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No. 72027-9

DIVISION I, COURT OF APPEALS
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)

Corrected Brief of Appellants

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I. Introduction

Mark and Linda Bressler filed this quiet title case against Kevin and Linda Sullivan to eliminate a mutual easement for joint use of a boat launch. The easement is unusual because the boat launch is nowhere near the parties' common boundary. The easement encumbers five feet on either side of most of the common boundary running from the street to the water, then curves sharply to cross over to the side of the Bresslers' property where the boat launch is located. The contractor who developed the adjoining properties reinforced the easement pathway with sturdy stone and "grassy" pavers to support the weight of a boat and trailer.

If the easement was unusual, so too was the Bresslers' success in establishing that the Sullivans had abandoned it. Language in Washington court decisions asserting that an easement can be terminated by abandonment is usually dicta because the requisite intent to abandon is not found. 17 STOEBUCK & WEAVER, 17 WASHINGTON PRACTICE: REAL ESTATE: PROPERTY LAW, § 2.12 at 121 (2nd Ed. 2004). "Physical relinquishment is usually not difficult to prove, but intent is often the stumbling block in ... easement abandonment cases." Id.

But the facts of this case were unusual too, not least because the Sullivans blamed their first attorney for some of their conduct and thereby waived their attorney-client privilege. The trial court found that:

- The Sullivans abandoned the easement by putting up a fence along the boundary, pulling up stone pavers and destroying grassy pavers, and blocking off their property subject to the easement;
- Presented with the Bresslers' demand that they either move their fence or sign paperwork to extinguish the easement, the Sullivans agreed to extinguish it;
- The Sullivans thereafter misled both the Bresslers and their own attorney as regards their commitment to extinguish the easement;
- While the Bresslers were paying their attorney to work with the Sullivans' attorney on an easement extinguishment, the Sullivans were buying time -- Ms. Sullivan's instructions were to, "keep them humming" -- in hopes of securing the money to put in a boat launch of their own from their title company;
- After the Sullivans learned the amount that the title company was offering in settlement, the Sullivans reneged on their commitment to extinguish the easement and fired their first attorney;
- Although the Sullivans moved most of their fence out of the easement after the Bresslers asserted their abandonment claims, they reconfigured a critical portion instead, diverting ingress and egress off the reinforced easement pathway and over the Bresslers'

reserve drainfield and affixed additional obstacles to block off their own property subject to the easement while this case was pending;

- Although this case had been filed before the Sullivans started using the boat launch, they repeatedly mis-used it: leaving their boat unattended on the ramp and on portions of the Bresslers' tidelands that are not subject to the easement.

But the case had an unwelcome surprise ending. Having found that the Sullivans had abandoned their easement, the trial court concluded that they were nonetheless entitled to repudiate their abandonment and reinstate the easement unless the Bresslers proved, by very clear and cogent evidence, that they would suffer undue hardship as a result. The trial court also concluded that the Bresslers would suffer no undue hardship if the Sullivans removed their obstacles from the easement and reimbursed the initial legal fees incurred by the Bresslers as of the date that the Sullivans repudiated their commitment to extinguish the easement.

The trial court correctly determined that the Sullivans abandoned the easement. But the trial court's decision affording the Sullivans an opportunity to reinstate the easement, and on conditions intended only to ameliorate undue hardship to the Bresslers, should be reversed.

II. Assignments of Error

1. The trial court erred in requiring proof, by very clear and cogent evidence, of equitable estoppel to preclude the Sullivans from repudiating their abandonment of an easement. (CoL 4; CP 4-5)

2. The trial court erred in concluding that, after intentionally abandoning an easement, the Sullivans could reinstate it. (CoL 3; CP 4-5)

3. The trial court erred in establishing easement reinstatement conditions intended only to ameliorate undue hardship. (CoL 7; CP 4-5)

4. The reinstatement conditions did not fully reimburse economic harm and did not account for non-economic hardship. (FoF 35)

5. The trial court erred in refusing to admit a police report, Ex. 19, and photographs of an animal's skull and skeleton, Ex. 115, and in failing to enter a finding regarding use of anti-Semitic and disability slurs.

Issues Pertaining to Assignments of Error

1. Is the beneficiary of an easement entitled to reinstate it after abandoning it without meeting the standards that would be required to create a new easement unless the owner of the servient tenement proves reinstatement will cause undue hardship? (Assignment of Error 1)

2. Did the trial court err in permitting reinstatement of an abandoned easement, despite determining that abandonment was not the result of a good faith mistake? (Assignment of Error 2)

3. In the alternative, did the trial court err in establishing conditions under which a beneficiary who had abandoned an easement could reinstate it that were intended solely to avoid undue hardship to the owner of the servient tenement, when the conditions

(a) did not do substantial justice to the parties or put an end to litigation (Assignment of Error 3)

(b) did not, in fact, avoid undue hardship to the owner of the servient tenement? (Assignment of Error 4)?

4. When the beneficiary of an easement who is alleged to have abandoned it asserts good faith and lack of intent to abandon as affirmative defenses, is the owner of the servient tenement entitled to present evidence of the abandoning beneficiary's bad faith, and should the abandoning beneficiary's bad faith have precluded reinstatement as a matter of law? (Assignments of Error 2 and 5)

III. Statement of the Case

The Bresslers and the Sullivans own adjoining lowbank waterfront houses on Whidbey Island. RP at 29-33; FoF 1. The Sullivans own Lot 25; the Bresslers own Lot 26. RP at 30-33; FoF 2. The north boundary of Lot 25 is the south boundary of Lot 26. Ex. 2 and Ex. 11 at 4. Both bought their houses on July 24, 2006. Exs. 12 and 14; FoF 1. Both

houses have large yards facing the water.[1] RP at 33; Ex. 11 at 4. But the houses are very close to one another, RP at 30-31: as Mr. Bressler testified, "we're really pretty much all on top of one another..." RP at 32.

Before July of 2006, Lots 25 and 26 were owned by Casa Group, a building contractor. RP at 30, 34; Ex. 1. A boat launch was located on the northeast corner of Lot 26. Ex. 2 and RP at 37. By July of 2006, the boat launch consisted of a flat concrete pad on the landward side of the bulkhead and a ramp, extending towards the water from the bulkhead at a slow incline. RP at 36-37. Casa installed stone pavers in the corridor between the two houses, RP at 55, and reinforcing plastic honeycomb, known as "grassy pavers", Ex. 104 at 2-4, under the sod at either end of the stone paver corridor and under a portion of the lawn between the north and south boundaries of Lot 26. RP at 47-48; FoF 3. The purpose of the pavers was to strengthen the ground so as to bear the weight of vehicles towing boats. Ex. 104 at 2-3; RP at 345; FoF 3. Casa's invoice for installation of the pavers on Lot 26 totaled over $17,500.[2] Ex. 104.

Right before the deeds to Lots 25 and 26 were recorded, Casa recorded a, "Declaration for Joint Use of a Boat Launch" ("Declaration").

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[1] The Bressler refer to their street-facing yard, on the west side of their house, as the front yard, and their yard facing the water, on the east side, as their back yard. RP at 33-34.

[2] The invoice also covers the landscaping, unremarkable except for the pavers, on Lot 26. Ex. 104; RP at 46-47.

Ex. 11. The purpose of the Declaration is to provide ingress and egress to the boat launch for both Lots 25 and 26. Ex. 11 at 2. The Declaration establishes an easement, 5 feet on either side of most of the common boundary, that runs from Columbia Beach Drive east between the houses and out towards the water, Ex. 11 at 2, 4, then runs north to the opposite side of Lot 26, where the boat launch is located. Id. The pathway of stone and grassy pavers installed by Casa follows the easement path depicted in the illustrative diagram in the Declaration. Ex. 11 at 4; RP at 47; FoF 3.

The Bresslers got an unacknowledged version of the Declaration at closing, RP at 43, and the closer said that she had gone over it with the Sullivans when they closed their purchase earlier that day. RP at 44. Ms. Sullivan testified that her husband asked repeatedly about the easement at closing. CP at 938.[3] Ms. Sullivan also testified that she talked with Rick Jones, the principal of Casa, RP at 34, about her plan to fence Lot 25, CP at 933, before buying it. CP at 936. Mr. Jones told her exactly where to put her fence, CP at 933: set back five feet from the common boundary, outside of the easement. CP at 935; RP at 349.

[3] Portions of Linda Sullivan's deposition were read at trial. RP at 315. The entire deposition was filed in open court, CP at 931, and the excerpts that were read into the record were not re-transcribed. See, e.g.. RP at 320. The trial court authorized transmission of the excerpts on appeal, in accordance with RAP 9.6(c)(1). Appellants' Supplemental Designation of Clerk's Papers at 1. (Aug. 5, 2014)(appellate docket).

The Bresslers use their house on Whidbey Island for weekends and vacations. RP at 59-60. For the first few years, the Sullivans did not live on Whidbey Island either. RP at 60-61. The Declaration requires the owners of Lots 25 and 26 to share the cost to maintain the boat launch and to meet annually to determine required maintenance. Ex. 11 at 2. After the concrete pad was damaged during the stormy winter season of 2006, Mr. Bressler secured the Sullivans' assent to repairs. RP at 67-72; FoF 8. Ms. Sullivan objected, however, to Mr. Bressler's efforts to thereafter protect the repaired pad by installing a board at its bulkhead entrance. RP at 72, 75. Even though the board was readily moveable, RP at 77, and neither the Sullivans nor the Bresslers yet had a boat, RP at 76, 277, Ms. Sullivan complained that the board was blocking her easement.[4] RP at 76.

When the Bresslers and the Sullivans bought their adjoining properties, there was no barrier between them. RP at 66 and Ex. 92. This was a problem because the Bresslers have two autistic sons, RP at 25-26, one of whom -- Kevin -- went onto the Sullivans' property. RP at 67. The problem became acute when Ms. Sullivan announced that she and her

[4] After the October of 2009 confrontation over the easement that ended with Mr. Bressler's call to the police, RP at 108, this board was vandalized and forcibly removed. RP at 115-19. The trial court did not enter a finding of fact about who vandalized it. But, in November of 2008, RP at 77, Ms. Sullivan yanked out the protective board, RP at 78, that Mr. Bressler installed at the entrance to the beach steps, RP at 72-73, located at the boundary between Lots 25 and 26, RP at 73, and tossed it on the beach, RP at 78: even though Mr. Sullivan had given Mr. Bressler permission to install the board. RP at 75.

dogs would be moving to Whidbey Island. Ms. Sullivan had previously told Mr. Bressler that her dogs hate other dogs, RP at 61-62, and Mr. Bressler was concerned about his children's safety. RP at 62. Ms. Sullivan and Mr. Bressler had a confrontation: Mr. Bressler told Ms. Sullivan that it was his responsibility to keep his children on his property and her responsibility to keep her dogs on her property. RP at 80-81.

Mr. Bressler thereafter placed a temporary rope fence along the common boundary, between his house and his bulkhead. RP at 81-82, 84-85, and Ex. 107. Mr. Bressler's rope fence was set back five feet, to keep it out of the easement. RP at 82. Mr. Bressler called Mr. Sullivan before putting the fence up: to tell him what he was doing to keep his son off the Sullivans' property and to find out what the Sullivans were going to do about their dogs. RP at 83. Mr. Sullivan later told Mr. Bressler that Ms. Sullivan was very enthusiastic because the rope fence would act as a visual cue for her dogs. RP at 84.

The rope fence achieved Mr. Bressler's intended purpose: Kevin Bressler never crossed it. RP at 86. Nonetheless, conflicts escalated in January of 2009, when Ms. Sullivan moved to Whidbey Island. FoF 6. Ms. Sullivan had a mailbox installed at the northwest corner of Lot 25, on property subject to the easement. RP at 95-98 and Ex. 117. Mr. Bressler told her that the mailbox had to be moved. RP at 99. Ms. Sullivan blamed

her contractor but agreed to move the mailbox. Id. But she did not. Id. See generally FoF 4.

In April of 2009, the Sullivans listed their house for sale. Ex. 15. By that time, the Sullivans had planted a row of shrubs along a portion of the common boundary. Id. at 2. Like the Bresslers' rope fence, the row was planted outside the easement, RP at 93-94, and Ms. Sullivan left room for a fence to be installed too without encroaching on the easement. CP at 949-50. But, in April or May of 2009, the Bresslers found the lengths of their rope fence that were closest to the water had been moved at a right angle, across their back yard. RP at 88. Ms. Sullivan said that her real estate agent had told her to move it. RP at 89. It was another unpleasant conversation: Ms. Sullivan said that, if Mr. Bressler didn't move his board out of the boat launch entrance, she was going to drive her boat trailer onto his back yard and leave it there. RP at 76, 89.[5]

The stormy season being over, Mr. Bressler moved the board. Id. He also called the Sullivans' real estate agent, after which he left a copy of the unrecorded version of the Declaration under his door mat. RP at 92. The Sullivans' trial attorney elicited Mr. Bressler's explanation: he had talked with the Sullivans' agent, explained the purpose of the rope fence,

[5] The Sullivans did not have a boat trailer on their property at this time. RP at 76-77.

made arrangements to give her a copy of the Declaration, and thereafter confirmed that she got it. RP at 295-97.

After one of the Sullivans' dogs bit another dog and an animal control officer came to the scene, CP at 958, the Sullivans fenced their property. Id. and FoF 6. In August of 2009, Ms. Sullivan told Mr. Bressler that she was going to give up her easement rights in order to put her fence on the property line. RP at 100. Mr. Bressler did not want to lose his right to use the easement and told Ms. Sullivan that she could not. RP at 101-02. Mr. Bressler told one of the fence contractors that there was an easement, after which Ms. Sullivan told the contractor not to listen to him: that she would put her fence anywhere she wanted. RP at 102-03. But the fence was, in fact, set back five feet from the property line and did not encroach on the easement. RP at 103. See generally FoF 6.

After the Sullivans' fence went up, on October 10, 2009, Mr. Bressler took down his rope fence. RP at 104. But he suspended one length between the last temporary post, RP at 86-87, and the permanent post on his side of the beach stairs at the common boundary: to keep his son off of the Sullivans' bulkhead. RP at 104. Ms. Sullivan came running out of her house to tell Mr. Bressler that he was blocking the easement. RP at 105. Mr. Bressler pointed out that the easement did not extend that far and that the shortened fence was entirely on his property. RP 105-06.

The trial court's findings credited Mr. Bressler's testimony. FoF 7. The trial court also found that, "the neighbors did not get along for a variety of reasons", FoF 4, and that "minor confrontations" over the easement escalated in January of 2009, when Ms. Sullivan moved to Whidbey Island. FoF 6. But the trial court entered no finding of fact about what Ms. Sullivan said to Mr. Bressler on October 10, 2009, before she retreated: "I can't talk to you. You're just a F'ing Jew. I'm so tired of seeing your retarded kids. They disgust me." RP at 106.[6] Mr. Bressler, who is Jewish, was shocked, upset, and even scared. RP at 107. Nonetheless, after talking things over with his wife, Mr. Bressler tried to explain that the purpose of the rope fence was to keep his son on the Bresslers' property. Id. Ms. Sullivan responded that, if his son went onto her property, her dogs would take care of him. RP at 108. At that point, Mr. Bressler called the police.[7] Id. Ms. Sullivan acknowledges the incident and admits using profanity. CP at 951-54. She denies threatening the Bresslers' children and using religious and disability slurs. CP at 952-

[6] The word, "F-ing" was not, in fact, the word that Ms. Sullivan used. Ms. Sullivan has what she describes as a, "salty sailor mouth." RP at 953. In opening statement, the Bresslers explained that euphemisms would be employed in place of language not suitable for a courtroom. RP at 16.

[7] The trial court rejected the Bresslers' offer of the police report, Ex. 19, into evidence after the Sullivans objected that confrontations between the parties were irrelevant to the issue of abandonment and stipulated to the date of the incident, RP at 109-10. The trial court observed that Mr. Bressler's testimony had already been admitted and that the police report didn't add anything other than its reference to, "religious remarks". Id.

955. Yet one of Ms. Sullivan's first emails to her attorney apologizes for, "name-calling" Mr. Bressler by referencing her own Jewish heritage, Ex. 26, presumably to dispel any impression of religious bigotry.[8]

For years after this incident, Mr. Bressler had no communications with Ms. Sullivan or with Mr. Sullivan. RP at 111; Ex. 131. The Sullivans stopped mowing the grass on most of their property outside of the perimeter of their fence, RP at 112, allowing grass, weeds, and wildflowers to grow unattended for almost two years.[9] Ex. 108, RP at 113, and FoF 7.

Prior to September of 2011, neither the Bresslers and the Sullivans had ever used any portion of the property subject to the Declaration for ingress or egress to launch a boat. RP at 119-20, 328. But things changed in September of 2011. The Sullivans finally cut their grass. Ex. 113 and FoF 7. They also bought a small aluminum boat and stored it in their fenced back yard. RP at 120; Ex. 110; FoF 8. The Sullivans also had a sliding gate installed in their fence facing the Bresslers' property. RP at 120; FoF 10. The Bresslers had been using the concrete boat pad as a

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[8] At trial, Ms. Sullivan testified that she could not recall the name that she used. RP at 334.

[9] According to Douglas Saar, the Sullivans' first attorney, one of the reasons that the Sullivans wanted him to write the Bresslers before they started to use the boat launch was that they were anticipating difficulties because Mr. Bressler kept a, "manicured" lawn. CP at 224.

seasonal outdoor patio: when they saw the Sullivans' boat, they immediately moved their furniture off it. RP at 121-23; FoF 5, 9.

The Sullivans met with attorney Douglas Saar to get a letter drafted to inform the Bresslers that the Sullivans intended to start using the boat launch. CP at 960; FoF 9. When Mr. Saar asked for a copy of the easement, however, the Sullivans had none. CP at 222.[10] After Mr. Saar looked through their title report and found no easement, he asked a retired title company manager to search too, but without success. CP at 222-23.

Noting Ms. Sullivan's prior confrontations with Mr. Bressler over the easement, the trial court found as fact that Ms. Sullivan was aware that an easement existed and of its location. FoF 6 and 7. Nonetheless, after Mr. Saar informed her on September 29, 2011, that there was no recorded easement, Ms. Sullivan decided to move her fence, "ASAP". Ex. 31. According to Mr. Saar, Ms. Sullivan, "intended to 'reclaim' the 5 feet of property on the property line between them and Bressler." Ex. 84. The

[10] At trial, the Bresslers presented the testimony of Mr. Saar by deposition. RP at 309. During the course of Mr. Saar's deposition, he revealed that some documents subject to the Bresslers' subpoena duces tecum, CP at 667-92, had not been produced, CP at 254, apparently at the request of the Sullivans' then-serving attorney, Christopher Thayer, CP at 591-92, despite Mr. Saar's declaration affirming that no responsive documents had been withheld. CP at 595. In response to a motion to compel, still more responsive documents were identified, CP at 521-22, 583-84, and ultimately produced. CP at 517-19. On the Bresslers' pretrial motion, the court ruled that they could present Mr. Saar's testimony at trial by deposition because Mr. Saar was unavailable to testify by reason of his assertion of his privilege against self-incrimination. Order on Motion to Present Testimony by Deposition. CP at 456-57. Saar Deposition Exhibits 3-31 were admitted at trial as exhibits 145-173 (many are duplicates, but were offered to identify the documents about which Mr. Saar testified). RP at 323.

trial court found that Ms. Sullivan took immediate action to move her fence to the middle of the easement. FoF 11. By October 5, 2011, poles had been set in concrete along the property line from the waterward end of the stone paver corridor out to the bulkhead. Ex. 36; FoF 11. By October 12, 2011, a solid chain-link fence had been placed along the poles. Ex. 113; FoF 11. In the course of putting in the fence, the Sullivans punched holes in the grassy pavers. CP at 969; FoF 11.

When the Bresslers came up to their property, Mr. Sullivan handed Mr. Saar's business cards to Mr. Bressler. RP at 142-43; Ex. 142; FoF 12. The Bresslers hired their own attorney, who called Mr. Saar. FoF 12. Mr. Saar advised the Sullivans that the Bresslers also believed that an easement existed, Ex. 39 and FoF 12, and that he might be able to work out an arrangement to record one. Id. But Ms. Sullivan responded:

> I am not interested in sharing anything with Mark Bressler as he is a liar and I would always be concerned with his lack of guidance over his handicap child which he can't control. I have a wooden fence going in between the rest of the property line - so there will be no visual whatsoever.

Ex. 39; FoF 12. Ms. Sullivan attached a $23,914 estimate for the installation of a boat launch on the Sullivans' property[11] to her response. Ex. 39 at 2. At trial, the only evidence regarding the value of the boat

[11] According to Mr. Saar, the cost to install a boat launch on the Sullivans' property was only $15,000, Ex. 38 at 2; the $23,914 estimate assumed that a $4,000 payment to a neighbor would be required for ingress and egress during construction. Ex. 39 at 2.

launch easement was from the Sullivans' appraisal, which, "lumps [the value] in," with their bulkhead at $17,500. Ex. 135; RP at 351.

On October 24, 2011, the Bresslers' attorney wrote to Mr. Saar, demanding that the Sullivans either move their fence and mailbox or agree to extinguish the Declaration. Ex. 45. The Declaration was inadvertently not enclosed, FoF 13, but was provided to Mr. Saar on October 25, 2011, Ex. 46, who advised Ms. Sullivan about it the next day. Ex. 47. By that time, the Sullivans had six-foot tall posts installed in concrete through the corridor between the houses out to the street, removing some of the stone pavers to do so. FoF 11. Even after she learned about the Declaration, Ms. Sullivan authorized her contractor to finish the fence.[12] CP at 971-72; FoF 13. Ms. Sullivan instructed Mr. Saar to, "Hold off on saying anything to [Bresslers' attorney] - 'just tell her title company to blame??' Keep them humming ... (you know my long term wishes)."[13] Ex. 47.

The Sullivans kept their fence in the middle of the easement. FoF 15. An easement extinguishment was prepared by the Bresslers' attorney

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[12] The trial court expressly found that Ms. Sullivan's explanation that she had finished installing her fence even after confirming that there was a recorded easement because the fence posts would be dangerous standing alone was not credible. CP at 971-72; FoF 29.

[13] As Mr. Saar saw it, the Sullivans were, "somewhat relieved and satisfied", Ex. 84, on being told that there was no easement because installing their own boat launch would avoid the problems that they anticipated in dealing the Bresslers and their special needs children. Id. Even after learning that a recorded easement existed, the Sullivans continued to want a boat launch of their own. Id.

and provided to Mr. Saar, Ex. 54, who repeatedly represented that the Sullivans would sign it. FoF 15 and Exs. 55, 56, 60, 64, 67, 68, 69, and 70. On November 22, 2011, in Exhibit 60, Mr. Saar explained:

> The Sullivans have made a claim against the title insurer. I do not want to have the Extinguishment recorded prior to the claim being processed.
>
> The Sullivans are coming in to sign the Extinguishment at my office. They are going to proceed with the Extinguishment regardless of whether the title company accepts or rejects the claim. I believe their claim is compromised if a voluntary Extinguishment is recorded at the same time a title claim is made.

Yet, despite Mr. Saar's explanation and repeated assurances, no executed extinguishment was forthcoming. Ex. 67 at 2. On December 5, 2011, Mr. Saar explained that the Sullivans were, "currently out of the area" and that, "their absence from the area was the only reason for the delay." Ex. 64. The trial court found that the Sullivans were actually at home when they said that they were not available. FoF 19; CP at 979-80. The trial court also found that the Bresslers were entitled to rely on Mr. Saar's representations about the Sullivans' commitment to extinguish the easement. FoF 16; see CP 963-65.

The trial court found as fact that the Sullivans were intentionally stalling. FoF 14; see CP at 1020-21. The trial court found that Ms. Sullivan's main purpose in stalling the Bresslers and her own attorney was

to determine whether she could get reimbursed for the costs to install a boat launch on her own property that she would not have to share with the Bresslers. FoF 22; Ex. 57; CP at 1011-13. Although the trial court found as fact that the Sullivans' fence was easily removed, FoF 33, the trial court also found that its posts had been set in concrete. FoF 11; RP at 141, 152-53, 284. Ms. Sullivan had attached a $4,127.34 estimate for the new fence to her October 19, 2014 email to Mr. Saar, Ex. 39, and the trial court found as fact that she did not want to incur additional expense to move her fence out of the easement until she knew the outcome of her effort to get someone to pay for a separate boat launch. FoF 22; CP at 982-83.

The trial court expressly found that the Sullivans had told Mr. Saar that they agreed to sign papers to relinquish the Declaration. FoF 15. On November 11, 2011, Ms. Sullivan wrote Mr. Saar that, "we will agree to sign the papers to relinquish the declaration, but we are in no hurry, as we are going to try to reimburse some of the $30,000.00 that will be out of our pocket by the time this is over and we have a boat ramp to use." Ex. 57. Ex. 57. The trial court found that Ms. Sullivan's testimony that she had never wanted to sign the extinguishment was not credible.[14] FoF 15.

[14] According to Mr. Saar, at the conclusion of his meeting with the Sullivans in November of 2011 at which they agreed to extinguish the easement, Mr. Sullivan shook his hand and told him that, "they could not have hoped for a better result." CP at 296.

Instead, the problem was that the Sullivans wanted Casa or their title company to pay for a separate boat launch. CP at 1020 and FoF 17. On November 21, 2011, however, Mr. Saar advised Ms. Sullivan that they were not entitled to recover such costs but that he would try to recover their legal fees. Ex. 61; FoF 18. The trial court noted that Ms. Sullivan felt at that point that Mr. Saar was no longer working for them, CP at 1018, 1020, and FoF18, but found that the Sullivans knew that he was working on an extinguishment and that they did not advise him to stop doing so or to add conditions to it. FoF 16; CP at 978-80.

Mr. Saar thereafter kept trying to schedule a time for the Sullivans to execute the extinguishment and reporting on his progress on their claim. Exs. 62, 72. On December 19, 2011, Mr. Saar sent paperwork showing that the Sullivans' title company would pay $3,951 to reimburse their legal fees. Ex. 73; FoF 20. The next day,[15] the Sullivans sent a letter to Mr. Saar, with a copy to the Bresslers' attorney, saying that they would not sign the extinguishment, "at this time." Ex. 74; FoF 21. This was false: the Sullivans decided not to sign the extinguishment after they consulted another attorney on December 9th or 10th. CP at 1022-23. Ms. Sullivan acknowledges that keeping the fence in the middle of the easement was

[15] The letter is dated December 21, 2011, but the envelope in which it was sent was postmarked December 20, 2011. Ex. 74; RP at 163, 387; FoF 21.

not consistent with keeping the right to use the boat launch: in Ms. Sullivan's words, "[i]sn't that kind of like having your cake and eating it too...?" CP at 985. Nonetheless, the Sullivans did not move their fence when they decided not to sign the extinguishment, CP at 982-83: Ms. Sullivan did not feel like spending any more money at that point. Id.

Shortly after Ms. Sullivan sent her letter, the Bresslers' attorney notified Mr. Saar that the Bresslers believed that the Declaration was no longer enforceable but were nonetheless offering the Sullivans an opportunity to mediate. Ex. 77 at 2; FoF 23.[16] On February 7, 2012, the Sullivans' next attorney, Christopher Thayer, notified the Bresslers' attorney that the Sullivans, "intend to move and return the fence that is between the two properties back to its original location." Ex. 80. The Sullivans finally agreed to mediate on February 27, 2012, RP at 167 and FoF 23; starting on March 1, 2012, Ex. 83, the Sullivans moved a majority of their fence back to its original location, out of the easement. FoF 23.

But the trial court found that the Sullivans intentionally reconfigured a @12-foot portion of their fence in the easement, where their sliding gate was installed. RP at 170; FoF 23. Referring to the diagram used by Ms. Sullivan to illustrate the work, Ex. 81, the trial court

[16] The Declaration includes a term requiring mediation of all disputes regarding it. Ex. 11 at 2; RP at 165.

found that the Sullivans knew or should have know that they were continuing to block off a portion of their property subject to the easement. FoF 31. The Bresslers' reserve drainfield area starts 50 feet from their bulkhead, Ex. 3 at 2, Ex. 5 at 2, and RP at 42: right where the Sullivans' sliding gate was relocated. Ex. 140; FoF 23. The Sullivans' configuration required both the Bresslers and the Sullivans to drive over the Bresslers' reserve drainfield to get a boat to or from Columbia Beach Drive to the boat launch. RP at 172; FoF 23. Island County prohibits driving over a reserve drainfield because doing so compacts the soil. I.C.C. 8.07D.280.A.7.c. The Bresslers' attorney advised Mr. Thayer that the new configuration was still in the easement, Ex. 85, but the Sullivans would not move it unless the trial court determined that they were blocking off property subject to the easement. CP at 998-1002. The trial court found as fact that the new fence configuration extended into the easement through trial. FoF 23.

The April 4, 2012 mediation was not successful. FoF 25. The Bresslers filed this case on June 8, 2012, CP at 903, asserting that the Sullivans had abandoned the easement and were equitably estopped from asserting their rights under the Declaration. CP at 920-21. The Bresslers sought a court decree quieting title to both Lots 25 and 26 free of the Declaration. CP at 921. The Sullivans denied that either doctrine applied

and alleged lack of intent and good faith in all actions as affirmative defenses. CP at 881-82. The Sullivans also counterclaimed for injunctive relief, alleging trespass and nuisance based on the Bresslers' failure to control the conduct of their disabled children. CP at 887-88.

The Sullivans started using the boat launch after the Bresslers' suit was filed. RP at 243; FoF 25. But the Sullivans did not comply with the Declaration. FoF 25. The easement is for ingress and egress to launch boats. Ex. 11. Instead, the Sullivans often tied their boat up on the Bresslers' tidelands and stored their boat on the boat ramp. RP at 244-45; Exs. 120-26; FoF 25. The Sullivans also authorized third parties to remove driftwood from the boat ramp without giving prior notice to the Bresslers and then demanded that the Bresslers pay half the bill. FoF 26.

In November of 2012, months after the Bresslers filed this case and a week or two before the Sullivans took Ms. Bressler's deposition, the Sullivans moved their mailbox out of the easement. RP at 259; FoF 32. In April of 2013, Mr. Thayer filed notice of his intent to withdraw. CP at 657. The Sullivans objected, CP at 653, but an order authorizing Mr. Thayer's withdrawal was entered on April 29, 2013.[17] CP at 627-28.

[17] The Sullivans submitted a malpractice claim to Mr. Thayer, CP at 630, and filed a $2.25 million-dollar malpractice suit against Mr. Saar, CP at 592, 613-14. One of the reasons that the Sullivans are suing Mr. Saar is that they relied on his advice to extinguish the easement, RP at 428, and counsel for Mr. Saar attended the trial. RP at 473. The Sullivans also filed a $5 million damages suit against the Bresslers' attorney. CP at 521.

In accordance with a Civil Rule 34 Request for Entry, CP at 625-26, the Bresslers engaged a surveyor, who established the extent to which the Sullivans had blocked off their property subject to the easement as of June 20, 2013. Ex. 140 and RP at 191-92. In addition to the fence/gate configuration that diverted ingress and egress over the Bresslers' reserve drainfield, the Sullivans had expanded their front-yard landscaping into the easement. Ex. 102; RP at 259-263, 273; FoF 26. After the surveyor's field work was finished, Ex. 140, but prior to trial, RP at 237-38, the Sullivans took out more stone pavers to put plants in the corridor between the houses. Id. ; Exs. 130 and 139[18]; FoF 26.

Prior to trial, a judgment was entered by stipulation as to the Sullivans' lender, GMAC, which agreed to be bound by the final judgment. CP at 510-12. The Bresslers also served Rule 904 Notices,[19] CP at 490-509, 453-55, regarding documents produced by both parties and gathered from the public record, as well as documents produced by Mr. Saar and his former law firm after the Sullivans formally waived their attorney-client privilege. Id.; CP at 689-92.

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[18] The trial court found that the plants had the potential to intrude five feet into the easement even if trimmed: left untrimmed, they could take over the entire corridor between the houses. FoF 26; RP at 226-30, 233.

[19] Trial exhibits 1-103 were designated, using the same numbers in the ER 904 Notice for "Sullivan/Public Record documents", exhibits 104-103 were designated in the ER 904 Notice for the Bresslers' documents, and exhibits 131-38 were designated in the Supplemental ER 904 Notice. RP at 464.

Under Island County Local Rule 40(a)(6), the parties were required to file trial briefs identifying the issues. The Bresslers' trial brief identified abandonment and equitable estoppel, citing the leading case, Heg v. Alldredge, 157 Wn. 2d 154, 137 P. 3d 9 (2006). CP at 438-42. Because the Sullivans had asserted lack of intent and good faith as affirmative defenses, the Bresslers also identified the, "good faith mistake" line of cases analyzed in Proctor v. Huntington, 169 Wn. 2d 491, 238 P. 3d 1117 (2010), CP at 442, and equitable defenses based on bad faith.[20] CP at 443. The Sullivans' trial brief also analyzed the Heg case and asserted that, "the single issue before the Court is whether or not the easement for joint boat access has been 'abandoned' by the [Sullivans]." CP at 400.

On the last day of trial, on December 12, 2013, the trial court stated that a decision would probably be issued within the next five days. RP at 492. But the trial court's letter opinion was not filed until February 10, 2014. CP at 201-10. The letter opinion became, in large measure, CP

[20] In their trial brief, the Bresslers also responded to the Sullivans' counterclaims of nuisance and trespass based on the conduct of their disabled children. CP at 445-49. But, in opening statement, the Sullivans' trial counsel, G. Geoffrey Gibbs, announced that the Sullivans would not be pursuing their nuisance and trespass claims, stating that he had, "no reason to believe that [the Bresslers] do not exercise appropriate control over their children." RP at 19. Although Mr. Bressler's testimony regarding his disabled children was thereafter restricted because the Sullivans had withdrawn those claims, RP at 27, Ms. Sullivan nonetheless testified about her concerns about the Bresslers' son and his conflicts with her dogs. RP at 367.

at 167 and 70, the formal Findings and Conclusions that were entered by the trial court in May of 2014.[21] *Compare* CP at 201-10 *with* 19-38.

The trial court found that the Sullivans' installation of their fence in the fall of 2011, blocking off their property subject to the easement, was unequivocal, decisive, and inconsistent with the easement's continued existence. FoF 29. The trial court found that, at that point, the Sullivans abandoned the easement. Id.

According to the trial court, however, "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." CoL 3. The trial court concluded that, to preclude them, the Bresslers also had to prove, by very clear and cogent evidence, all elements of equitable estoppel. CoL 4. The trial court concluded that the first two elements, an inconsistent assertion by the party to be estopped and the estopping party's reliance thereon, were proved. CoL 5. As for injury to the estopping party, the Bresslers had

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[21] Under Civil Rule 54(e), a proposed form of judgment should ordinarily have been presented for entry no later than 15 days after the letter opinion was filed. As permitted under Civil Rule 54(e), however, the court directed that proposed final documents be filed by March 10, 2014, CP at 198, and the Bresslers' presentation motion was timely filed. CP at 165. Owing to personal circumstances, RP at 2-3 (May 12, 2014), however, the trial court was thereafter not available either for the original March 24th hearing date or for the continued hearing date in April. CP at 40. The presentation hearing at which the conditional decree was finally entered occurred 3 months after the letter opinion was filed and 5 months after the conclusion of trial.

spent $2,500 in legal fees on efforts to extinguish the easement by the time of Ms. Sullivan's letter repudiating their commitment. RP at 267. The Sullivans were advised by Mr. Saar about the Bresslers' fees, Ex. 76, and do not assert that they ever offered to reimburse them.

But the trial court concluded that, in order to preclude the Sullivans from repudiating their abandonment and reinstating the easement, the Bresslers had to prove not just injury but undue hardship. CoL 6. The trial court concluded that the Bresslers had proved undue hardship because the Sullivans had blocked off substantial portions of their own property that are subject to the Declaration and because the Bresslers had incurred legal fees because of the Sullivans' conduct. CoL 7. Nonetheless, the trial court concluded that the Sullivans could reinstate the easement by avoiding that undue hardship. CoL 7, 9.

In the letter opinion, the trial court expressly stated that the Bresslers had not only incurred attorney fees in reasonable reliance on Mr. Saar's representations about the extinguishment prior to the Sullivans' repudiation but also because of the Sullivans' continuing encroachments up to and through the time of trial. CP at 209; see FoF 33. The letter opinion concludes with a call for briefing on attorney's fees. CP at 210.

As prevailing parties, the Bresslers had a duty under CR 54(e) to prepare a proposed form of judgment. Although the Bresslers expressly

stated their position that an unconditional decree quieting title should be entered in light of the court's determination that the Sullivans had abandoned the easement, CP at 165, the Bresslers recast the trial court's letter opinion into proposed findings and conclusions and submitted a proposed form of judgment based thereon. CP at 165-197. The Bresslers had not, CP at 857, and did not seek an award of reasonable attorney's fees. CP at 172, 176. But, the trial court having expressly referenced their on-going attorney's fees, the Bresslers documented the $99,476.62 total, CP at 77, as the amount to be paid by the Sullivans to reinstate the easement.[22] CP at 57. The Sullivans responded by asserting that they had incurred as much or more in their own attorney's fees in defending the case, CP at 68, and argued that the trial court had no authority to make an award of reasonable attorney's fees. CP at 63-66. Reasoning that the trial court did not have authority to condition revival of the easement on payment of an amount equivalent to an award of reasonable attorney's fees, RP at 9 (May 12, 2014), the trial court conditioned easement reinstatement on removal of the encroachments and deposit of $2,500 into the registry of the court. CP at 4-5.

[22] The proposed amount for reinstatement was based on the Bresslers' legal bills, CP at 72-164, as adjusted to delete fees attributable to the Sullivans' nuisance and trespass claims about the Bresslers' autistic children, which the Sullivans had dropped on the first day of trial. CP at 76-77.

In formulating reinstatement conditions, the trial court did not consider the continuing conflict between the parties: Ms. Sullivan had once again run out of her house to confront Mr. Bressler just a few months before the trial. RP at 274-76. The trial court also did not consider the Sullivans' intentional stalling or their repeated mis-use of the easement[23] to preclude reinstatement. The trial court did not address other evidence of the Sullivans' bad faith.[24] The trial court found as fact that the Sullivans had expanded their river rock perimeter into the easement, FoF 26; Ex. 128, RP 262-263; some of the additional rocks were thrown into the Bresslers' yard after photographs of the enlarged perimeter were designated in an ER 904 notice. RP at 264-67; Ex. 143 (*compare* page 1 *with* page 4). The trial court found that there was insufficient evidence to prove that the Sullivans had dumped a large amount of dog waste on the Bresslers' tidelands shortly after the mediation was scheduled, FoF 34, but the Sullivans are the only ones in the vicinity who keep a bucket of such waste on their property. RP at 255. The trial court made no finding of fact about the vandalized bulkhead board about which Ms. Sullivan had complained. And the trial court rejected Exhibit 115, photographs

[23] In addition to the Sullivans' use of the boat ramp for storage, Ms. Sullivan did not dispute Mr. Bressler's testimony that she repeatedly, "danced" on the boat launch. RP at 180.

[24] The trial court did note that the fact that the Sullivans are "contentious", CoL 7, is "unfortunate". Id.

depicting the Sullivans' placement of the decapitated skull and skeleton of a horned animal at eye-level facing the Bresslers' yard, as irrelevant. RP at 150-51,[25] 258.

Rather, in formulating conditions for reinstatement of the easement, the only factor that the trial court considered was undue hardship. And, in considering undue hardship, the trial court did not consider Ms. Sullivans' anti-Semitic and disability slurs in determining whether reinstatement would cause undue hardship to the Bresslers.

The Sullivans timely met the court's conditions. CP at 10-18. The Bresslers appealed the portion of the trial court's judgment establishing conditions for reinstatement of an abandoned easement. CP at 1.

IV. Argument

A. Standard of Review: Error of Law.

The Bresslers filed this case seeking a decree quieting title to both Lots 25 and 26 free of the Declaration. CP at 857. A quiet title action is brought in equity. Eichorn v. Lunn, 63 Wn. App. 73, 80, 816 P. 2d 1226 (Div. I, 1991). When a court has equitable jurisdiction, the court has the power to grant whatever relief the facts warrant, and appellate courts

[25] Because the trial court also sustained objections to Mr. Bressler's testimony about the skull and skeleton, RP at 151, the Bresslers did not have an opportunity to explain its suspicious timing: when the Sullivans finally took down their wooden fence, the Bresslers found the skull and skeleton facing their front yard. CP at 436; see Ex. 102.

frequently defer to a trial court's judgment in tailoring an equitable decree. Id. But claims of error of law in a trial court's decision in an equitable case are reviewed de novo. Id., 63 Wn. App. at 77. When a trial court's remedy is within the range supported by applicable law, a trial court has tremendous discretion to fashion an equitable remedy. Young v. Young, 164 Wn 2d 477, 488, 191 P. 3d 1258 (2008). But an appellate court does not defer to a trial court's equitable remedy that is based on an error of law. Id. (reversing determination of quantum meruit recovery outside range based on alternate proper measures of damages).

B. An Easement can be Terminated by Abandonment or by Estoppel: the Bresslers were not Required to Prove Both.

Every conveyance of an interest in real property must be by deed. RCW 64.04.010. Deeds must be in writing, signed by the person bound thereby, and formally acknowledged. RCW 64.040.020. An easement is an interest in land that is subject to these statutes. Kesinger v. Logan, 113 Wn. 2d 320, 325-26, 779 P. 2d 263 (1989). A court will nonetheless enforce an oral agreement to convey an interest in property if a party can establish part performance and the terms of the contract to which both parties agreed, despite the missing writing. Berg v. Ting, 125 Wn. 2d 544, 556, 886 P. 2d 564 (1995). Without a writing that complies with the statue of frauds, however, a party typically cannot, by his or her own

conduct, eliminate or extinguish the property rights of another unless that conduct continues through the period of the statute of limitations. 17 STOEBUCK & WEAVER, WASHINGTON PRACTICE: REAL ESTATE: PROPERTY LAW, § 8.5 at 510-11 (2nd Ed. 2004) (holder of record title is entitled to decree ejecting possessor unless adverse possessor proves elements of same through statute of limitations).

In contrast, a party can extinguish his or her own rights in an easement without executing a writing by abandoning it. Heg, 157 Wn. 2d at 161. An interval of nonuse is a circumstance that may properly be considered in determining the intent of the easement-holder, but intention to abandon is the key. Id. "Acts evidencing abandonment of an easement must be unequivocal and decisive and inconsistent with the continued existence of the easement." Id.

The trial court found that the Sullivans abandoned the easement when they installed their fence down the middle of it. FoF 29. Having resolved that dispositive issue against the Sullivans, however, the trial court erred in determining how and whether the Sullivans were entitled to reinstate or revive it. The trial court's error appears to have been based on a misreading of Heg. Like the parties seeking to prevent the holders of an easement from enforcing it in Heg, the Bresslers asserted that, under the doctrines of abandonment and equitable estoppel, they were entitled to an

order quieting title to eliminate the easement. CP at 855-56; 157 Wn. 2d at 161, 165-66. The trial court erroneously concluded that, even after determining that the Bresslers had proved that Sullivans had abandoned the easement, the Sullivans were entitled to reinstate it unless the Bresslers also proved that the Sullivans were equitably estopped from asserting their rights under it. CoL 3-4. But, in Heg, the court considered the two doctrines in the alternative: that is, that the holder of the easement had not lost it through non-use unless the owner of the servient estate established that the holder had abandoned it **or** was estopped from asserting rights under the easement: "[Owners of servient estate] next contend that, even if [holder of easement] had not abandoned her easement, she is nonetheless estopped from enforcing her rights." 157 Wn. 2d at 165. The Heg court thus analyzed abandonment and estoppel as two distinct grounds on which an easement can be extinguished.

The trial court quoted Humphrey v. Jenks, 61 Wn. 2d 565, 379 P. 2d 366 (1963), for the proposition that:

> 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.

CoL 6. But, as the trial court noted, CoL 6, the quoted language from the Humphrey case was itself a quotation from II, AMERICAN LAW OF PROPERTY, § 8.99 at 305 (1952). As it happens, that language was replaced in its supplement:

> **The extinguishment of an easement may result in part from conduct by the owner of it which would not of itself satisfy the requirements for abandonment.** This is through the application of the doctrines of estoppel as exemplified in 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 result in undue hardship to the owner of the servient tenement.

II, Supp, §8.99 at 64 (1962) (emphasis added); Supp. § 8.99 at 251 (1977).

An easement can be extinguished by abandonment. An easement can be extinguished by estoppel. But the two doctrines, though related, are not one and the same. Extinguishment of an easement by abandonment requires proof of an intentional relinquishment as evidenced by conduct respecting the use. V, RESTATEMENT OF THE LAW OF PROPERTY, § 504 at 3076 (1944); see also Heg, 157 Wn. 2d at 161. Under a claim of termination by abandonment, verbal or written expressions of an intent to abandon are relevant only for the purpose of giving meaning to acts or conduct by the holder of the easement that can be interpreted as animated by an intention to surrender the easement: they are not sufficient, in and of themselves, to extinguish the easement. RESTATEMENT, § 504,

comment *c*, at 3078. The easement-holder's intention to abandon must be proved by conduct, and actual intention to abandon is required.

In contrast, an easement can be extinguished by estoppel even if the easement-holder has no intention to give it up. RESTATEMENT, § 505, comment *d* and *Illustrations*, at 3086-87; Humphrey, 61 Wn. 2d at 567. Furthermore, estoppel can properly be based on the verbal or written expressions of the easement-holder: conduct is not required. RESTATEMENT, § 505, comment *d,* at 3086. The Humphrey case involved only a claim of termination of an easement by estoppel: not abandonment. 61 Wn. 2d at 567-68. And extinguishment of an easement by estoppel requires reliance by the owner of the servient tenement precisely because it can result from conduct by the owner of the easement that would not, in and of itself, satisfy the requirements for abandonment:

> The conduct relied upon [to extinguish an easement by estoppel] must be such as reasonably to be subject to the inference that it evidenced an intention to abandon the easement. It may consist of any conduct from which such an intention may be inferred. It may consist of or include direct expressions to that effect whatever form such expressions may take. The conduct may or may not be based on an actual intention to abandon. It is sufficient to constitute the basis of an estoppel if it is such conduct as may reasonably be relied upon as indicating such an intention. **If it is based upon an actual intention to abandon the easement and it is conduct capable of producing an abandonment ... reliance upon it is not essential to the extinguishment of the easement. It is**

> **extinguished by the abandonment without the necessity of proving an estoppel.**

RESTATEMENT, § 505, comment d, at 3086 (emphasis added).

Proof of undue hardship to the owner of the servient tenement is thus **not** required to extinguish an easement by abandonment. The trial court having determined that the Sullivans abandoned the easement, FoF 29 and CoL 1-2, the Bresslers were not required to **also** prove all elements of estoppel in order to establish that a decree quieting title in both properties free of the easement should be entered. The Bresslers did nothing, said nothing, and signed nothing to grant the Sullivans an interest in the Bresslers' property after the Sullivans abandoned their rights under the Declaration. The trial court having expressly found that the Sullivans abandoned the easement when they installed their fence down the middle of it, the only remaining question should have been whether the Sullivans had established an equitable basis to be relieved of the consequences of their actions. See Section IV.C below.

The trial court's reliance on City of Edmonds v. Williams, 54 Wn. App. 632, 784 P. 2d 1241 (Div. I, 1989) for the proposition that, until and unless the Sullivans' fence stopped the Bresslers from bringing in their own boat, the Sullivans were free to repudiate their abandonment and

reinstate the easement, CoL 3, is misplaced.[26] Once an easement is terminated, it may not be revived or reinstated except by act or writing sufficient to establish an easement as an initial matter: the standards for creating an easement and recreating a terminated easement are the same. See Radovich v. Nuzhat, 104 Wn. App. 800, 806, 16 P. 3d 687 (Div. I, 2001). After the Sullivans abandoned their easement, the Declaration still existed of record, but the Sullivans could no longer enforce their rights under it, and their easement could not thereafter be reinstated on the Bresslers' property by any act short of what would have been required to create an easement as an initial matter. See Nickell v. Southview Homeowners Association, 167 Wn. App. 42, 52, 271 P. 3d 973 (Div. II, 2012) (same proof required to divest ownership of real property from one who acquired by adverse possession as from one who acquired by deed).

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[26] The Edmonds case also involved an access easement that had not been, "opened": that is, improved for use as an easement. The portion of the Edmonds case cited by the trial court was based on Thompson v. Smith, 59 Wn. 2d 397, 407-08, 367 P. 2d 798 (1962), another unopened access easement case. 54 Wn. App. 636-37. Because the owner of the servient tenement is entitled to use his or her land for any purpose not inconsistent with the future use of the easement, 54 Wn. App. at 636, the installation and maintenance of a fence at the perimeter of his property by the owner of the servient tenement was not sufficient to establish termination of the unopened easement by adverse possession. In contrast, as regards this easement, stone and grassy pavers were installed all along the easement pathway by Casa before selling the properties, FoF 3, and Rick Jones, Casa's principal, told Ms. Sullivan before her purchase that a fence could not be installed within the easement. CP at 935. Indeed, Ms. Sullivan specifically anticipated that, "Mark Bressler is going to flip when he sees..." the fence posts that the Sullivans had started installing on the property line, Ex. 36, precisely because she saw them as demonstrating that there was no easement. RP at 353.

The trial court erred, as a matter of law, in concluding that the Sullivans were entitled to repudiate their abandonment and reinstate the easement unless the Bresslers proved that reinstatement would cause undue hardship. "[I]t has come to be the established rule that an easement can be abandoned by the act of the owner of the easement. By act on his part without participation by the owner of the servient tenement he can wholly extinguish his rights with respect to his easement." II AMERICAN LAW OF PROPERTY, § 8.96 at 302 (footnote omitted).

C. The Sullivans Cannot Avoid the Consequences of Their Abandonment on Grounds of a Good Faith Mistake.

The trial court having determined that the Sullivans abandoned the easement, the Bresslers had a legal right to an order quieting title free of the Declaration. In the context of encroaching structures, however, a mandatory injunction of removal can be withheld as oppressive, even when it is clear that the encroacher has no legal right to retain it, if, "[t]he encroacher did not simply take a calculated risk, act in bad faith, or negligently, willfully or indifferently locate the encroaching structure." Arnold v. Melani, 75 Wn. 2d 143, 152, 449 P. 2d 800 (1969). In contrast to the, "all or nothing" relief afforded to the party who is determined to have a legal right to it in a case seeking damages, invocation of a court's

equitable jurisdiction brings with it the court's power to exercise that jurisdiction only in the service of an equitable result. See generally, Procter v. Huntington, 169 Wn. 2d 491, 238 P. 3d 1117 (2010).

As affirmative defenses, the Sullivans asserted that their conduct was done in good faith, that they did not intend to give up their easement rights, and that the Bresslers' claims arose out of the fault of the Sullivans' first attorney and/or their title company. CP at 826-27. As the trial court noted, the Bresslers acknowledged that the Sullivans' decision to put their fence in the middle of the easement appeared to have been based on the mistaken belief that no easement existed. FoF 29. But the Sullivans' decision to finish their fence after receiving verification that a recorded easement existed was intentional, Id., as was their decision to keep it in the middle of the easement while stalling the Bresslers. FoF 30.

The line of cases cited in and following Arnold v. Melani is characterized as the, "good faith mistake" line of cases. Proctor v. Huntington, 169 Wn. 2d at 504. They uphold a trial court's application of equitable principles to avoid the use of, "a legal right to gain purchase of an equitable club to be used as a weapon of oppression..." Arnold, 75 Wn. 2d at 153. But, the trial court having found as fact that the Sullivans intentionally finished the fence and then kept it there, intentionally stalling the Bresslers while trying to get someone else to pay for a separate boat

launch, the Sullivans cannot avoid the consequences of their own abandonment actions by blaming their attorney or their title company. The Sullivans not only failed to establish the requisite good faith mistake: the trial court found that they dealt with the Bresslers in bad faith.

D. Test for Equitable Relief is Substantial Justice and End to Litigation: Not Just Undue Hardship.

Even if the trial court's decision to establish conditions under which the Sullivans could reinstate the easement was otherwise correct, the trial court erred in failing to consider whether establishing conditions for reinstatement was an appropriate equitable remedy. When sitting in equity, a trial court may fashion broad remedies to do substantial justice to the parties and put an end to litigation. Eichorn v. Lunn, 63 Wn. App. at 80. But the test is whether the decree balances both parties' interests and reaches an equitable and reasonable solution. Clausing v. Deforest, 83 Wn. 2d 70, 77-78, 515 P. 2d 982 (1974). The trial court's remedy in this case was intended only to avoid undue hardship to the Bresslers, CoL 7: it was not intended to do, and did not do, substantial justice to the parties, nor did it put an end to litigation.

1. No Substantial Justice.

Because the trial court's remedy was intended only to ameliorate undue hardship, the trial court simply did not balance the parties' interests.

The sole factor cited by the trial court as supporting reinstatement was that the Bresslers knew about the easement before they bought their property. CoL 7. But that same factor applies with equal force to the Sullivans: they were on notice of both the existence of the easement and its location before they chose to abandon it. FoF 6-7.

The trial court's decision to allow the Sullivans to reinstate the easement also ignored the relative hardships of abandonment as against reinstatement. The Bresslers spent some $100,000 to bring this case to and through a trial, CP at 77; the Sullivans assert that they incurred as much or more. CP at 68. But the only evidence of the easement's value to the Sullivan property was that, together with the Sullivans' bulkhead, it was worth $17,500, Ex. 135, and the cost to put in a separate boat launch on the Sullivans' property was less than $24,000. Ex. 39 at 2.

Most importantly, the trial court's remedy wholly failed to consider the relative equities of the parties. Even before she put her fence in the easement, Ms. Sullivan put her mailbox in the easement, admitted its misplacement, agreed to move it: and did not move it. Presented with the news that the Sullivans had put their fence on the property line in the mistaken belief that no easement existed, the Bresslers could have kept their mouths shut. Instead, they gave the Sullivans both a copy of the Declaration and a choice: move the fence and mailbox or extinguish the

easement. Although the Sullivans' attorney repeatedly represented that the Sullivans were going to extinguish the easement, they instead intentionally stalled the Bresslers so that they could try to get someone else to pay for their own boat launch. Even after repudiating the commitments by their first attorney, the Sullivans represented, through a different attorney, that they would put their fence back in its original location: then repudiated that commitment too, reconfigured their fence to divert ingress and egress over the Bresslers' reserve drainfield and kept it there, and installed additional obstacles in the easement, up to and through the trial.

The trial court's decision to allow the Sullivans to reinstate the easement was based on the trial court's error of law: that the Sullivans were entitled to reinstate the easement so long as they avoided undue hardship to the Bresslers. The trial court's decision was not intended to do, and did not do, substantial justice to the parties.

2. Remedy did Not Put an End to Litigation.

The easement was a source of on-going conflict between the Sullivans and the Bresslers for years before the Sullivans started using the boat launch. The trial court's decision allowing the Sullivans to reinstate the easement after abandoning it does not put an end to litigation; it rather assures that litigation will continue, because, once the Sullivans started using the boat launch, they repeatedly mis-used it. FoF 25-26. Mis-use of

an easement does not constitute grounds to extinguish it. Neitzel v. Spokane International Ry. Co., 80 Wash. 30, 36, 141 Pac. 186 (1914). But the Sullivans' repeated mis-use was a sufficient basis for the trial court to enter injunctive relief in order to forestall it. CP at 7. Especially when taken together with the other evidence of the Sullivans' bad faith in their dealings with the Bresslers over the easement, see section IV. F below, it is also a sufficient basis to establish that the trial court's remedy will not put an end to disputes between these parties over the easement.

E. The Remedy did not Even Achieve its Sole Goal: Avoiding Undue Hardship.

The purpose of the trial court's conditions on reinstatement was to avoid undue hardship to the Bresslers. CoL 7. Equitable estoppel requires proof that the party urging the estoppel would suffer injury if the party to be estopped contradicts or repudiates his prior position. Heg, 157 Wn. 2d at 165. In the context of extinguishment of an easement by estoppel, the injury component is properly characterized as unreasonable harm, RESTATEMENT, § 505(c) at 3083, or undue hardship. Humphrey v. Jenks, 61 Wn. 2d 567-68. But undue hardship is not the only factor that should be considered in formulating an equitable remedy. See Section IV.D above. Even if it was, the conditions imposed by the trial court did not, in fact, avoid undue harm to the Bresslers.

1. An Equitable Remedy Should At Least Make the Injured Party Economically Whole.

Equitable relief is properly fashioned so as make the injured party whole: to afford full and complete relief. Carpenter v. Folkerts, 29 Wn. App. 73, 80, 627 P. 2d 559 (Div. III, 1981) (proper to award both specific performance and compensation for deficiency in title of property to be transferred). The trial court specifically found as fact that the Bresslers had incurred on-going attorney fees, even after the Sullivans repudiated their commitment to extinguish the easement, because they continued to block off additional portions of their property right up to the time of trial. FoF 26. But the court declined to condition the Sullivans' reinstatement of the easement on reimbursement for such fees, reasoning that the court did not have the power to do so. RP at 9 (May 12, 2014).

Even if the trial court was correct in permitting reinstatement, and in conditioning reinstatement solely on avoiding undue harm, the trial court erred in fashioning a remedy that did not make the Bresslers whole. A trial court has "tremendous discretion" to fashion creative remedies when doing so make the injured party whole, does substantial justice to both parties, and brings an end to litigation. See, e.g., Young v. Young, 164 Wn. 2d at 488. At a minimum, reinstatement should have been conditioned on making the Bresslers financially whole for the undue

hardship that the trial court had opined was due to the Sullivans' conduct in reconfiguring their fence so as to divert access off the easement and over the Bresslers' reserve drainfield and installing additional obstacles to block off more of their own property subject to the easement up to and through the trial. CP at 209. It was the Sullivans who deliberately chose to keep blocking off their property subject to the easement until and unless the trial court required them to stop, CP at 1001-02: even as they used (and mis-used) the boat launch on the Bresslers' property.

Even a, "make whole" equitable remedy does not include an award of attorney's fees in the absence of an applicable contract, statute, or recognized equitable grounds. Carpenter, 29 Wn. App. at 80 (trial court's substantive "make whole" remedy affirmed; trial court's award of fees reversed). But the Bresslers did not seek an award of reasonable attorney's fees in response to the trial court's call for briefing. CP at 172. The difference between awarding attorney's fees and conditioning reinstatement on reimbursement of the attorney's fees attributable to the Sullivans' wrongful conduct in blocking off the easement is that the Sullivans would have had no choice but to pay an award of fees. In contrast, conditioning reinstatement of the easement on reimbursement would have allowed the Sullivans to choose: in order to reinstate the easement, they would have remove the obstacles that they placed to block

off their own property subject to the easement and to reimburse the legal fees attributable to their wrongful conduct in blocking it off.

2. Undue Hardship is not Just Economic.

Had the trial court conditioned easement reinstatement on reimbursement to the Bresslers for all of the legal fees attributable to the Sullivans' wrongful conduct, reinstatement would at least have required reimbursement for the fees attributable to the Sullivans' insistence on a trial to determine that they were not entitled to block off their own property subject to the easement even as they asserted a right under that same easement to use the Bresslers' property. But, even if reinstatement had been conditioned on the Sullivans' reimbursement of all of the Bresslers' legal fees attributable to the Sullivans' wrongful conduct, the Bresslers would still have pursued this appeal if the Sullivans had chosen reinstatement because the resulting harm is not just economic. The trial court's characterization of the Sullivans as "contentious", CoL 7, may fairly describe their multiple claims against attorneys. See ftn. 17 above. But Ms. Sullivan's use of an anti-Semitic slur regarding Mr. Bressler and a disability slur regarding his autistic sons was not, "contentious": it was repugnant. The trial court's decision to allow the Sullivans to reinstate the easement has caused material emotional hardship to the Bresslers.

In determining whether an easement has been extinguished by estoppel, the court properly considers the extent of the harm that would be caused to the owner of the servient estate. RESTATEMENT, § 505, comment *f* to clause c, at 3088. "If, under all the circumstances, it would be unreasonable to restore the privilege, restoration will be denied." Id. 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. Outside of the context of the workplace, slurs based on the object's religion or disability may not support a claim for damages based on the tort of outrage, Robel v. Roundup Corp., 148 Wn. 2d 35, 52, 59 P. 3d 611 (2001), but they are appalling nonetheless. In allowing the Sullivans to reinstate the easement, the trial court erred in wholly failing to consider the resulting emotional hardship to the Bresslers.

Even if undue hardship to the Bresslers was the only factor to be considered in determining whether the Sullivans should have been permitted to reinstate the easement, reinstatement should have been denied.

F. Evidence of Bad Faith was Improperly Excluded; Even so, Evidence of Bad Faith was Sufficient to Bar Reinstatement as a Matter of Law.

Abandonment is the intentional relinquishment of an easement. RESTATEMENT, § 504 at 3076. As an affirmative defense, the Sullivans alleged that they lacked intent to abandon; indeed, the Sullivans asserted their good faith in, "all actions" as an affirmative defense. CP at 826. The Sullivans having chosen to put their good faith at issue, the Bresslers were entitled to meet that claim with evidence of the Sullivans' bad faith.

Mr. Bressler's testimony regarding Ms. Sullivan's use of anti-Semitic and disability slurs was admitted without objection. RP at 105-08. But the trial court rejected the Bresslers' offer of an Island County Sheriff's report, RP at 110, thus excluding its contemporaneous corroboration not only that the October 10, 2009 incident -- which began with a confrontation over the easement -- was sufficiently disturbing as to cause Mr. Bressler to call law enforcement but also that the official record referenced religious remarks. Rejected Ex. 19 at 3. The trial court also rejected the Bresslers' offer of photographs depicting a decapitated animal skull and skeleton, Ex. 115, placed by the Sullivans at eye-level, facing the Bresslers' property, before they took down their wood fence.

In so ruling, the trial court accepted the Sullivans' arguments that such evidence was irrelevant to the issue of abandonment,[27] RP at 150-51, and such determinations are reversed only for a manifest abuse of discretion. 5 TEGLAND, WASHINGTON PRACTICE: EVIDENCE, § 401.7 at 270 (5th Ed. 2007). But such evidence manifestly **was** relevant to determine whether to excuse the Sullivans from the consequences of their conduct on the grounds of good faith, as well as to more general considerations as to whether an equitable remedy for abandonment other than the unconditional quiet title decree sought by the Bresslers would do substantial justice to the parties. See Sections IV.C and D.1 above. A specific finding of fact regarding Ms. Sullivans' use of anti-Semitic and disability slurs should have been entered, and the excluded evidence should have been admitted.

Nonetheless, the facts as found by the trial court regarding the Sullivans' bad faith in their dealings with the Bresslers regarding their abandonment and on-going installation of impediments to block off their own property subject to the easement even after they started to use the boat launch should have been sufficient to preclude the Sullivans' effort to be excused from the consequences of their own conduct as a matter of law.

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[27] Because both exhibits had been designated without objection under ER 904, the only grounds for objection at trial was relevance. ER 904(c)(2).

"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. On the facts found by the trial court, it was an abuse of discretion to relieve the Sullivans from the consequences of their own abandonment conduct by allowing them to reinstate the easement.

G. The Portion of the Judgment Permitting Reinstatement of the Easement Should be Reversed.

The trial court's judgment establishing conditions for the Sullivans to reinstate the easement was erroneous. If the trial court could formulate conditions for reinstatement based on correct propositions of law, this case could be remanded for a determination of such conditions. See Young v. Young, 164 Wn. 2d at 491 (case remanded for trial court's determination of quantum meruit compensation within range established by proper alternative measures of damage). But conditions on equitable relief that are inappropriate or inadequate as a matter of law should be reversed outright. See City of Seattle v. Nazarenus, 60 Wn. 2d 657, 659-60, 670, 374 P. 2d 1014 (1962)(term of trial court's order staying requirement for removal of encroachments from easement on condition that encroacher secure and maintain liability insurance for fee owner in the event of harm

removed by appellate court as, "an inadequate solution to the problem.") The portion of the trial court's judgment establishing conditions for the Sullivans to reinstate the easement after abandoning it should be reversed.

V. Conclusion

The Bresslers respectfully request that the portion of the Final Judgment and Condition Decree Quieting Title entered on May 12, 2014, that establishes conditions for reinstatement of the easement be reversed and that the case be remanded for entry of an unconditional decree quieting title to Lots 25 and 26 free of the Declaration.

DATED this 27 day of October, 2014.

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Appellants.

WSBA No. 14301