STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0739

Souhsiung Jack Chiu,
Appellant,

vs.

Timbershore Home Owners' Association,
defendant and third party plaintiff,
Respondent,

vs.

New Horizon Homes, Inc.,
Third Party Defendant.

Filed January 16, 2018
Affirmed in part and remanded
Rodenberg, Judge

Dakota County District Court
File No. 19HA-CV-14-1026

Patrick K. Horan, Edina, Minnesota (for appellant)

Gerald H. Bren, Fisher Bren & Sheridan, LLP, Minneapolis, Minnesota (for respondent)

Considered and decided by Rodenberg, Presiding Judge; Worke, Judge; and Reilly, Judge.

U N P U B L I S H E D O P I N I O N

RODENBERG, Judge

Appellant Souhsiung Jack Chiu appeals from the district court's findings of fact, conclusions of law, and judgment for respondent Timbershore Home Owners' Association after trial to the court. He argues that that the district court (1) erroneously concluded that respondent's inaction did not render it liable to appellant for trespass, (2) failed to follow the law of the case, (3) misapplied the law, (4) made clearly erroneous findings, and (5) erroneously excluded certain evidence from trial. We affirm in part, but remand to the district court concerning respondent's admitted liability for the expenses of maintaining and repairing the water line that damaged appellant's townhome.

FACTS

In 1973, appellant bought a townhome at 1261 Timbershore Lane in Eagan. His townhome is part of a four-unit complex. The townhomes at Timbershore Lane are managed by respondent Timbershore Home Owners' Association. Respondent owns an easement for the sewer and water pipes that service the townhomes at Timbershore Lane. The easement arose when the townhomes were constructed, and the easement grant is contained in the following provision in the "Declaration of Covenants, Restrictions, and Easements" (the declaration):

> Section 4. Sewer and Water Easement. Whereas, [New Horizon Homes] has, or may, construct units with certain sewer and water pipes . . . .
>
> NOW THEREFORE, [New Horizon Homes] does hereby declare that [Timbershore] and each dwelling unit and the lot occupied thereby upon which [New Horizon Homes]

> has or does hereafter build is granted full and complete easement and right to use such pipes and facilities. Full right of access for maintenance and repair at reasonable hours is hereby granted each dominant parcel and [Timbershore]. Expense of repair or maintenance shall be common expenses of [Timbershore].

The declaration granting the easement is silent concerning liability for consequential damages caused by the water-service lines.

Appellant sued respondent for trespass and negligence after a water-service line, which runs under appellant's townhome and serves another unit, broke in 2011. Respondent moved for summary judgment, which the district court granted. Appellant appealed and, in an unpublished opinion, we reversed and remanded for further proceedings, outlining the applicable law for trespass. *Chiu v. Timbershore Home Owners' Ass'n.*, No. A14-1994, 2015 WL 4523925 (Minn. App. June 29, 2015) (*Chiu I*). On remand, the case was tried to the court, and the evidence at trial was as follows.

Appellant's Testimony

In 1999, appellant had the City of Eagan shut off the water service to his townhome because he lived in Utah for a period of time and then moved into his wife's home in Minneapolis. At first, appellant had some trouble getting the water turned off because the water stop was covered by a cement slab. Eventually, respondent removed the slab, and the city was able to access the water stop to turn off the water. Appellant had the water turned on for a brief period in 2009, but then had it turned off again. Since getting married in 1986, the longest appellant has stayed continuously at his townhome was for a few months. During periods when he is not living there, appellant has returned to the townhome

once every few weeks to pick up mail and maintain the property. His practice was to enter the townhome each time and check both the upstairs and downstairs. Before October 11, 2011, appellant had never seen a water problem at his townhome. Appellant never made any significant renovations to his unit.

Appellant learned that, on October 11, 2011, appellant's neighbor, M.S., who occupied the unit adjoining appellant's townhome (1255 Timbershore Lane) noticed that there was water pooling in or near her laundry room, which shared a wall with appellant's townhome. M.S. called a plumber on October 11, 2011. The plumber, upon discovering that M.S.'s living room carpet was soaked, determined that there was likely a leak. M.S. and the plumber went outside in an attempt to locate the source of the leak. When she passed appellant's patio, M.S. saw water coming out by the sliding door. The plumber told M.S. that she needed to call someone to get inside that unit to deal with the water. M.S. testified at trial that she spoke to Mike O'Brien (respondent's vice-president) at some point, but could not remember if it was on the 11th. One of the townhome occupants called appellant to tell him about the water, and appellant soon arrived at the townhome. By the time appellant arrived, there was also a city employee present.

Appellant went into his townhome, leaving the door open. According to appellant, it looked like there had been a flood, with water throughout the downstairs area. M.S., who was looking down from the landing near the front door, saw standing water in the lower level and water stains on the walls. She testified that the walls had "a green kind of line," which she thought was mold, but was not sure. Appellant tried turning on his faucet and, when no water came out, he said he exclaimed, "It cannot be my water. . . . It's not my

water." The city water employee confirmed that water to appellant's unit was turned off. Appellant said he told the city water employee to "sound the alarm" the next morning to help get the leak fixed. Appellant testified that he did not know what else to do at that time, so he took down the telephone numbers of M.S. and of respondent's president and vice-president, and returned to Minneapolis.

The next morning, on October 12, appellant called respondent's president, Leah Lund, and left a voicemail message. He then called O'Brien, who was unavailable that morning, but who agreed to meet that afternoon. Appellant and O'Brien later went into appellant's unit, where they found the water situation unchanged from the day before. According to appellant, the sheetrock walls were wet above the waterline. He testified that O'Brien said that the water could have been from a broken pipe, but did not say much else. Appellant said that he pleaded with O'Brien to shut off the water, saying that it had to have been the association's water and not his own. No repairs were made then, and the leak continued. Appellant and O'Brien left the townhome, and appellant went to city hall. At city hall, appellant tried to get someone to come to his townhome, but he was told that everyone had already gone home for the day. Appellant set up an appointment for someone from the city to come to his townhome at 11:00 a.m. the next day.

Appellant went to his townhome on Thursday, October 13, to meet the city water employee. O'Brien also came to this meeting. According to appellant, the first thing the city employee, Troy Hoepner, said was that the water to appellant's unit was still turned off. Appellant testified that, at some point, it was determined that the water entering appellant's unit was coming from the service line to unit 1255. Appellant asked Hoepner

to turn off that line. Hoepner told appellant that he could not turn off the water line to 1255 without permission from the owner. Appellant returned to Minneapolis. Later that evening, John Rand, a member of respondent's board, called appellant and told him to come to the townhome at 8:00 a.m. the next day. Rand had arranged for a plumber to work on the leak the next day.

On October 14, appellant arrived at his townhome at 7:30 a.m. He waited in his car until 8:30 a.m., when a Pro Master Plumbing truck drove by and the driver went into M.S.'s unit. According to appellant, other people also went into that unit. Appellant waited in his car for a while, then went to the door of 1255. Eventually, O'Brien came out of 1255 and told appellant to go into his own unit, and O'Brien and a number of others followed him there. Appellant said that Rand was also present, and another man introduced himself as the association president. According to the plumber, Rand and Hoepner were also present at this time.

Inside his townhome, appellant saw that the floor was still wet but that the water had receded, which led him to believe that the water had been turned off. Jim Thompson, the plumber from Pro Master, eventually came into appellant's unit and tried to locate the leak using a listening device. Thompson told appellant that the leak was in front of the water heater. That afternoon, Thompson opened a hole in appellant's floor near the water heater using a jackhammer. However, the pipe beneath that hole was not leaking. Appellant told Thompson that he had earlier seen a bubble in front of the toilet, and, after doing some measurements, Thompson jackhammered a second hole in front of the toilet; however, the leak was not in that spot either. After the second hole did not reveal the

leaking part of the pipe, appellant said that Thompson put his hand into the second hole and said that the leak was under the shower.

Once the leak's location was verified, O'Brien was called for permission to dig another hole. Thompson then jackhammered the third hole. Thompson dug up a little bit of dirt, cut out the pipe, and showed it to appellant. Appellant testified that the pipe was bent and deformed. Thompson also showed appellant a wooden stake. According to appellant, Thompson believed that the stake had been hammered into the pipe during construction 38 years earlier, causing the dent, and that a pinhole leak in the soft copper pipe eventually got bigger. After finishing up on Friday, October 14, Thompson told appellant that he would come back the next day for another look.

On Saturday, October 15, Thompson came back to appellant's unit with Rand. According to appellant, Rand did not speak to him. On the way out, Thompson told appellant that someone would call him to follow up. However, appellant testified that nobody associated with respondent called him. He also testified that he tried to follow up with O'Brien and respondent's president but received no answer for a long time. When he did reach them, he was told to contact respondent's lawyer. Appellant said that when he called respondent's lawyer, he was asked to identify his own lawyer. According to appellant, respondent never offered to repair the holes, but did pay for the plumber who repaired the leak; appellant agreed that he did not personally pay anyone for work related to repairing the leak. The holes remain in the floor of appellant's unit.

Rand's Testimony

Rand testified that he first learned of the leak from O'Brien on Wednesday, October 12, and that he went out to appellant's townhome to look at the damage. According to Rand, Hoepner was also present. Rand testified that they saw four inches of standing water and mold starting to grow in appellant's basement. According to Rand, Hoepner told them that they could not turn off the water for another unit absent permission from the other owner. Hoepner gave Rand contact information for Water Conservation to help locate the leak, and Rand said that he set up appointments for both a plumber and someone from Water Conservation to come to fix the leak. Rand testified that he was not aware of any other breaks in water pipes servicing the Timbershore townhomes, except for outside lines. Regarding those lines, Rand explained that generally a plumber will come out and repair the pipe but that the association never pays for repairs inside the homes; those are up to the homeowner. He also agreed that respondent did not intend to perform any pipe maintenance in the absence of a problem with a pipe.

According to Rand, the only other time that he went to appellant's townhome was on October 15, when Thompson showed him the holes in appellant's basement and explained where the leak had been. Rand also testified that, at a later meeting, respondent decided to make an offer to repair the holes and shower surround in appellant's basement, and that respondent's legal counsel verbally conveyed that offer to appellant. According to Rand, appellant did not accept that offer.

At oral argument, respondent's counsel agreed that it is respondent's obligation under the declaration to patch the holes in appellant's unit that were necessary to allow respondent to access and repair the water line.

Thompson's Testimony

Thompson testified at trial that air-pressure testing may have revealed the pinhole leak in the pipe before a larger leak occurred. However, he also testified that he does not usually advise clients to test service pipes. Testing would only find an existing leak; it would not predict future leaks or where they would occur. Thompson also testified that it would be unrealistic to test all water-service lines regularly. He testified that there is no industry standard that requires preventive-maintenance testing on water-service lines.

Schrantz's Testimony

Anthony Schrantz of Water Conservation Services, Inc., testified that some cities hire him to proactively test their water-service lines, but that he has never done such testing for a private consumer. Such testing would usually cost several thousand dollars to complete. Schrantz also testified that pipes can last a long time without maintenance, and that there is no industry standard requiring preventive testing of water-service pipes.

Expert Testimony

Three experts testified to the extensive repair and remediation work that would be required to restore appellant's townhome to its condition before the leak. One of appellant's experts testified that the repairs would have cost about $49,006 at the time he inspected the unit in July of 2012. Both experts who testified for appellant agreed that the cost and amount of work would have been much lower if the townhome had been repaired

sooner. Respondent's expert estimated that the cost of repairs would have been $18,115 if repairs had been completed within a few days of the leak.

The district court issued written findings of fact and conclusions of law, concluding that respondent was not liable for appellant's claimed damages, and it dismissed appellant's complaint with prejudice. Appellant moved for amended findings and for a new trial. The district court denied the new-trial motion and amended several of its earlier factual findings. The amended findings did not alter the district court's disposition.

This appeal followed.

D E C I S I O N

Appellant challenges the district court's factual findings, its application of the law, its evidentiary rulings at trial, and its ultimate disposition.

A district court's "[f]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Minn. R. Civ. P. 52.01. In reviewing a district court's findings and conclusions, we consider "whether the district court's findings were clearly erroneous and whether the district court erred as a matter of law. A finding is clearly erroneous if we are left with the definite and firm conviction that a mistake has been made. We review issues of law de novo." *In re Distrib. of Attorney's Fees between Stowman Law Firm, P.A. & Lori Peterson Law Firm*, 855 N.W.2d 760, 761 (Minn. App. 2014) (quotation and citations omitted), *aff'd*, 870 N.W.2d 755 (Minn. 2015).

I. The district court properly applied the law of the case and properly concluded that respondent is not liable for trespass on the facts as it found them.

Appellant argues that the district court failed to follow the law of the case on remand. Consequently, he argues that the district court erred in concluding that respondent is not liable to him in trespass.

The law-of-the-case doctrine "applies where an appellate court has ruled on a legal issue and has remanded the case to the lower court for further proceedings." *Mattson v. Underwriters at Lloyds*, 414 N.W.2d 717, 719-20 (Minn. 1987). "The doctrine provides that 'when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.'" *Matter of Welfare of M.D.O.*, 462 N.W.2d 370, 375 (Minn. 1990) (quoting *Arizona v. California*, 460 U.S. 605, 618, 103 S. Ct. 1382, 1391 (1983)).

In *Chiu I*, we reversed the district court's grant of summary judgment to respondent because we determined that "[t]he district court . . . erred by concluding that [appellant]'s negligence claims fail for lack of a duty." 2015 WL 4523925, at *6. We recognized that "an easement holder has a common-law duty to maintain and repair the easement and not to misuse the easement." *Id.* We then explained that there was a genuine issue of material fact concerning whether respondent breached that duty. *Id.* We also concluded that the district court erred in granting summary judgment to respondent on the trespass claims based on appellant's failure to prove an intentional intrusion. *Id.* at *8. We stated that the Minnesota Supreme Court has recognized several ways in which a trespass may be committed, including intentionally failing to remove intruding matter when the defendant

either has a duty to do so *or* tortiously caused the intrusion in the first instance. *Id.* at *6-7. We specifically referenced the Restatement (Second) of Torts §§ 158(a), 158(c), and 161 (1965). *Id.* at *6-7. We reversed the district court's grant of summary judgment and remanded for further proceedings. *Id.* at *8.

Appellant argues that the district court failed to apply the legal standards identified in our earlier opinion regarding both duty and trespass. From our review, the district court's findings of fact and conclusions of law indicate that it correctly applied the law as identified in *Chiu I*; the district court's findings assessed trespass through the three Restatement provisions as we directed in that earlier opinion.

A. The district court did not err in analyzing appellant's trespass claims under the Restatement (Second) of Torts § 158(a).

Restatement (Second) of Torts § 158(a) states that a person is liable for trespass if he intentionally "enters land in possession of the other, or causes a thing or a third person to do so." A person acts intentionally when he either desires his act to lead to an intrusion or is substantially certain that an intrusion will result from his act. *Victor v. Sell*, 301 Minn. 309, 313, 222 N.W.2d 337, 339 (1974); Restatement (Second) of Torts § 158 cmt. i (1965).

Appellant argues that respondent's plan to withhold maintenance on the water lines until there was a leak proves intent to cause water to enter the townhomes. The district court found no intent to cause water to enter appellant's unit. The record supports that finding.

There is no evidence in the record indicating that respondent desired a leak to occur, and there is no evidence that the district court was bound to accept establishing that

respondent was substantially certain that waiting to perform maintenance until it was necessary would cause a leak. The district court did not err in concluding that respondent is not liable in trespass under Section 158(a) of the Restatement based on its finding of no intentional entry by respondent, which finding the record supports.

B. The district court did not err in analyzing appellant's trespass claims under the Restatement (Second) of Torts § 158(c).

The district court also considered the Restatement (Second) of Torts § 158(c), as we directed in *Chiu I*. That section provides that a person is liable for trespass if the person "intentionally . . . fails to remove from the land a thing which he is under a duty to remove." The district court concluded that respondent is not liable to appellant for failing to remove the water. Appellant argues that respondent, as the holder of an easement over the water-service lines, had a duty to maintain the lines and failed to remove the water by intentionally failing to turn off the water as soon as possible after being notified of the leak.

In *Chiu I*, we stated that there was a fact issue concerning whether respondent is liable under section 158(c) for breach of a common-law duty to remove the water by intentionally failing "to turn off the water supply to the leaking pipe." 2015 WL 4523925, at *7. The district court recognized respondent's common-law duty to maintain and repair its water line. However, the district court found as a fact that respondent did not intentionally fail to remove the water or turn off the water supply. The district court found that respondent "acted promptly and reasonably to locate and repair the pipe," even though the water was not immediately turned off. The record evidence supports this finding of reasonableness.

On October 11, the leak was believed to be coming from appellant's unit and his water-service line, which the on-site city water employee said was turned off. The next time a city employee was at the townhome was when Hoepner came on October 13. It was then discovered that the leak may have been coming from the line servicing M.S.'s unit, but Hoepner was not authorized to turn off that line without the owner's permission. There is no evidence in the record that M.S. had given permission to have the water service to her unit turned off at that point in time.[1] Appellant testified that the water in his townhome had receded by October 14, which led him to believe that the leaking water line had been turned off between when he left on October 13 and when he returned on October 14. Based on this timeline and the evidence in the record, the district court's finding that respondent did not intentionally and unreasonably delay by not immediately turning off the water-service line causing the leak is not clearly erroneous. The voluminous and conflicting evidence might have led to different findings, but examining possible alternative findings is not our proper role; we consider whether the record supports the findings that the district court made—and it does. *See M.D.O.*, 462 N.W.2d at 374-75. We see no error in the district court's application of the law to the facts as it found them.

C. The district court did not err in analyzing appellant's trespass claims under the Restatement (Second) of Torts § 161.

Finally, the district court considered the Restatement (Second) of Torts § 161, which states that "[a] trespass may be committed by the continued presence on the land of a

[1] M.S. is not a party, and no claims are asserted against her by any party. The record reveals little concerning whether and when her permission was sought concerning turning off the water to her unit.

structure, chattel, or other thing which the actor has tortiously placed there, whether or not the actor has the ability to remove it." If there was no initial tortious trespass by respondent, it cannot be liable for trespass under section 161. *Victor*, 301 Minn. at 314, 222 N.W.2d at 340.

As we noted in *Chiu I*, a trespass under section 161 may be found if the initial entry is the result of an intentional act, a negligent act, or a negligent failure to act. 2015 WL 4523925, at *7. Because the district court found no intentional trespass, as discussed above, appellant's section 161 claim depends on proof of negligence.

To succeed on a negligence claim, appellant must prove "(1) the existence of a duty of care, (2) a breach of that duty, (3) an injury, and (4) that the breach of the duty of care was a proximate cause of the injury." *Domagala v. Rolland*, 805 N.W.2d 14, 22 (Minn. 2011). A duty is an obligation "to conform to a particular standard of conduct." *Minneapolis Emp. Ret. Fund v. Allison-Williams Co.*, 519 N.W.2d 176, 182 (Minn. 1994). Generally, the standard "is that degree of care which a reasonably prudent person would exercise under the same or similar circumstances." *Id.* What constitutes reasonable care varies depending on the circumstances of each individual case. *Otto v. City of St. Paul*, 460 N.W.2d 359, 361 (Minn. App. 1990). "The question becomes what was the character and extent of the respondents' duty under the[] circumstances." *Id.* In *Otto*, we stated that "[a]n essential element of negligence is the actor's knowledge, actual or imputed, of the facts out of which the alleged duty arises." *Id.* at 362 (quotation omitted). Because the respondents in *Otto* neither knew nor should have known of the defects in a sewer system,

we concluded that they were not responsible for the collapsing street resulting from a leak in the sewer system. *Id.*

While reasonable care in maintenance and operation of appliances generally imposes an obligation to make reasonable periodic inspections of those appliances, there are circumstances where it is not reasonable to require such inspections. *Segal v. Bloom Bros. Co.*, 249 Minn. 367, 373, 82 N.W.2d 359, 363 (1957). No routine inspection and maintenance is required when "periodic inspection would be ineffective and a continuous inspection would be impractical and unreasonable." *Bassett v. Rybak*, 294 Minn. 505, 506, 200 N.W.2d 399, 401 (1972). These cases stand for the proposition that only reasonable inspections are required and reasonable care may not require an inspection when it would be unlikely to reveal a defect or would require an unreasonable amount of effort to conduct on a regular basis, absent some prior notice of a defect.

Respondent had no notice of either a leak or any damage before water was discovered in appellant's unit. While respondent did not perform any testing or preventive maintenance on the water-service lines, the record supports the district court's factual finding that there is no industry standard requiring or even recommending preventive maintenance on the water-service lines. Thompson testified that it is unrealistic to routinely test and inspect underground water-service lines. Even if detection were attempted using a listening device, nothing would be found unless and until a leak existed. Schrantz testified that it would cost thousands of dollars to conduct such tests, and that water-service lines can last up to or even more than a hundred years without any maintenance.

The scope of respondent's duty presented factual questions of reasonableness. On this record, the district court's findings concerning the scope of respondent's duty (to maintain the easement) are not clearly erroneous. The record evidence supports the district court's findings and its conclusion that respondent did not tortiously cause the water to enter appellant's townhome.

Because we discern no error in the district court's findings of fact or in its conclusion that respondent did not breach a duty and is not liable for trespass or negligence, we do not reach the questions raised by appellant concerning causation, the burden of proof, or damages.

D. The district court did not fail to follow the law of the case regarding extrinsic evidence.

Appellant argues that the district court failed to follow the law of the case when it considered memoranda and advisories distributed by respondent to townhome owners. *Chiu I* held only that the extrinsic evidence could not be used to limit respondent's liability. 2015 WL 4523925, at *5. The only place that these extrinsic documents are mentioned in the district court's analysis is in its discussion of appellant's failure to mitigate damages. Even there, the district court did not use the documents as dispositive of any legal issue or as a limit on respondent's liability; rather, the district court observed that the documents indicated that appellant was aware that respondent took the position that it was not liable for any damage to townhome interiors. The district court found that respondent was not liable, and then found, relying on the memoranda and advisories, that appellant had failed

to mitigate his damages even if respondent were liable. The district court did not fail to apply the law of the case regarding extrinsic evidence.

II. The district court's findings of fact are not clearly erroneous nor would they change the result of this case.

We will set aside a district court's findings of fact only if they are clearly erroneous. Minn. R. Civ. P. 52.01. In applying this rule, "we view the record in the light most favorable to the judgment of the district court." *Rogers v. Moore*, 603 N.W.2d 650, 656 (Minn. 1999). "Findings of fact are clearly erroneous only if the reviewing court is left with the definite and firm conviction that a mistake has been made." *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999) (quotation omitted). "If there is reasonable evidence to support the district court's findings, we will not disturb them." *Rogers*, 603 N.W.2d at 656. Moreover, "where the decisive facts found by the trial court are sustained by the evidence, this court need not discuss specifically other proposed findings of fact which would not change the result." *Agner v. Bourn*, 281 Minn. 385, 398, 161 N.W.2d 813, 821 (1968). Erroneous findings or omitted findings that are not controlling on the outcome of the case "are harmless and do not necessitate a reversal nor would any useful purpose be served by remanding the case for corrected or additional findings." *State by Burnquist v. Bollenbach*, 241 Minn. 103, 110, 63 N.W.2d 278, 283 (1954).

Appellant challenges a number of the district court's findings of fact, arguing that they are clearly erroneous and require reversal. Upon review, all of the challenged findings are supported by the record evidence. While appellant challenges the district court's

having credited respondent's witnesses over his own, credibility determinations are within the province of the district court. *Goldman v. Greenwood*, 748 N.W.2d 279, 284 (Minn. 2008). Moreover, none of the challenged findings, even if clearly erroneous, would cause us to reach a different conclusion on the issue of respondent's liability, which was, as discussed, resolved on the basis of respondent's duty. The district court found no breach of duty. As such, no "useful purpose [would] be served by remanding the case for corrected or additional findings," in any event. *Burnquist*, 241 Minn. at 110, 63 N.W.2d at 284.

III. Under the declaration, respondent is liable for the maintenance and repair of the water-service line, but not for consequential damages.

"The operative documents that govern a townhome association constitute a contract between the association and its individual members." *Swanson v. Parkway Estates Townhouse Ass'n*, 567 N.W.2d 767, 768 (Minn. App. 1997). As we noted in *Chiu I*, claims for damages to an individual unit in an association are usually brought under a contract theory, based on the governing declaration or statute. 2015 WL 4523925, at *3. Here, the declaration grants respondent an easement to access and maintain the water-service lines, but is silent on respondent's responsibility for consequential damages to the individual units. Appellant asserted no contract claims for consequential damages. Appellant makes no claim that respondent is statutorily liable for these damages. His only claims are that respondent is responsible for the "maintenance and repair" of the water-service line and therefore liable to him in trespass and negligence, as discussed.

Despite the foregoing discussion, the declaration's statement that respondent is responsible for the "maintenance and repair" of the water-service lines entitles appellant to

relief from respondent for the three holes that were jackhammered in the lower level of his townhome. The holes were necessary to repair the leaking pipe. Respondent's counsel conceded at oral argument that respondent is responsible under the declaration for the expense of repairing the holes opened to fix the water-service line. The state of the record is that respondent agrees that it must fix the holes and has not yet done so (or had not done so according to the record when transmitted). Accordingly, we remand to the district court to resolve that remaining issue as appropriate.

Affirmed in part and remanded.