No. 92036-2

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

MARK F. and LINDA H. BRESSLER, husband and wife,

Plaintiffs-Appellants,

v.

KEVIN F. AND LINDA SULLIVAN, husband and wife,

Defendants-Respondents,

v.

GMAC MORTGAGE, LLC, & MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.,

Defendants.

ON APPEAL FROM
ISLAND COUNTY SUPERIOR COURT
(The Honorable Vickie I. Churchill)

Bresslers' Answer to Sullivans' Petition for Review

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2. Tables

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I. Identity of Answering Party.

Mark and Linda Bressler were the plaintiffs at the trial court and the appellants at the Court of Appeals.

II. Decision of Court of Appeals.

In a unanimous, unpublished decision filed June 29, 2015, the Court of Appeals determined that the trial court erred in allowing Kevin and Linda Sullivan to reinstate an easement that they had intentionally abandoned unless the Bresslers proved that they were estopped from doing so and reversed the portion of its judgment establishing reinstatement conditions.

III. Additional Issues Presented for Review.

The petition for review should be denied. But, if the petition is granted, the Bresslers ask the Court to review their other challenges to easement reinstatement: (1) Whether equity can relieve an intentional actor of the consequences of her actions, despite the lack of a good faith mistake? (2) Whether the abandoner's bad faith precluded reinstatement? (3) whether excluded evidence of bad faith should have been considered as bearing on the emotional hardship of reinstatement? (4) whether reinstatement was appropriate under the circumstances? Corrected Appellants' Brief at 4-5.

IV. Introduction.

The Bresslers filed suit to extinguish an easement for joint use of a boat launch on grounds that the Sullivans had abandoned the easement or, in

the alternative, that they were estopped to deny that they had abandoned it. In lengthy and detailed findings of fact,[1] the trial court found that the Sullivans had intentionally abandoned the easement. Nonetheless, the trial court concluded that they were entitled to repudiate their abandonment unless the Bresslers proved that they were equitably estopped from doing so. Under the trial court's judgment, the easement was determined to be abandoned, but the Sullivans were allowed to reinstate it.

The Bresslers appealed the portion of the judgment establishing reinstatement conditions. In an unanimous, unpublished decision, the Court of Appeals reversed the challenged portion. In seeking review, however, the Sullivans assert conflicts with Washington authorities where none exist, distort or omit key facts on which both decisions below were based, and take issue with the trial court's determination that they abandoned the easement, despite their failure to cross-appeal or to assign error to any findings of fact.

V. Statement of the Case.

The Bresslers and the Sullivans own adjoining waterfront properties. FoF 1. They bought their properties on the same day, from the same developer. FoF 1, 3. The developer installed stone and, "grassy" pavers down the corridor between the two houses and curving sharply over to the

[1] A copy of the appellate court decision is attached to the Petition for Review. Copies of the Findings and Conclusions and the Final Judgment & Conditional Decree Quieting Title (through the trial court's signature pages, to avoid excess length) are attached hereto.

side of the Bresslers' property where a boat launch is located. FoF 3. Right before the sales, the developer recorded an access easement to launch boats centered on most of the common boundary and over the grassy-paver path to the other side of the Bresslers' property. FoF 1. Both the Bresslers and the Sullivans were told about the easement. RP at 43-44; CP at 938-40.[2] When Ms. Sullivan told the developer that she wanted to put up a fence, he responded that it would need to be set back five feet from the property line, outside of the easement. CP at 933-35.

For years, neither party used the boat launch. RP at 119-20, 328. Nonetheless, there were repeated disputes about the easement, FoF 6: disputes that escalated when Ms. Sullivan started living at her house. Id. Ms. Sullivan had a mailbox put up in the easement; when Mr. Bressler complained, she agreed to move it but did not. FoF 4. Ms. Sullivan thereafter offered to give up the easement because she wanted to put up a fence on the common boundary, but Mr. Bressler did not want to give up his easement rights.[3] FoF 6. After a particularly ugly dispute over the easement culminated in Ms. Sullivan's use of religious and disability hate speech to

[2] Selected pages from Ms. Sullivan's deposition were read at trial. RP at 315-26.

[3] The Sullivans erroneously assert as fact not only that the Bresslers did not have a boat, RP at 277, but also that they did not intend to use the easement to launch boats. Pet. for Rev. at 9. They ignore the trial court's finding that Mr. Bressler did not agree to Ms. Sullivan's initial offer to give up the easement in order to put her fence on the property line because he did not want to lose his own easement rights. FoF 6

Mr. Bressler and threats to one of the Bresslers' autistic children,[4] RP at 104-06, 108, the two stopped communicating altogether. RP at 111; Ex. 131.

Some two years later, FoF 7-8, the Sullivans bought a boat and went to an attorney for advice about how to start using the boat launch. FoF 8. The attorney mistakenly informed them that there was no easement. FoF 9. Ms. Sullivan immediately made arrangements to move her fence, which had been set back five feet, FoF 6, to the property line. FoF 11. Before the fence was completed, the Bresslers' attorney provided the Sullivans' attorney with a copy of the easement and demanded that the Sullivans move their fence and their mailbox or extinguish the easement. FoF 13.[5] When Ms. Sullivan learned about the recorded easement, she instructed her attorney not to respond to the Bresslers' attorney and authorized her contractors to finish the fence. Id.; Court of Appeals Opinion at 3 (hereinafter, "Opinion").

The Sullivans did not move the fence and mailbox by the Bresslers' deadline. FoF 15. Instead, they agreed to sign an easement extinguishment.

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[4] Mr. Bressler's testimony about the incident was admitted without objection, RP at 106, but the trial court excluded the Bressler's offer of the corroborating police report, Rejected Exhibit 19, despite its reference to, "religious remarks" as the basis for Mr. Bressler's complaint, as irrelevant to abandonment. RP at 109-10. Similarly, the trial court cited irrelevance, RP at 150-51, 257-58, in excluding photographs showing the decapitated skull and skeleton of a horned animal, Rejected Exhibit 115, that the Sullivans placed in a tree at eye-level, facing the Bresslers' front yard, before removing a portion of the fence that they had installed on the property line. CP at 436.

[5] The Sullivans' unsupported assertion that the Bresslers hired an attorney in order to get an agreement to extinguish the easement, Pet. for Rev. at 4, is inconsistent with this express finding of fact.

Id. While their attorney was working on the extinguishment with the Bresslers' attorney and representing that the Sullivans would sign it, FoF 15 the Sullivans were pursuing a boat launch of their own.[6] FoF 17. When the Sullivans learned that their title company would not pay for it, however, they reneged on their commitment. FoF 21.

The Bresslers promptly gave notice that they regarded the easement as abandoned by the Sullivans and invoked the easement's mediation term. FoF 23. After the mediation was scheduled -- and the Sullivans changed lawyers, Ex. 80 -- they moved most of their fence back out of the easement. FoF 23. But they reconfigured their sliding gate to block off a portion of the easement[7], Id., and continued to put additional obstacles in it up to the trial. FoF 26. And, although the Sullivans did not start using the easement until after the Bresslers had filed suit, FoF 25, the Sullivans mis-used it by storing their boat on the launch and on the Bresslers' tidelands. FoF 26.

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[6] According to the Sullivans, the Bresslers' boat launch is located in the only opening in the bulkhead wide enough for launching boats. Pet. for Rev. at 4. But Ms. Sullivan got an estimate for replacing the beach stairs, most of which are on the Sullivans' property, RP at 72-74, with a boat launch. Ex. 39 at 2. The Sullivans assert that costs and regulatory demands proved prohibitive. Pet. for Rev. at 5. But the trial court found as fact that Ms. Sullivan wanted a boat launch that she would not have to share with the Bresslers, that she wanted someone else to pay for it, and that she did not want to move her fence from the easement until she knew the outcome of her effort. FoF 22.

[7] According to the Sullivans, they moved their fence to free up the easement area on March 1, 2012. Pet. for Rev. at 5. But the trial court found as fact that the Sullivans' reconfigured sliding gate encroached on a portion of the easement, FoF 24, that they knew or should have known that it was encroaching, FoF 31, and that, despite the Bresslers' written notification about the encroachment, the Sullivans kept it in the easement through the trial. FoF 23.

The Bresslers filed suit to extinguish the easement on grounds that the Sullivans had abandoned the easement or, in the alternative, that they were estopped to deny that they had abandoned it. Opinion at 4. The Sullivans denied that either doctrine applied and pled their lack of intent to abandon the easement and their good faith as affirmative defenses. CP at 881-82. In Finding of Fact 29, the trial court expressly found that the Sullivans had abandoned the easement when they chose to finish their fence after receiving verification that a recorded easement existed:

> The Sullivans' installation of a fence along the property line, down the middle of the easement, was unequivocal, decisive, and inconsistent with the continued existence of the easement. At that point, the Sullivans abandoned the easement. The Sullivans' decision to relocate the fence to the middle of the easement after they were mistakenly told that there was no recorded easement appears to have been done in the mistaken belief that the easement had not been executed or recorded, as acknowledged by the Bresslers.... However, the Sullivans' actions after being advised that an easement was recorded were intentional. After receiving verification that the easement was recorded, Ms. Sullivan nevertheless continued with the installation of the fence inside the easement. Her testimony that she thought the wooden posts which were already installed would be dangerous standing alone was not credible.

But the trial court nonetheless concluded that the Sullivans had a right to repudiate their abandonment unless the Bresslers proved that they were estopped from doing so. CoL 3-4. And, despite concluding that the Bresslers had proved inconsistent admissions, statements, and acts by the

Sullivans and their reliance, CoL 5 and Opinion at 7, the trial court concluded that the Sullivans could reinstate the easement by avoiding the undue hardship to the Bresslers that would otherwise result if they reimbursed the legal fees that the Bresslers had incurred to the point when the Sullivans reneged on their commitment to execute the extinguishment and removed their obstacles from the easement. CoL 7.

The Court of Appeals reversed the portion of the judgment allowing the Sullivans to reinstate the easement. Opinion at 1, 11. As the Court of Appeals observed, abandonment requires a showing of intent to abandon, Id. at 6, while, under equitable estoppel, an easement can be extinguished even if the dominant owner has no intention to give it up. Id. at 7. The trial court's determination that the Sullivans had intentionally abandoned the easement was thus sufficient, in and of itself, to extinguish it. Id. at 8. The Bresslers consequently did not need to also prove that they would suffer undue hardship -- an element of equitable estoppel -- in order to prevail. Id. at 8-9 As the Court of Appeals observed in reversing the errant portion of the judgment, there is no legal support for the remedy of reinstatement of an abandoned easement. Id. at 9. Rather, an easement that has been extinguished, whether through abandonment or some other legal doctrine, ceases to exist and may only be, "reinstated" by the creation of a new easement. Id. at 5, 8.

Reversal of this error of law being dispositive, the appellate court expressly did not reach the Bresslers' challenge to the trial court's exclusion of evidence of the Sullivans' bad faith. Id. at 11. The appellate court also did not reach the Bresslers' other challenges to reinstatement.

VI.A. Argument Why Review Should be Denied.

1. Appellate Opinion Was Properly Based on a Recent, Unanimous Decision of this Court.

The Sullivans assert a conflict of authority where none exists. In Heg v. Alldredge, 157 Wn. 2d 154, 137 P. 3d (2006) -- a recent, unanimous decision -- this Court considered abandonment and equitable estoppel as alternative grounds on which a disputed easement could be extinguished. This Court expressly held that the facts were not sufficient to support either a determination of abandonment or that the dominant owner was estopped from enforcing her easement. 157 Wn. 2d at 156-57.

Heg established that, for acts of an easement-holder to constitute abandonment, they must be unequivocal, decisive, and inconsistent with the existence of an easement. Id. at 161. Heg also applied established elements of the doctrine of equitable estoppel: there must be inconsistent statements, acts, or conduct by the party to be estopped, on which the opposing party relies, and the opposing party must suffer injury if the other is allowed to change positions. Id. at 165. There are no published

Washington decisions citing Heg, much less decisions that are in conflict with it. Indeed, although the Sullivans now assert a right to reinstate the easement they had abandoned unless the Bresslers proved that they were equitably estopped, they originally asserted that, "[t]he single issue before [the trial court] is whether or not the easement for joint boat access has been 'abandoned' by the Defendants." CP at 400.

Abandonment and equitable estoppel are different easement extinguishment doctrines: abandonment requires proof that the holder has intentionally abandoned the easement, while equitable estoppel does not. Opinion at 6-7. But the very language from the appellate decision in Heg that the Sullivans quote for the proposition that an abandoner has a right to revive an easement unless equitably estopped from doing so instead supports the Court of Appeals' Opinion:

> 'An easement may be extinguished by conduct of the owner of it even though he had no intention to give up the easement. This is due to the general principle that an owner of an easement will not be permitted to change a position once taken by him if the change would cause undue hardship to the owner of the servient tenement."
>
> Humphrey v. Jenks, 61 Wn. 2d 565, 567-68, 379 P. 2d 355 (1963) (quoting 2 AMERICAN LAW OF PROPERTY §8.99, p. 305). **Thus, where the conduct of an owner of an easement does not suffice to establish abandonment of the easement, it may nevertheless suffice to bar enforcement where there has been a change of position by the owner of the servient estate and resulting hardship.**

Pet. for Rev. at 7-8, *quoting* Heg v. Alldredge, 124 Wn. App. 297, 310, 99 P. 3d 914 (Div. I, 2005) (emphasis added).

In Humphrey, this Court's decision quoted in the appellate court's decision in Heg, proof of reliance and undue hardship were required because there was no claim of abandonment: the holder had never stopped using the easement or indicated any intent to give it up. 61 Wn. 2d at 568. In both the appellate and Supreme Court opinions in Heg, abandonment and equitable estoppel were considered as alternate grounds on which an easement can be extinguished, 124 Wn. App. at 300, 310, and 157 Wn. 2nd at 156, 165: not because the party seeking extinguishment has to prove not only that the holder has intentionally abandoned an easement but also is equitably estopped from reviving it.

The Sullivans seek to avoid the consequences of their abandonment conduct -- installing a fence in the middle of the paved path down the property line, despite prior notice that doing so was inconsistent with the easement -- by attributing it to mistaken advice from their first attorney. An easement can be extinguished through abandonment by nonuse 'accompanied with the express or implied intention of abandonment', Heg, 157 Wn. 2d at 161, *quoting* Netherlands Am. Mortgage Bank v. E. Ry. & Lumber Co, 142 Wash 204, 210, 252 P. 916

(1927). The Sullivans ask this Court to decide whether it is sufficient that the objective acts of the holder evidencing abandonment of an easement are unequivocal and decisive and inconsistent with the continued existence of an easement or whether the holder must also subjectively intend to abandon the easement. Pet. for Rev. at 12-14.

Interesting as that question might otherwise be, however, the facts of this case do not present it. As emphasized by both the trial court in finding that the Sullivans had abandoned the easement, FoF 29, and by the Court of Appeals in quoting the finding in its entirety, Opinion at 8, the Sullivans may have started putting up their fence based on mistaken advice from their lawyer. But, after she got a copy of the easement, Ms. Sullivan instructed her attorney not to respond to the Bresslers' attorney and finished her fence instead. FoF 13. Ms. Sullivan wanted a boat launch that she would not have to share with the Bresslers, wanted someone else to pay for it, and did not want to move her fence until she knew the outcome. FoF 22.

The Sullivans assert that public policy favors permitting them to, "preserve" the easement even after they intentionally abandoned it. Pet. for Rev. at 15, 17. But no authorities cited by the Sullivans support the notion that abandonment is revocable or that an easement continues to exist after it has been abandoned. The Sullivans ignore Radovich v.

Nuzhat, 104 Wn. App. 800, 16 P. 3d 687 (Div. I, 2001), even though Radovich was repeatedly cited in the Opinion for the propositions that, "[o]nce extinguished, an easement ceases to exist and may only be recreated by creation of a new easement", Opinion at 5-6; "[an easement that has been extinguished by abandonment, or by any other means]...may only be 'reinstated' by creation of a new easement", Opinion at 8, and; "the standards for creating an easement by express conveyance and for recreating such an easement are the same." Opinion at 8, ftn. 13. In asking this Court to determine that abandonment is revocable, the Sullivans thus ignore reported Washington authority that looks the other way.

2. Finding of Abandonment does not Merit Review.

The Sullivans also ask this Court to review the trial court's determination that they abandoned the easement. Pet. for Rev. at 2, Item 4. But unchallenged findings of fact are verities on appeal. Cowiche Canyon Conservancy v. Bosley, 118 Wn. 2d 801, 808, 828 P. 2d 549 (1992). The Sullivans did not cross-appeal the portion of the judgment, CP at 4-5, quieting title to both properties free of the easement unless they fulfilled the reinstatement conditions, see Smoke v. City of Seattle, 79 Wn. App. 412, 422, 902 P. 2d 678 (Div. I, 1995), *revs'd on other grounds*, 132 Wn. 2d. 214, 937 P. 2d 214 (1997) (respondents must cross-appeal when seeking review of adverse rulings), or assign error to any findings of

fact. State v. Kindsvogel, 149 Wn. 2d 477, 481, 69 P. 3d 870 (2003) (respondent who does not seek affirmative relief may secure appellate review of trial court's findings by assigning error thereto in brief). The Court of Appeals did not reach this issue precisely because the Sullivans did not preserve it for appellate review. Opinion at 8.

Even if the Sullivans had preserved it, the issue they describe is not presented by the facts as found by the trial court. According to the Sullivans, the Court of Appeals erred in determining that placement of a fence in the middle of an easement, "without prior demand for its removal and failure to comply with such demand" is satisfactory evidence of abandonment. Pet. for Rev. at 2. But the trial court found as fact that the Bressler did demand that the Sullivans remove the fence, FoF 13, that the Sullivans did not remove it by the Bresslers' deadline, FoF 15, that, when they finally removed it, they reconfigured their fence to continue to block off a portion of the easement, FoF 23, and that, despite written notice of its mis-placement, they kept it there through trial. Id.

The Sullivans are also wrong on the law. A servient-owner's installation of a fence blocking an unopened access easement is not sufficient to start the statute of limitations running against the holder of the easement. City of Edmonds v. Williams, 54 Wn. App. 632, 636-37, 774 P. 2d 1241 (Div. I, 1989). But abandonment is largely a question of fact.

In re Trustee's Sale of Real Property v. Brown, 161 Wn. App. 412, 415, 250 P. 3d 134 (Div. III, 2011). The trial court did not err in determining that, when an easement-holder who has previously been told by the common grantor that any fence has to be installed outside the improved easement path, CP at 933-35, and whose previous offer to give up the easement in order to put up a fence on the property line has been rejected, FoF 6, nonetheless chooses to finish a fence down the property line after receiving actual notice that a recorded easement exists, she thereby abandons that easement. FoF 29; CoL 1-2. And the Court of Appeals did not err in determining that the reasoning in Edmonds, which involved claims of termination by adverse possession, does not apply to this case and does not support the trial court's reinstatement remedy. Opinion at 10.

3. The Correct Standard of Review was Applied.

The Sullivans assert both that the decision of the Court of Appeals presents a, "clear question of law", Pet. for Rev. at 10, and that the Court of Appeals erred by failing to apply an, "abuse of discretion" standard. Id. at 3, 10. Although the Sullivans cite no authority for the proposition, a trial court's formulation of an equitable remedy is reviewed for abuse of discretion. See, e.g., Liens for Real Property Taxes v. Kahn ("Liens II"), 123 Wn. 2d 197, 204-05, 867 P. 2d 605 (1994). But the trial court did not decide that allowing the Sullivans to reinstate the easement was an

equitable result: indeed, it is precisely the trial court's failure to consider all the relevant circumstances that is at the heart of the issues raised by the Bresslers that the appellate court did not reach. See Section IV.B below. Rather, the trial court's decision permitting the Sullivans to reinstate the easement was driven by an erroneous conclusion of law: that the Sullivans were entitled, as a matter of right, to repudiate their abandonment and reinstate the easement unless the Bresslers provided that they were equitably estopped from doing so. CoL 3-4; compare Liens II, 123 Wn. 2d at 205 (application of abuse of discretion standard appropriate where trial court considered equities of case). And the Court of Appeals correctly applied a *de novo* standard of review in reversing the trial court's error of law. See Id. at 204.

4. No Substantial Public Interest.

Even where a petition for review presents no conflict with reported authorities, review may properly be granted when the petition involves an issue of substantial public interest. RAP 13.4(b)(4). This case does not. Disputes over property rights among neighbors are regrettably common. This is a distinctly fact-specific case, distinguished principally by the personal nature of the Sullivans' animus for their neighbors and their effort to blame their first lawyer for their conduct, thereby waiving the attorney-client privilege as to the communications that they would otherwise have been

entitled to keep private. It was Ms. Sullivan who first decided that she did not want to share a boat launch with Mr. Bressler. FoF 6, 12. On this record, the Bresslers respectfully submit that there can be no doubt that both these parties and the public are better-served if she does not.

VI.B. Additional Issues if Review Accepted.

The heart of the Sullivans' petition for review is the proposition that a trial court has the power to permit the holder of an easement who has abandoned it to nonetheless reinstate the easement, without meeting the standards that would be required to create an easement as an initial matter, unless the holder is equitably estopped from doing so. Pet. for Rev. at 15, 17. That proposition is wrong as a matter of law, as the Court of Appeals correctly determined. But the heart of the issues that were raised by the Bresslers on appeal but that were not addressed by the Court of Appeals -- because its reversal on the, "right to reinstate" issue was dispositive -- is the proposition that, even if a trial court does have such power, it was not equitable to permit the Sullivans to reinstate the easement under the circumstances of this case. If the Court accepts review of the Sullivans' petition, the Bresslers ask the court to also accept review of the issues that should preclude the reinstatement remedy that the Sullivans seek, even if the trial court would otherwise have the power to provide it.

1. Equity Cannot Save an Intentional Actor on Grounds of a Good Faith Mistake.

A trial court's power in equity to relieve a party from the consequences of his or her actions depends on a finding that those actions were based on the party's reasonable, but mistaken, good faith belief. See generally Proctor v. Huntington, 169 Wn. 2d 491, 238 P. 3d 1117 (2010). In this case, the trial court found as fact that the Sullivans intentionally abandoned the easement. FoF 29. There is no simply no basis in equity for relieving the Sullivans of the consequences of their actions as based on a good faith mistake when their actions were intentional. Corrected Appellants' Brief ("COA Appellants' Brief") at 4, Item 2, and 37-39.

2. Sullivans' Bad Faith Precludes Reinstatement.

"Equity exists to protect the interests of deserving parties..." Columbia Community Bank v. Newman Park, LLC, 177 Wn. 2d 566, 569, 304 P. 3d 472 (2013). One who seeks equity must do equity and must come into equity with clean hands. Id. at 581. The trial court found that the Sullivans intentionally finished their fence after the Bresslers provided them with the recorded easement, FoF 29, and then intentionally stalled the Bresslers, FoF 13-14, maintaining their fence in the middle of the easement while they tried to get someone else to pay for a boat launch of their own. FoF 22. The trial court allowed the Sullivans to reinstate the

easement based on its erroneous conclusion of law that they had a right to do so unless they were equitably estopped: not because the trial court concluded that it was fair or equitable to allow them to do so. Even if the trial court otherwise had the equitable power to relieve the Sullivans from the consequences of their actions, their bad faith towards the Bresslers precludes any such relief. COA Appellants' Brief at 5, Item ¶ 4, and 48-49.

3. Erroneous Exclusion of Bad Faith and Emotional Impact as Undue Hardship; Reinstatement Was not Equitable Under the Circumstances.

Mr. Bressler testified about Ms. Sullivan's use of religious and disability hate speech in a dispute over the easement, RP at 106, and his testimony was corroborated by Ms. Sullivan's reference to his religion in one of her first emails to her attorney. Ex. 26. But the trial court excluded the police report of the hate speech incident, RP at 109-10, and made no express finding of fact about it. The trial court also excluded photographs of the decapitated skull and skeleton of a horned animal, Rejected Ex. 115 and RP at 150-51, 238, placed by the Sullivans to face the Bresslers' front yard after the Bresslers gave notice of their abandonment claims. CP at 436.

In formulating the equitable remedy upheld in Proctor v. Huntington, the trial court found that requiring the couple who had, in good faith, built their house on their neighbors' property to move it would cause both substantial financial expense and, "considerable emotional

hardship", and declined to issue injunctive relief that would be, "oppressive ... and inequitable." 169 Wn. 2d at 495. In this case, the trial court determined that the excluded evidence was irrelevant to abandonment. But that evidence was manifestly relevant to meet the Sullivans' affirmative defenses of good faith and lack of intent to abandon, as well as to the only factor that the trial court considered in formulating its reinstatement conditions: whether allowing reinstatement would work an undue hardship on the Bresslers. COL 7. The trial court erred in excluding this evidence and in failing to enter a specific finding of fact about Ms. Sullivan's use of hate speech. COA Appellants Brief at 4, Item 5, and 47-48.

The Sullivans assert that the trial court had the power to permit them to reinstate the easement after intentionally abandoning it. But, even if the trial court had such power, the trial court should have considered all of the circumstances in determining whether it was equitable, or appropriate, or fair to allow the Sullivans to reinstate an easement on the Bresslers' property after intentionally abandoning it. Id. at 5, Item 3, and 42-46. "[T]he court must grant equity in a meaningful manner, *not blindly*." Proctor v. Huntington, 169 Wn. 2nd at 502, *quoting* Arnold v. Melani, 75 Wn. 2d 143, 152, 449 2d 908 (1969) (emphasis added by court).

Minor confrontations over the easement escalated after Ms. Sullivan moved to the property. FoF 6. Mr. Bressler was panicked, upset, and scared

by Ms. Sullivan's use of hate speech, RP at 107, and he called law enforcement after she threatened one of his autistic children. RP at 108. Although this case was pending before the Sullivans started using the boat launch, they repeatedly mis-used it. FoF 25-26.

An equitable remedy should be fashioned to do substantial justice to the parties and to put an end to litigation. Eichorn v. Lunn, 63 Wn. App. 73, 80, 816 P. 2d 1226 (Div. I, 1991). On this record, easement reinstatement cannot be expected to put an end to litigation; it rather ensures that disputes continue. Even if the trial court had the power to allow the Sullivans to reinstate the easement, reinstatement was not an appropriate remedy under the circumstances of this case. COA Appellants' Brief at 5, Item 3(a), 39-42.

VII. Conclusion.

The Bresslers respectfully request that the petition for review be denied. But, if the petition is granted, the Bresslers respectfully request that the Court also review the issues set forth in Section III above, which the Bresslers raised on appeal but which the Court of Appeals did not reach.

DATED this 26 day of August, 2015.

CAROLYN CLIFF
Attorney for Mark and Linda Bressler

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APPENDIX

FILED
MAY 12 2014
DEBRA VAN PELT
ISLAND COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF ISLAND

MARK F. and LINDA H. BRESSLER, husband and wife, Plaintiffs, vs. KEVIN F. and LINDA SULLIVAN, husband and wife, GMAC MORTGAGE, LLC, & MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., Defendants,	File No. 12-2-00469-7 FINDINGS OF FACT & CONCLUSIONS OF LAW

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SCANNED

This matter came before the court on a duly-noted presentation motion filed in accordance with Civil Rule 54(b) and based on the court's letter opinion filed on February 11, 2014, after the trial in this case on December 3-5 and December 12, 2013. Having considered the materials filed with the presentation motion on the issue of fees identified in the court's letter opinion and having heard argument from Carolyn Cliff, attorney for Mark and Linda Bressler, and from G. Geoffrey Gibbs, attorney for Kevin and Linda Sullivan, the court now ENTERS the following findings of fact and conclusions of law.

Findings of Fact

1. Sullivans and Bresslers each bought adjoining low-bank waterfront homes in Island County, Washington, on Whidbey Island, on Columbia Beach Drive in Clinton

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on the same day, July 24, 2006. The Sullivans own Lot 25 and the Bresslers own Lot 26. Both lots were encumbered with a mutual easement over a five-foot strip on either sides of most of their common boundary, while Lot 26 is encumbered with an easement for the benefit of Lot 25 that crosses Lot 26 to the side where the boat ramp is located on Lot 26. Both easements are set forth in the "Declaration for Joint Use of a Boat Launch" that was recorded with the Island County Auditor on July 24, 2006, under Auditor's file number 4176808. Ex. 11.

2. Lot 25 is legally described as Lot 25, Plat of Columbia Beach, as per plat recorded in Volume 3 of Plats, page 7, records of Island County, Washington, EXCEPT that portion, if any, lying within right of way of Columbia Beach Drive, and TOGETHER WITH tidelands of the second class situate in front of, adjacent to, or abutting on said premises. Lot 26 is legally described as Lot 26, and the South 10 feet of Lot 27, Plat of Columbia Beach, as per plat recorded in Volume 3 of Plats, page 7, records of Island County, Washington, EXCEPT that portion, if any, lying within right of way of Columbia Beach Drive, and TOGETHER WITH tidelands of the second class situate in front of, adjacent to, or abutting on said premises.

3. Prior to the Sullivans' and the Bresslers' purchase of their lots, both lots were owned by Casa Group Corporation, a Washington corporation, whose president was Rick Jones. Casa Group installed stone pavers along the corridor between the two houses and reinforcing plastic honeycomb, called "grassy pavers," under the sod at each end of the stone paver corridor, following the intended easement path between the two lots and across Lot 26 down to the boat launch. *See* "Declaration for Joint Use of a Boat Launch,"

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Ex. 11. The purpose was to strengthen the ground so vehicles towing boats would not tear up the ground.

4. The neighbors did not get along for a variety of reasons, and, over the years, both were careful to stay on their side of the easement. There were two exceptions. Ms. Sullivan had her mailbox installed on property that is subject to the easement in January 2009 and kept it there, despite Mr. Bressler telling her it was in the middle of the easement. She agreed to move the mailbox, but she never did until after this lawsuit was filed. Additionally, the Sullivans put in landscaping along the side and in front of their house that encroached on the easement.

5. The Bresslers sometimes put lawn furniture on the paved boat launch but such use was seasonal. The Sullivans apparently did not like that use but did not complain to the Bresslers. The Bresslers removed the lawn furniture from the boat launch pad when they saw that the Sullivans had a boat.

6. There were some minor confrontations between the neighbors about use of the easement area, but it did not escalate until January 2009, when Ms. Sullivan moved onto the property and brought her dogs to stay with her. At the end of August 2009, Ms. Sullivan decided to put up a fence because of some problems with her dogs and another neighbor's dogs. At one point, she told Mr. Bressler she was going to give up her easement rights in order to put the fence along the property line. Mr. Bressler did not want to lose his right to use the easement and reminded Ms. Sullivan that it would be inconsistent with the easement and that she could not do that. Mr. Bressler told one of the contractors installing the fence that there was an easement, and Ms. Sullivan came up

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and told the contractor, "Don't listen to what he says. I'm going to put my fence anywhere I want." The chain-link fence that she installed was five feet from the mid-point of the easement, and there was no encroachment on the easement. It is apparent to this court, and this court finds, that Ms. Sullivan was aware that an easement existed and its location.

7. After Ms. Sullivan moved onto the property and brought her dogs to stay with her, Mr. Bressler placed a single rope, set back five feet from the property line. to give his autistic child a visual reminder of the limits of Mr. Bressler' s yard. Ex. 107. After Ms. Sullivan put up the chain-link fence, in October of 2009 Mr. Bressler placed a single length of the rope, attached to his post at the bulkhead, for the same reason. Ex. 95. While he was doing so, Ms. Sullivan told Mr. Bressler that he could not put it there because it blocked the easement. But Mr. Bressler reminded her that the easement did not go down that far. Here again, Ms. Sullivan knew about the existence of the easement and was on notice about its location. The Sullivans thereafter allowed grass, weeds and wildflowers to grow on their side of the easement. Ex. 108. When they finally cut the grass, the grass had a yellow or newly-mown look, which can be seen in Ex. 113.

8. In September 2011, the Sullivans bought a small aluminum boat and stored it inside their fence. On September 27, 2011, the Sullivans got their vessel registration. Ex. 30. On September 5, 2011, Ms. Sullivan emailed her attorney with questions about how to begin using her easement shared with Bressler. Ex. 131. Unfortunately, Ms. Sullivan was thereafter told that no easement existed, even though she had believed that an easement existed from the time she and her husband purchased the

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property and even though her neighbor, Mr. Bressler, had continuously affirmed the existence of an easement. In fact, in August 2007, the Sullivans paid one-half the cost of repairs to the boat launch, acknowledging the existence of a joint-use agreement and easement.

9. On September 8, 2011, Ex. 172, the Sullivans met with an attorney to draft a letter to the Bresslers, informing them they intended to start using the easement. The easement was not mentioned in the Sullivans' Statutory Warranty Deed, Ex. 12, and for whatever reason, the attorney was unable to find the easement in the title records, possibly because it was called "Declaration for Joint Use of a Boat Launch." Ex. 11.

10. When Mr. Bressler saw the boat stored inside the Sullivans' fence, he immediately moved his outdoor furniture off the boat pad. The Sullivans also made arrangements to install a sliding gate in their fence in preparation to move their boat from their property to the boat launch. With the exception of the Sullivans' mailbox and some of their plantings alongside the house and in the front yard, there was no encroachment on the easement at this time.

11. On September 29, 2011, Ms. Sullivan's attorney advised her there was no recorded easement, and Ms. Sullivan took immediate action to move her fence to the middle of the easement. Ex. 31. By October 5, 2011, poles had been set in concrete in the ground along the property line east of the corridor between the two houses. Ex. 36. By October 12, 2011, a solid chain-link fence had been placed along those poles. Ex. 113. Fence posts were thereafter placed in concrete all along the property line in the middle of the easement, including six-foot high wooden posts between the two houses.

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The Sullivans had to remove some of the grassy pavers along the property line, as well as some of the stone pavers between the two houses, in order to install the fence posts.

12. When the Bresslers came to the property after October 12, 2011, and saw the new fence and poles, Mr. Sullivan came up to Mr. Bressler and gave him cards from his attorneys. Ex. 142. The Bresslers then hired their own attorney, who contacted the Sullivans' attorney. The Sullivans learned by email dated October 19, 2011, that the easement did exist. Ex. 39. Even though the Sullivans' attorney thought the Bresslers were probably wrong about the easement, he suggested to the Sullivans that they might be able to record a mutual easement, since both parties believed one existed. *Id.* Ms. Sullivan responded, "I am not interested in sharing anything with Mark Bressler ..." *Id.*

13. On October 24, 2011, the Bresslers, via their attorney, wrote to the Sullivans' attorney and demanded that the fence and mailbox be removed from the easement no later than November 4, 2011, or alternatively, they would agree to extinguish the easement. Ex. 45. An easement was supposedly enclosed. Unfortunately, the Bresslers' attorney enclosed the wrong document, not the easement. However, by email a day later on October 25, 2011, the easement was provided to the Sullivans' attorney. Ex. 46. The Sullivans' attorney sent the easement to the Sullivans by email on October 26, 2011. Ex. 47. Ms. Sullivan responded on October 27, 2011, advising her attorney not to say anything to the Bresslers' attorney, but to, "Keep them humming . .." *Id.* Ms. Sullivan authorized her fence contractor to continue with the installation of the wooden fence between the two houses, which only had the posts installed at that point, even after learning that the Bresslers' attorney had provided the easement.

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14. The court finds that the Sullivans intended to stall the Bresslers from taking any action to enforce the easement. The Sullivans' later actions are also consistent with this finding.

15. Then followed a group of emails between the Bresslers' attorney and the Sullivans' attorney in which the Sullivans' attorney represented that the Sullivans wanted to extinguish the easement. Exs. 55, 56, 59, 60, 64, 67, 68 and 70. An extinguishment agreement, prepared by the Bresslers' attorney, had been provided to the Sullivans' attorney on November 9, 2011, Ex. 54, and the Sullivans kept their fence installed in the middle of the easement. In addition to the emails between the two attorneys, the Sullivans told their attorney in an email dated November 11, 2011, that they agreed to sign the papers to relinquish the declaration. Ex. 57. Ms. Sullivan is not credible when she said at trial that she never wanted to sign the relinquishment. The court finds that she expressly and impliedly communicated her acquiescence to her attorney.

16. The court finds that the Sullivans were aware that their attorney was working on an extinguishment and that neither she nor her husband advised their attorney to stop representing them or to add conditions to the extinguishment. The court further finds that the Bresslers were entitled to rely on the representations made by the Sullivans' attorney.

17. The Sullivans originally wanted either the property seller, Ex. 38, the Casa Group, and its owner, Rick Jones, or the title company to pay for a boat launch on their property. *Linda Sullivan's deposition,* page 413, lines 4-24. On October 16, 2011, the Sullivans even got an estimate for partial costs of installing a boat ramp on their property,

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$23,914. Ex. 39. When the easement was found, their claim against the property owner was no longer possible, leaving only the title company as a possibility.

18. On November 21, 2011, the Sullivans' attorney advised the Sullivans that they were not entitled to recapture from the title company the costs for installing a boat ramp or the fence and that it was unlikely the title company would reimburse the Sullivans' attorney fees. Ex. 61. At that point, Ms. Sullivan testified that she felt that their attorney was no longer working on their behalf. *Linda Sullivan's deposition,* page 413, lines 4-24. The Sullivans did not respond to the email.

19. Eventually, the Sullivans' attorney emailed them again, inquiring as to when they could sign the extinguishment agreement prepared by the Bresslers' attorney. Ex. 62. On November 30, 2011, Ms. Sullivan responded that they were "unavailable until mid-December." *Id.* However, the Sullivans were actually at home when they said they were "unavailable." Ex. 69.

20. On December 8, 2011, the Sullivans' attorney wrote them a letter explaining that their attorney fee claim against the title company for not including the easement in the title policy issued to the Sullivans was rejected but that the attorney would try again to recoup the attorney fees. Ex. 72. On December 19, 2011, the Sullivans' attorney emailed the Sullivans that the title company was willing to pay $3,951 for attorney fees to settle their claim. Ex. 73.

21. On December 20, 2011, one day after being informed that the title company would only reimburse $3,951, the Sullivans sent a letter to their attorney, with a

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copy to the Bresslers' attorney, that they would not sign the extinguishment agreement "at this time". Ex. 74.

22. Later, the Sullivans' second attorney represented that the Sullivans wanted the title company to reimburse them for the costs of relocating their fence as well as attorney fees and were upset that their attorney had not included the fence relocation claims. Ex. 89. However, the court finds that, contrary to Ms. Sullivan's reasons at trial, her main purpose in stalling the Bresslers and her own attorney was to determine whether she could get reimbursed for a separate boat launch on her own property that she would not have to share with the Bresslers. The court finds that, until she knew the outcome of that question, she did not want to move her fence out of the easement area and incur additional fence expenses.

23. On December 29, 2011, the Bresslers notified the Sullivans that they believed that the easement was no longer enforceable, and, pursuant to a term in the declaration, requested mediation. Ex. 77. The Sullivans finally agreed to mediate on February 27, 2012, and shortly thereafter, on March 1, 2012, Ex. 83, moved the majority of their fence back to its original configuration, five feet from the middle of the easement. However, the Sullivans intentionally left an @12-foot portion of the fence inside the easement where the 10-foot swinging gate was installed. Ex. 81. The Bresslers' reserve drainfield begins 50 feet from the bulkhead, Ex. 3, right where the encroaching portion of the fence was left. The Sullivans' current configuration requires both the Bresslers and the Sullivans to drive over part of the Bresslers' reserve area for their drainfield to get a boat to or from Columbia Beach Drive to the boat ramp. The Bresslers' attorney again

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advised the Sullivans' new attorney that the Sullivans were blocking the easement, Ex. 85, but the Sullivans did nothing to rectify the situation. The new fence configuration continued to extend into the easement through trial.

24. Ms. Sullivan testified that the easement only extended 140 feet from Columbia Beach Drive and that her fence was placed five feet from the midline of the easement until that point, after which the fence was placed on her property line. She argued that her fence did not encroach on the easement. The court disagrees with Ms. Sullivan. As the diagram presented by Ms. Sullivan to her fence installers show, the fence is placed in the middle of the easement where a vehicle towing a boat would have to turn. Ex. 81. The court finds that the Sullivans' fence encroaches on the easement for more than 12 feet where the 10-foot sliding gate is installed (14.13 feet, according to the surveyor. Ex. 140).

25. Mediation, which did not occur until April 4, 2012, was not successful, and the Bresslers filed this lawsuit on June 8, 2012. After the lawsuit was filed, the Sullivans used the boat ramp numerous times. However, they did not comply with the boat launch easement in several respects. The boat launch easement provides that the easement is to be used for "ingress and egress to the easement on Lot 26 for the purpose of launching boats." Instead, the Sullivans often tied their boat up on the Bresslers' tidelands or stored their boat on the boat ramp. Exs.120-126, Ex. 182.

26. In addition, the Sullivans authorized third parties to use the easement to remove driftwood from the beach below the boat launch without notifying or obtaining the Bresslers' agreement and then demanded that the Bresslers pay half the bill, even

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though they had not followed the terms of the boat launch declaration. After this case was filed, the Sullivans enlarged the river rock bed on the property facing the Bresslers' property, and expanded their front yard landscape further into the easement area. Ex. 143. The Sullivans also took out stone pavers in the corridor between the two houses and installed plants that have the potential of intruding into the easement area by five feet if trimmed and by 10 feet if left untrimmed. Ex. 130 and Ex. 139.

27. The Sullivans' trial attorney advised the court on the first day of trial that the Sullivans were dropping their counterclaims and stipulating that they did not intend to ask the court to amend their pleadings to add "the public" as a necessary party.

28. The foregoing facts are mostly undisputed. Ms. Sullivan contends at trial that she will move any encroachments found by the court. The court has found above that Sullivans' fence encroaches on the easement at the point where the easement makes a turn, that the Sullivans' bushy plants planted in and extending into the corridor between the two houses encroach on the easement, and that the Sullivans' front landscaping encroaches on the easement.

29. The Sullivans' installation of a fence along the property line, down the middle of the easement, was unequivocal, decisive, and inconsistent with the continued existence of the easement. At that point, the Sullivans abandoned the easement. The Sullivans' decision to relocate the fence to the middle of the easement after they were mistakenly told that there was no recorded easement appears to have been done in the mistaken belief that the easement had not been executed or recorded, as acknowledged by the Bresslers. Ex. 45. However, the Sullivans' actions after being advised that an

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easement was recorded were intentional. After receiving verification that the easement was recorded, Ms. Sullivan nevertheless continued with the installation of the fence inside the easement. Her testimony that she thought the wooden posts which were already installed would be dangerous standing alone was not credible.

30. The Sullivans' actions after they received verification that there was a recorded easement continued to be inconsistent with the continued existence of the easement. The Bresslers, through their attorney, notified the Sullivans, also through their attorney, that either the fence and mail box must be removed by November 4, 2011, or, alternatively, the Bresslers would prepare paperwork to extinguish the easement. The Sullivans did neither. Instead, they instructed their attorney not to say anything to the Bresslers and to stall them, or in Ms. Sullivan's words, "Keep them humming . ..." Ex. 47. The Sullivans unequivocally told the Bresslers that they intended to sign the relinquishment agreement prepared by the Bresslers, but they stalled from October 25, 2011, until December 20, 2011, when they finally notified their own attorney and the Sullivans' attorney that they would not sign the relinquishment. Even then, their fence and mailbox continued to remain in the middle of the easement.

31. The Sullivans did not remove portions of the encroaching fence until March 1, 2012, and left an @12-foot portion thereof inside the easement, blocking off a portion of their own property that is subject to the easement and forcing anyone getting a boat from the street to the boat launch pad to drive over part of the Bresslers' reserve area for their drainfield. Based on the Sullivans' own diagram, Ex. 81, they knew or should have known that they were continuing to encroach on the easement. The Sullivans were

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notified of that continued violation of the easement in a letter from the Bresslers' attorney dated May 24, 2012, Ex. 85, but took no corrective action.

32. The Bresslers filed their complaint on June 8, 2012, after offering the Sullivans the opportunity to mediate the controversy. The Sullivans finally moved their mailbox outside the easement in November 2012, months after the lawsuit was commenced by the Bresslers. The fence installed by the Sullivans on March 1, 2012, of which an @ 12-foot portion encroaches into the easement, remains in its current configuration.

33. The Bresslers incurred attorney fees in reasonable reliance on the representations that were made on behalf of the Sullivans, in drafting the extinguishment agreement and attempting to have it executed. The Bresslers have also incurred ongoing attorney fees because of the continued encroachments by the Sullivans, even after those encroachments were called to the Sullivans' attention. Most of the fence that the Sullivans placed along the property line had been removed by time of trial, but an @ 12-foot portion in the vicinity of their sliding gate and the landscaping encroachments found above remain. The continued presence of the fence in the easement area threatens the integrity of the Bresslers' reserve drainfield. However, the fence can be easily removed, as shown by the number of times the Sullivans moved their fence, as can the encroaching landscaping.

34. There is insufficient evidence for the court to find the Sullivans placed a pile of dog waste on the Bresslers' tidelands. The court does find that the Sullivans have intentionally left their boat on the boat launch pad for periods of time that are not

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consistent with ingress and egress and that they have intentionally tied their boat up on the Bresslers' tidelands. But the court cannot find that the Bresslers suffered any financial damage by reason of these intentional trespasses.

35. ~~Based on the materials submitted pursuant to the court's letter opinion, the court finds that the Bresslers have actually incurred legal fees and associated costs of $108,224.97 as a result of this controversy, from the time that Mr. Sullivan handed Mr. Bressler the business cards for the Sullivans' first attorneys to the date of the hearing on the presentation motion. But that total includes the taxable costs identified in Finding 36 below. Furthermore, the Bresslers acknowledge that a portion of their legal fees and associated costs is attributable to the Sullivans' nuisance counterclaims, which they dropped at the opening of the trial.~~ The court finds that the Bresslers must be reimbursed for $2,500.00 ~~$99,476.62~~ of the legal fees and costs that they have actually incurred to avoid the undue hardship that they would otherwise suffer if the Sullivans are to be permitted to repudiate their abandonment of the easement.

36. Based on the cost bill portion of the declaration of the Bresslers' counsel filed with the presentation motion, the court finds that $1,755.95 of the Bresslers' legal expenses are properly characterized as taxable costs, consisting of $240 filing fee, $39 service of process fee, $579.75, which is 20% of the transcription cost for Linda Sullivan's deposition, and the $897 transcription cost for Douglas Saar's deposition.

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Conclusions of Law

1. In order to find that an easement has been abandoned, the court must find more than mere nonuse. *Heg v. Alldredge,* 157 Wash.2d 154, 161, 137 P.3d 9 (2006). The nonuse "must be accompanied with the express or implied intention of abandonment." *Id., citing Netherlands Am. Mortgage Bank v. E. Ry. & Lumber Co.,* 142 Wash. 204, 210, 252 P.916 (1927). "Acts evidencing abandonment of an easement must be unequivocal and decisive and inconsistent with the continued existence of the easement." *Heg v. Alldredge* , 157 Wash.2d at 161.

2. In this case, the easement was laid out on the ground with the stone and grassy pavers before the parties bought their properties. The parties acknowledged the existence of the easement and kept obstructions outside the width of the easement. Before October of 2011, the only exception to this was Ms. Sullivan's mailbox, which she placed in the middle of the easement and refused to move it for years, even while acknowledging that it was in the easement. But, after Ms. Sullivan was told by her attorney in 2011 that there was no recorded easement, within six days she had fence posts set in concrete in the middle of the easement. She was even unwilling to negotiate with the Bresslers to establish a mutual easement because she was not "interested in sharing anything with Mark Bressler." The court has found that the Sullivans' installation of a fence along the property line was unequivocal, decisive, and inconsistent with the continued existence of the easement and that, at that point, the Sullivans abandoned the easement. The Sullivans' actions in finishing the fence installation after receiving

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verification that the easement had been recorded were intentional. Their continued encroachments into the easement thereafter were also unequivocal and decisive and inconsistent with the continued existence of the easement. *Heg v. Alldredge* , 157 Wash.2d at 161.

3. But the question that has concerned the court is that, after abandoning the easement as the Sullivans did, whether the Sullivans can now repudiate that abandonment and reinstate the easement. Courts have long held that blocking the way of an easement does not constitute evidence of abandonment until the other individual benefiting from the easement seeks to access it and any barrier is not removed. *Edmonds v. Williams,* 54 Wn. App. 632, 636-637, 774 P.2d 1241 (1989).

4. Equitable estoppel requires a showing that the party to be estopped (1) made an admission, statement or act which was inconsistent with his later claim; (2) that the other party relied thereon; and (3) that the other party would suffer injury if the party to be estopped were allowed to contradict or repudiate his earlier admission, statement or act. *Pub. Util. Dist. No. 1 v. Walbrook Ins. Co.,* 115 Wn.2d 339, 347, 797 P.2d 504 (1990). The Bresslers, as the parties asserting that the Sullivans are equitably estopped from denying that they abandoned the easement, must prove these elements by "'very clear and cogent evidence.' " *Proctor v. Huntington,* 146 Wn. App. 836, 845, 192 P.3d 958 (2008)(quoting *Sorenson v. Pyeatt,* 158 Wn.2d 523, 539, 146 P.3d 1172 (2006)), *review granted,*165 Wn.2d 1041 (2009).

5. The Sullivans' admissions, statements, and acts after learning that the easement was recorded are inconsistent with their claim at trial. Additionally, the

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Bresslers relied on those statements by incurring attorney fees to prepare a legal document to relinquish the easement and to attempt to get the relinquishment signed. After receiving proof of the recorded easement, the Sullivans finished installation of the fence and continued to represent that they would sign the relinquishment, and even enlarged their landscaping long after this case was filed so it extended further into the easement. Thus, the first two prongs of equitable estoppel have been met.

6. The third prong of equitable estoppel focuses on the injury the other party would suffer if the owner of the easement, in this case the Sullivans, were allowed to contradict or repudiate their earlier admissions, statements or acts:

> "An easement may be extinguished by conduct of the owner of it even though he had no intention to give up the easement. This is due to the general principle that the owner of an easement will not be permitted to change a position once taken by him if the change would cause undue hardship to the owner of the servient tenement."

Humphrey v. Jenks, 61 Wn2d 565, 379 P.2d 366 (1963), (quoting from 2 *American Law of Property* 305, §8.99) (emphasis added).

7. As things stood at trial, the Bresslers would suffer undue hardship if the Sullivans were allowed to repudiate their abandonment and reinstate the easement. But the court concludes that they will not suffer undue hardship if the Sullivans are required to move the encumbrances found by the court to encroach on the easement and to pay the Bresslers' legal expenses. When the Bresslers bought their property, they knew it was encumbered by the boat launch declaration and that they would have to allow their neighbors to use it. The fact that the neighbors are contentious is unfortunate.

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8. ~~The Bresslers have not sought, and the court has not determined, that the Bresslers are entitled to an award of their reasonable legal fees. The amount of the Bresslers' legal expenses that the Sullivans must reimburse to reinstate the easement does not include the amount attributable to the Sullivans' nuisance counterclaims, which were dropped on the first day of trial, and is less than an award of reasonable attorney's fees would be that is computed using a lodestar analysis.~~

9. Whether the Sullivans comply with the court's requirements to reinstate the easement by removing the encroachments and paying the Bresslers' legal expenses is up to the Sullivans. The Sullivans should be required to satisfy those requirements within a reasonable period of time in order to reinstate the easement. The court concludes that a period of 20 days is a reasonable period of time in which to satisfy these requirements, having in mind that the Sullivans started installing their fence along the property line 6 days after they were told that there was no recorded easement and that the Bresslers gave notice to the Sullivans' attorney on February 13, 2014, of the approximate amount of fees and costs they would seek based on the court's letter opinion filed February 11, 2014.

10. The court having concluded that the Sullivans abandoned the easement and having established material requirements for the Sullivans to reinstate the easement, the court concludes that the Bresslers are the prevailing party herein and that the Bresslers are entitled to an award of statutory attorneys fees and taxable costs in the amount of $1,755.95.

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11. Trespass is an intentional tort. *Broughton Lumber Co. v. BNSF Ry. Co.*, 174 Wn.2d 619, 630, fn. 9, 278 P.3d 173 (2012). The court has found that the Sullivans have intentionally left their boat on the boat launch pad for periods of time not consistent with a right of ingress and egress, have tied their boat up on the Bresslers' tidelands on portions thereof that are not subject to any easement, and have authorized third parties to enter onto the Bresslers' property to remove driftwood without following the terms of the boat launch easement. The court concludes that these actions constitute trespass. The court has not found that any damages resulted from these trespasses. But the court concludes that, if the Sullivans timely comply with the requirements imposed by the court to reinstate the easement, they should also be required, in using the easement, not to enter any portion of the Bresslers' property that is not subject to the easement, to use the portion of the Bresslers' property that is subject to the easement only for ingress and egress for the purpose of launching boats, and to comply with the term of the easement regarding an opportunity to meet and confer before any maintenance work is done.

DATED this 12 day of ~~March~~ May, 2014.

Vickie I. Churchill

Judge Vickie I. Churchill

Approved By:
~~PRESENTED BY~~:

CAROLYN CLIFF
Attorney for Mark and Linda Bressler

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF ISLAND

172

MARK F. and LINDA H. BRESSLER, husband and wife, Plaintiffs, vs. KEVIN F. and LINDA SULLIVAN, husband and wife, GMAC MORTGAGE, LLC, & MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., Defendants,	File No. 12-2-00469-7 FINAL JUDGMENT & CONDITIONAL DECREE QUIETING TITLE

1.1 Real Property Judgment Summary: Island County Assessor's Parcel Nos. S6400-00-00025-0 (Defendants) and S6400-00-00026-0 (Plaintiffs)

1.2 Money Judgment Summary:

Judgment Creditors:	Mark F. and Linda H. Bressler
Creditors' Attorney:	Carolyn Cliff
Judgment Debtors:	Kevin F. and Linda Sullivan
Debtors' Attorney	G. Geoffrey Gibbs
Principal:	$ 0
Interest:	$ 0
Taxable Costs:	$ 1,755.95
Attorneys' Fees:	$ 200.00

ORIGINAL

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This court having presided over the trial in this matter on December 3-5 and December 12, 2013, having issued a letter opinion filed February 11, 2014, and having considered materials, including the Declaration of Cliff re: Bresslers' Legal Expenses filed herein as regards the issue of attorney's fees identified in the court's letter opinion, and the court having entered Findings of Fact & Conclusion of Law herewith on which this Final Judgment & Conditional Order Quieting Title is based, the court now enters this JUDGMENT. This is a final judgment that concludes this case as to all claims and all parties.

1. Abandonment of Easement; Conditional Reinstatement. As regards the, "Declaration for Joint Use of a Boat Launch" that was recorded with the Island County Auditor on July 24, 2006, under Auditor's File No. 4176808, that was the subject of the trial, (hereinafter, "Boat Launch Easement"), the court has determined that the Boat Launch Easement was abandoned and has established conditions for its reinstatement. From the time that this judgment is entered, neither party may use the other's property under the authority of the Boat Launch Easement until and unless the conditions for reinstatement set forth below are timely fulfilled. In order for the Boat Launch Easement to be reinstated, Kevin and/or Linda Sullivan must, within twenty (20) days of the entry of this judgment:

A. Remove all portions of their fence, including the 10-foot sliding gate and the pedestrian access gate, that are depicted as located on property subject to the

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Boat Launch Easement on the, "As Built Survey of Lots 25 and 26" that was admitted into evidence at trial as Exhibit 140; remove all plants within and intruding into the corridor between the houses on Lots 25 and 26, which plants are depicted in the photos admitted into evidence at trial as Exhibits 129 and 130; and remove the row of river rock and the plants in the Sullivans' front yard, a portion of which is depicted in the photo admitted into evidence at trial as Exhibit 143, that encroach on property subject to the easement. To satisfy this condition, Kevin or Linda Sullivan shall also file with the court, and serve on counsel for the Bresslers, a declaration or affidavit, made under penalty of perjury, affirming that the foregoing encroachments have been fully removed. If the Bresslers contest the accuracy of said affirmation, they may bring that matter before the court, but the filing of the affirmation is sufficient to satisfy this condition until and unless the court determines otherwise.

B. Deposit the sum of ~~$99,476.62~~ 2,500.00 into the registry of the court and give notice thereof to counsel for the Bresslers, on the date that the deposit is made. The clerk of the court is hereby AUTHORIZED to accept said deposit and is directed to credit said funds to this cause number and to hold them pending further order of the court. Said funds shall not be disbursed from the registry of the court until more than 30 days has passed after entry of this judgment, and, if a notice seeking appellate review of this decision is timely filed, they shall not be disbursed except pursuant to a court order establishing adequate security under R.A.P. 2.5(b) until appellate review is concluded.

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2. Decree Quieting Title. Unless both conditions set forth in paragraph 1 have been fully satisfied within 20 days after the entry of this Final Judgment, a decree quieting title is hereby ENTERED, establishing that title to Lot 25, Plat of Columbia Beach, as per plat recorded in Volume 3 of Plats, page 7, records of Island County, Washington, EXCEPT that portion, if any, lying within right of way of Columbia Beach Drive, and TOGETHER WITH tidelands of the second class situate in front of, adjacent to, or abutting on said premises (hereinafter, "Lot 25), is quieted in Kevin F. and Linda Sullivan and all those who claim by or through them, including, but not limited to, their lenders, all free of any encumbrance under the Boat Launch Easement identified on page 2 above, and a decree quieting title is hereby ENTERED, establishing that title to Lot 26, and the South 10 feet of Lot 27, Plat of Columbia Beach, as per plat recorded in Volume 3 of Plats, page 7, records of Island County, Washington, EXCEPT that portion, if any, lying within right of way of Columbia Beach Drive, and TOGETHER WITH tidelands of the second class situate in front of, adjacent to, or abutting on said premises (hereinafter, "Lot 26"), is quieted in Mark and Linda Bressler and all those who claim by or through them, all free of any encumbrance under the Boat Launch Easement identified on page 2 above. On appropriate advance notice, either the Sullivans or the Bresslers may, after the expiration of the 20-day period provided in paragraph one above and after the conclusion of any appellate review of this judgment,

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apply, under Civil Rule 70 or otherwise, for the court's confirmation that the conditions set for in paragraph 1 above were or were not timely satisfied.

3. Injunctive Relief. If the reinstatement conditions are timely satisfied in accordance with Paragraph 1 above, Kevin and Linda Sullivan, and all those claiming by or through them, are hereby ORDERED not to enter any portion of Lot 26 that is not subject to the Boat Launch Easement; to use the portions of Lot 26 that are subject to the Boat Launch Easement only for ingress and egress for the purpose of launching or outhauling a boat; and to conduct any maintenance of the boat launch only in accordance with the terms of the Boat Launch Easement as regards an annual opportunity, in advance, for the owners of Lots 25 and 26 to confer and agree as regards that maintenance.

4. Statutory Fees and Taxable Costs. As the prevailing party in these proceedings, judgment is awarded in favor of Mark F. and Linda Bressler and against Kevin F. and Linda Sullivan as follows: 0 in principal; 0 in interest, $200 in statutory attorneys fees, and taxable costs of $1,755.95.

Dated this 12 day of ~~March~~ May, 2014.

Judge Vickie I. Churchill

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No. 92036-2

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

MARK F. and LINDA H. BRESSLER, husband and wife,

Plaintiffs-Appellants,

v.

KEVIN F. and LINDA SULLIVAN, husband and wife,

Defendants-Respondents,

v.

GMAC MORTGAGE, LLC, & MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.,

Defendants.

ON APPEAL FROM
ISLAND COUNTY SUPERIOR COURT
(The Honorable Vickie I. Churchill)

DECLARATION OF SERVICE

Carolyn Cliff
WSBA No. 14301
Attorney for Plaintiffs/Appellants
Mark F. and Linda H. Bressler

CAROLYN CLIFF
120 Second Street, Suite C
Langley, Washington 98260
Telephone: 360-221-3313
Facsimile: 360-221-0781

I, Carolyn Cliff, hereby declare under penalty of perjury of the laws of the state of Washington that, on Thursday, August 27, 2015, I caused to be mailed, first class and postage paid, true and correct copies of Bressler's Answer to Sullivans' Petition for Review and this declaration to:

G. Geoffrey Gibbs
Anderson Hunter Law Firm, P.S.
2707 Colby Avenue, Suite 1001
Everett, Washington 98206-5397

I also sent true and correct, "pdf" copies of these same documents to Geoff Gibbs at ggibbs@andersonhunterlaw.com.

DATED this 27th day of August, 2015, at Langley, Washington.

Carolyn Cliff

OFFICE RECEPTIONIST, CLERK

To: Carolyn Cliff
Subject: RE: Bressler v. Sullivan, Washington Supreme Court Case No. 92036-2; Email Filing of Answer to Petition for Revew and Declaration of Service

Rec'd on 08-27-2015

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Carolyn Cliff [mailto:ccliff@whidbey.com]
Sent: Thursday, August 27, 2015 11:51 AM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Bressler v. Sullivan, Washington Supreme Court Case No. 92036-2; Email Filing of Answer to Petition for Revew and Declaration of Service

Dear Sir or Madam;

In accordance with the policy regarding FAX and Email Filing that is posted on the website of the Office of the Clerk of the Washington Supreme Court, I attach the following original documents for filing with the clerk:

Bresslers' Answer to Petition for Review; and

Declaration of Service.

These documents are submitted for filing in the case of Bressler v. Sullivan, Case No. 92036-2, by Carolyn Cliff, 360-221-3313, WSBA No. 14301, ccliff@whidbey.com.

I look forward to receiving your confirmation that these documents have been received.

Thank for you for assistance.

Very truly yours,

Carolyn Cliff