13). Defendant failed to prove alternate causation, while Sanderson presented sufficient evidence of causation to persuade the trial court to enter a mandatory injunction against the defendant.

CONCLUSION

The trial court recognized that Sanderson's damages were on-going. This was in part the basis for the mandatory injunction order. This strongly supports the argument that defendant's conduct is a continuing tort. Now that the pipeline has been de-watered, the patterns of underwater movement have continued to change. Sanderson continues to suffer damages because of illegal conduct of the Defendant.

Sanderson prays that the trial court order of dismissal of the damage claims be reversed and that this matter be remanded back to the district court for a new trial on damages.

Submitted this 30th day of July, 2007.



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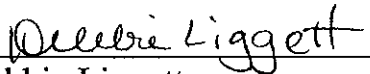
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on the 30th day of July, 2007, a true and correct copy of the foregoing **REPLY BRIEF OF PLAINTIFFS/ APPELLANTS** was served by U.S. Mail, postage prepaid, addressed to the following:

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