IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

EAMONN NOONAN, a married person, as his separate estate, Appellant, v. THURSTON COUNTY, Washington, a municipal corporation, Respondent.	No. 41433-3-II UNPUBLISHED OPINION

Worswick, A.C.J. — Eamonn Noonan owns property off of French Loop Road (Road) in Thurston County. Flooding occurred on his property in 2006, 2007, and 2009. Noonan sued the County, alleging negligence, inverse condemnation, nuisance, common law intentional trespass, and statutory trespass. The County moved for summary judgment, which the trial court granted. Noonan appeals. We hold that genuine issues of material fact exist as to Noonan's common law intentional trespass claim and reverse summary judgment as to that claim, remanding for further proceedings. We affirm summary judgment on Noonan's remaining claims.

FACTS

French Loop Road was constructed by private parties more than 50 years before Noonan purchased his property in 2005.[1] The County performed maintenance and repairs on the Road from 1987 to at least 2002. This maintenance work included ditching, filling potholes and cracks, and repair or replacement of culverts.

During a storm in 1994, a drainage pipe that ran along the property broke, causing a landslide. The County replaced the broken concrete drainage pipe with a plastic PVC (polyvinyl chloride) pipe.

In January 1995, the County determined that the drainage situation was an emergency and authorized a contractor to repair the Road's drainage system. But the record reflects that the County hired contractors to fix only the property's septic system, to restore its landscaping, and to prepare a plan to stabilize the unstable slope. There is no evidence in the record showing that the county made repairs to the Road or to its drainage system in 1995.

Noonan purchased the property in 2005, and then further flooding caused damage to his property in 2006, 2007, and again in 2009. Noonan sued the County, alleging negligence, inverse condemnation, nuisance, injury to land under RCW 4.24.630 (statutory trespass), and common

[1] Noonan argues that the County's evidence that the Road was privately constructed was untimely submitted. But Noonan does not assign error on this basis nor argue that the trial court erred by considering this evidence. "It is well settled that a party's failure to assign error to or provide argument and citation to authority in support of an assignment of error, as required under RAP 10.3, precludes appellate consideration of an alleged error." *Escude v. King County Pub. Hosp. Dist. No. 2*, 117 Wn. App. 183, 190 n.4, 69 P.3d 895 (2003).

law intentional trespass.

The County moved for summary judgment on Noonan's claims. At the hearing on the County's motion, Noonan conceded his negligence, nuisance, and inverse condemnation claims. Noonan also made an oral motion to amend his complaint to include negligent trespass.

The trial court granted summary judgment to the County on all claims and dismissed Noonan's claims with prejudice. Although the trial court's written order did not specify the basis for summary judgment, the trial court orally ruled that based on Noonan's concessions, summary judgment was appropriate on Noonan's negligence, nuisance, and inverse condemnation claims. The trial court further granted summary judgment on Noonan's common law intentional trespass and statutory trespass claims, finding no genuine issue whether the County committed any intentional act. The court further ruled that RCW 36.75.080 shielded the County from liability for Noonan's trespass claims. The trial court did not rule on Noonan's oral motion to amend. Noonan subsequently moved for reconsideration, which the trial court summarily denied. Noonan appeals.

ANALYSIS

I. Standard of Review

We review a grant of summary judgment de novo. *Briggs v. Nova Servs.*, 166 Wn.2d 794, 801, 213 P.3d 910 (2009). Summary judgment is appropriate where, viewing all facts and resulting inferences most favorably to the nonmoving party, there is no genuine issue of material fact and where the moving party is entitled to judgment as a matter of law. *Briggs*, 166 Wn.2d at

801. "A genuine issue of material fact exists where reasonable minds could differ on the facts controlling the outcome of the litigation." *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008). The moving party bears the burden of demonstrating that there is no genuine issue of material fact.[2] *Fitzpatrick v. Okanogan County*, 169 Wn.2d 598, 605, 238 P.3d 1129 (2010).

II. Negligent Trespass

The County argues that Noonan may not raise the negligent trespass issue on appeal because he did not plead such a cause of action. Although Noonan attempted to bring separate causes of action for negligent trespass and negligence below, on appeal he briefs only "negligence." Nor does Noonan assign error to the trial court's failure to grant his motion to amend. Consequently, we do not address negligent trespass. *Escude v. King County Pub. Hosp. Dist. No. 2*, 117 Wn. App. 183, 190 n.4, 69 P.3d 895 (2003).

III. Negligence, Nuisance and Inverse Condemnation

Noonan raises several issues that relate to his negligence claims. The County argues that Noonan may not raise the negligence, nuisance, and inverse condemnation claims that he conceded had no merit below.[3] We agree with the County.

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[2] Noonan apparently argues that the moving party's burden to demonstrate the absence of any genuine issue of material fact requires the moving party to present its own evidence and that failure to do so precludes summary judgment. But the moving party may prevail by showing that the nonmoving party has failed to present sufficient evidence to support its case. *Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 70, 170 P.3d 10 (2007).

[3] The County further argues that Noonan cannot assert equitable estoppel to prevent the County from denying liability for the design and maintenance of the Road. But Noonan does not argue

Under CR 2A and RCW 2.44.010, attorneys have authority to bind their clients to agreements or stipulations on the record. We will not review an agreement on the record "unless the party contesting it can show that the concession was a product of fraud or that the attorney overreached his authority." *Nguyen v. Sacred Heart Med. Ctr.*, 97 Wn. App. 728, 735, 987 P.2d 634 (1999).

Here, Noonan's counsel twice conceded Noonan's negligence, nuisance, and inverse condemnation claims:

> COUNSEL: I would concede that the negligence claim, the nuisance claim, and the inverse condemnation claim we give up.
> . . . .
> COURT: So you're agreeing that the inverse condemnation and the nuisance action cannot be maintained?
> COUNSEL: And the negligence.
> COURT: And the negligence. So then we're dealing with the injury to land under [RCW] 4.24.630.
> COUNSEL: Yes.

Report of Proceedings (RP) (amended) at 20-22.

Noonan makes the incorrect assertion that his concessions to these claims appear "nowhere in the record." Br. of Appellant at 45. He repeats this claim in his reply brief, arguing that the record provides "no evidence" to support the argument that he conceded these claims. Reply Br. of Appellant at 14. On the contrary, as set forth above, counsel explicitly conceded these claims on the record twice.

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equitable estoppel, and we do not consider the issue.

Noonan does not argue and the record does not reflect that Noonan's concessions were based on fraud or that they exceeded counsel's authority. Consequently, as in *Nguyen*, Noonan is bound by his concessions. We do not consider his arguments as to negligence, nuisance, or inverse condemnation.

IV. Applicability of RCW 36.75.080 and .070

We now turn to the applicability of RCW 36.75.080 and .070. The County successfully argued below that because the Road was constructed by private parties, RCW 36.75.080 relieves it from any duty to Noonan. Noonan raised RCW 36.75.070 in his motion for reconsideration, arguing that operation of section .070 converted the Road into a county road. We hold there are material issues of fact regarding the application of these statutes and we reverse summary judgment on this point.

A. RCW 36.75.080

Noonan argues that the trial court erred in finding that RCW 36.75.080 applied to shield the County from liability for the damage to Noonan's property. We agree that the trial court erred in ruling by summary judgment that the statutory limitation of liability of RCW 36.75.080 applies here.

RCW 36.75.080 provides:

> All public highways in this state, outside incorporated cities and towns and not designated as state highways which have been used as public highways for a period of not less than ten years are county roads: PROVIDED, That no duty to maintain such public highway nor any liability for any injury or damage for failure to maintain such public highway or any road signs thereon shall attach to the county until the same shall have been adopted as a part of the county road system by

resolution of the county commissioners.

The applicability of RCW 36.75.080 turns on whether the County adopted the Road as a county road "by resolution of the county commissioners." The record presents a genuine issue of fact whether the County adopted the Road.

Noonan submitted a 1995 resolution by the county commissioners that authorized repairs to the Road and which referred to the Road as a "county roadway." Clerk's Papers (CP) at 77-78. In response, the County submitted the affidavit of LaBonita Bowmar, the Clerk of the Board of Commissioners for Thurston County, that a search of County records reveals no documents regarding adoption of the Road.

Noonan argues throughout his briefing that the resolution actually adopted the road as a county road. We disagree. But Noonan also argues that the resolution calls Bowmar's declaration into sufficient doubt to raise a genuine issue of material fact. Viewing the evidence in the light most favorable to Noonan, he is correct.

While it is possible that the commissioners were simply mistaken about whether the Road was a county road, that is not the only inference that can be drawn. A competing inference, that the commissioners had a valid reason to believe the Road was a county road, is also reasonable. As such, there is a genuine issue of fact whether the proviso in RCW 36.75.080 applies. We accordingly reverse summary judgment on this point. Because we remand for further proceedings, we do not decide whether RCW 36.75.080 can limit liability for a trespass action under the particular facts and concessions of this case.

B. RCW 36.75.070

Noonan next argues that the trial court erred in denying his motion for reconsideration, in which he argued that RCW 36.75.070, not .080, applies here, precluding the County from asserting the limitation of liability under RCW 36.75.080. [4,5] There are genuine issues of material fact whether RCW 36.75.070 applies.

RCW 36.75.070 provides:

> All public highways in this state, outside incorporated cities and towns and not designated as state highways, which have been used as public highways for a period of not less than seven years, where they have been worked and kept up at the expense of the public, are county roads.

The record shows that the County performed maintenance and repairs on the Road from 1987 to at least 2002. This included ditching, filling potholes and cracks, and repair or replacement of culverts. As such, there is sufficient evidence in the record to create a genuine issue of fact whether the Road was "worked and kept up at the expense of the public" long enough for the

[4] The County argues that because Noonan did not raise RCW 36.75.070 until his motion for reconsideration below, he may not raise the statute on appeal, citing *Yakima Fruit Growers Ass'n v. Hall*, 180 Wash. 365, 40 P.2d 123 (1935). But there, our Supreme Court held that a party was precluded from raising an affirmative defense after trial. 180 Wash. at 366-67. *Yakima Fruit Growers Association* does not support the County's argument. Moreover, under RAP 9.12, in deciding summary judgment we may address all evidence and issues considered by or called to the attention of the trial court. RCW 36.75.070 was called to the trial court's attention and thus we consider it on appeal. *See Jacob's Meadow Owners Ass'n v. Plateau 44 II, LLC*, 139 Wn. App. 743, 755, 162 P.3d 1153 (2007) (considering evidence raised for the first time on motion for reconsideration because trial court considered the issue below).

[5] The County argues that RCW 36.75.080 applies and the County remains shielded from liability for failure to maintain the Road regardless of whether RCW 36.75.070 applies. Because there is a genuine issue of material fact whether the proviso in RCW 36.75.080 applies to the County, we do not decide the interplay of these two statutes.

Road to have become a county road under RCW 36.75.070. We accordingly reverse summary judgment on this point.

V. Statutory Trespass

Noonan also argues that there are genuine issues of material fact as to his statutory trespass claim. We disagree.

The statutory trespass statute, RCW 4.24.630, provides:

> Every person who goes onto the land of another and who removes timber, crops, minerals, or other similar valuable property from the land, or *wrongfully* causes waste or injury to the land, or *wrongfully* injures personal property or improvements to real estate on the land, is liable to the injured party for treble the amount of the damages caused by the removal, waste, or injury. *For purposes of this section, a person acts "wrongfully" if the person intentionally and unreasonably commits the act or acts while knowing, or having reason to know, that he or she lacks authorization to so act.*

(Emphasis added.) In *Clipse v. Michels Pipeline Constr., Inc.*, 154 Wn. App. 573, 577-78, 225 P.3d 492 (2010), Division One of this court held that there are three types of statutory trespass under RCW 4.24.630: "(1) removing valuable property from the land, (2) *wrongfully* causing waste or injury to the land, and (3) *wrongfully* injuring personal property or real estate improvements on the land." The court further held that the requirement that the defendant act wrongfully means that the defendant knew or had reason to know that he or she lacked authorization to act. *Clipse*, 154 Wn. App. at 580.

The instant case is analogous to *Colwell v. Etzell*, 119 Wn. App. 432, 441-42, 81 P.3d 895 (2003) (plurality opinion), where Division Three of our court held that RCW 4.24.630 did

not apply. There, the Colwells sued Etzell for interfering with the Colwells' use of an easement while Etzell installed ditching and culverts. 119 Wn. App. at 435-36. The trial court awarded the Colwells costs and attorney fees under RCW 4.24.630, which allows recovery of reasonable attorney fees based on a statutory trespass. 119 Wn. App. at 437. Division Three of this court held, "The statute's premise is that the defendant physically trespasses on the plaintiff's land." 119 Wn. App. at 439. The court held that because Etzell was attempting to protect his own property from serious drainage problems rather than intentionally interfering with the Colwells' easement, the record did not support liability under RCW 4.24.630. 119 Wn. App. at 440.

So too here, the record does not support liability under RCW 4.24.630. The one action the County took that may have directly caused the flooding on Noonan's land was installation of the PVC pipe. But it is undisputed that the County installed this pipe to repair the Road's drainage system, not to intentionally divert water onto Noonan's land. As in *Colwell*, Noonan has not demonstrated the intent necessary to recover for statutory trespass under RCW 4.24.630.

Moreover, as Division One held in *Clipse*, 154 Wn. App. at 580, RCW 4.24.630 requires a showing that the defendant acted while knowing that the defendant lacked authorization to act. Here, Noonan does not even allege that the County took any action related to his land without authorization. As such, his RCW 4.24.630 claim fails. *See Borden v. City of Olympia*, 113 Wn. App. 359, 53 P.3d 1020 (2002).

VI. Common Law Intentional Trespass

Noonan finally argues that genuine issues of material fact precluded summary judgment on his common law intentional trespass claim. We agree.

The elements of common law intentional trespass are "'(1) an invasion of property affecting an interest in exclusive possession, (2) an intentional act, (3) reasonable foreseeability that the act would disturb the plaintiff's possessory interest, and (4) actual and substantial damages.'" *Grundy v. Brack Family Trust*, 151 Wn. App. 557, 567, 213 P.3d 619 (2009) (quoting *Wallace v. Lewis County*, 134 Wn. App. 1, 15, 137 P.3d 101 (2006)). An act is intentional either if the actor subjectively desires the resulting outcome or is substantially certain that the outcome will occur. *Bradley v. Am. Smelting & Refining Co.*, 104 Wn.2d 677, 682, 709 P.2d 782 (1985) (quoting Restatement (Second) of Torts § 8A (1965)).

The record shows that the County hired a contracting firm to make repairs to the property after the 1995 flood. The County hired the firm to arrange for repairs to the property's septic system, to arrange for the landscaping to be restored, and to develop a plan to stabilize the unstable slope that collapsed during the flooding. But Henry Borden, an employee of the contracting firm, warned the County by letter that a poorly constructed pipe would cause additional flooding problems, writing:

> The stormwater pipe installed just north of the Miles'[6] residence is incomplete and constructed using apparently questionable methods. It is incomplete because it empties onto the marine bluff a number of feet above the beach level, in an area of erosion prone and very steep bluff. This pipe needs to be extended fully to the beach level, with appropriately designed momentum dissipating devices in place. If

[6] Don Miles owned the property in 1995.

> this is not done, more serious damage will be done with heavy rainfall.
>
> The questionable methods refer to the manner in which the pipe is secured to the ground, and held together. The joints need to be fixed together by tension devices, and the pipe needs to be more strongly secured in place. We think that this installation, as constructed, could fail and cause more destruction at the Miles residence.

CP at 71. Borden did not provide any information as to whether the County installed this pipe or had any responsibility for its poor design or construction.

However, County Engineer Dale Rancour gave deposition testimony that, in 1994, the County replaced a broken concrete pipe on Noonan's land with a PVC pipe. And according to a hydrology study conducted in 2009, that PVC pipe was located "along the western site boundary" and "will sooner or later fail catastrophically" if not properly tested and maintained. CP at 115.

The record does not conclusively show that the pipe Borden identified in his letter is the PVC pipe the County installed in 1994. But drawing the inference most favorable to Noonan, Borden's letter and the hydrology study refer to the same pipe, located both north of Noonan's residence and along the western border of his property. Accordingly, there is a genuine issue of material fact whether the County installed the pipe that Borden identified as improperly built.

Moreover, there is a genuine issue of material fact whether the County was substantially certain that the pipe would fail when it installed the pipe. According to Borden's letter, the pipe improperly ended above the beach level, lacked momentum dissipating devices, was improperly secured to the ground, and was improperly held together. Additionally, Borden warned the County that "more serious damage *will be done*" with heavy rainfall. CP at 71 (emphasis added).

Viewing the evidence most favorably to Noonan, these multiple, serious problems with the pipe, coupled with Borden's warning, give rise to an inference that the County knew this pipe was substantially certain to fail and damage Noonan's land when it installed the pipe. Hence, there is a genuine issue of material fact whether the County's installing the PVC pipe constituted an intentional common law trespass, and we reverse summary judgment on this claim and we remand for further proceedings consistent with this opinion.[7]

ATTORNEY FEES

Noonan finally argues that he "may" be entitled to attorney fees under RCW 8.25.075 if he prevails on his inverse condemnation claim. Br. of Appellant at 49-50. RCW 8.25.075(3) provides that a defendant who wins a judgment for inverse condemnation is entitled to attorney fees if the judgment is at least ten percent greater than the highest settlement offer received.

Here, Noonan conceded his inverse condemnation claim and consequently is not entitled to attorney fees under RCW 8.25.075. We deny Noonan's request.

[7] The County argues that Noonan has not shown that the County's actions were the proximate cause of the damage to Noonan's land. But the County raised this issue for the first time below in its reply to Noonan's response in opposition to summary judgment. A moving party must bring all grounds supporting summary judgment in its motion for summary judgment; we will not consider issues raised for the first time in a reply brief below. CR 56(c); *White v. Kent Medical Center, Inc., P.S.*, 61 Wn. App. 163, 168-69, 810 P.2d 4 (1991) (refusing to consider issue of proximate cause where it was raised in reply to response and not in original motion for summary judgment). Accordingly, it was error for the trial court to consider proximate cause and we do not consider the issue.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Worswick, C.J.

We concur:

Armstrong, J.

Van Deren, J.