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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

RONALD L. and SHERRY A. BEERS,	)	
Husband and Wife,	)	
	)	NO. 34123-9-II
Plaintiff,	)	APPELLANT'S
vs.	)	REPLY BRIEF
	)	
DEANNA ROSS, unmarried; and	)	
WASHINGTON STATE HOUSING	)	
COMMISSION; and	)	
THE LEADER MORTGAGE CO., nka	)	
U.S. BANK HOME MORTGAGE,	)	
Defendant.	)	
	)	

COMES NOW, the undersigned attorney for plaintiff and files the appellant's reply brief with the clerk of the court and certifies to the court that a true copy hereof has been served via ABC Legal Services, Inc. on each opposing legal counsel, namely: Shelly K. Speir, attorney for DEANNA ROSS; and Athan E. Tramountanas, attorney for WASHINGTON STATE HOUSING COMMISSION; and David C. Neu, attorney for U.S. BANK HOME MORTGAGE.

Date: May 15<sup>th</sup>, 2006

ALAN RASMUSSEN WSB 2545  
 Attorney at Law

I. IN REPLY TO DEFENDANT'S ARGUMENT THAT THE  
PLAINTIFF WAIVED ASSIGNMENT OF ERROR  
NUMBERED TWO

*The defendant's argument seems to be that since the plaintiff did not devote a section in the appellant's brief to the assignment of error numbered two, the plaintiffs' assignment of error is deemed waived. The citation offered by defendant to support this argument is curious. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 808-809, 828 P.2d 549 (1992), does not address the issue of whether an assignment of error to an order on a motion for reconsideration under CR 59 is waived. The opinion of the court in Cowiche Canyon, *supra*, does not even mention reconsideration of a trial court's order. The Supreme Court in Cowiche Canyon, *supra*, was asked to consider an issue raised by appellant in the appellant's reply brief. The Court's holding is that an issue raised for the first time in a reply brief will not be considered.*

*The Rules of Appellate Procedure, RAP 2.4(f), provide as follows.*

*RAP 2.4(f) An appeal from a final judgment brings up for review the ruling of the trial court on an order deciding a timely motion based on . . . CR 59 (reconsideration) . . .*

*The trial court hearing on defendant's motion for summary judgment occurred September 23, 2005, (RP 09-23-2005). The trial court's order dismissing plaintiffs' complaint was entered September 27, 2005,*

*(CP 274-275). The trial court simultaneously entered the order denying plaintiff's motion to file a late reply, (CP 272-273), with the order on summary judgment dismissing plaintiffs' complaint.*

*The plaintiffs' motion for reconsideration was served and filed timely on September 30, 2005, (CP 302-315). The trial court decided not to modify the oral decision and order entered granting summary judgment and order denying plaintiff's motion to file a late-reply, (RP on 11-10-2005). It would be superfluous for plaintiff to devote a separate section of the appellant brief to the order denying reconsideration of the trial court's orders entered on September 27, 2005. But if the trial court had modified or amended the order denying plaintiff's motion to file a late-reply, (CP 272-273), or the order granting defendant's motion for a summary judgment, (CP 274-275), a different case would be presented. The order denying plaintiff's motion for reconsideration, CP 437-439), did not make any change in the trial court's original decision, nor was there any new issues raised at the hearing on reconsideration. Therefore, no separate argument was necessary to support the plaintiffs' claimed error number two.*

II. IN REPLY TO THE ARGUMENT THAT THE TRIAL COURT WAS CORRECT TO GRANT SUMMARY JUDGMENT ON PLAINTIFF'S CLAIM FOR THE PRESCRIPTIVE EASEMENT.

The argument that defendant makes to support the trial court's summary judgment dismissing the plaintiff's claim for prescriptive easement is a familiar one under CR 56, that no material facts are disputed and reasonable minds could reach but one conclusion regarding the undisputed facts at issue. (Response brief at page 13) However, the case cited by defendant, Miller v. Likins, 109 Wn. App. 140, 34 P.3d 835 (2001), is not an apt decision to the facts in the immediate case for, as will be seen, there is substantial conflict on the material facts concerning both location and use of the portion of the driveway plaintiffs claim the right to use by prescription.

In Miller v. Likins, *supra*, the parent of a minor child, suing as guardian, claimed negligence against the City of Federal Way when the child was struck by an automobile outside the fog line on the highway. The plaintiff claimed the City should have taken precautions by installing raised pavement markings on the fog line, lowering the speed limit, etc. The plaintiff's theory was that such additional precautions might have alerted the defendant driver to the possible presence of pedestrians, enabling him to avoid a collision. Miller v. Likins, *supra*, at 147 The defendant driver passed away before his testimony could be obtained

*about how the accident happened, and the court said that there was no direct or circumstantial evidence showing that the defendant driver was confused or misled by the condition of the roadway. The court's holding is given at page 147 in Miller v. Likins, supra: We conclude summary judgment was proper here because Miller failed to satisfy her burden of producing evidence showing that the City's negligence proximately caused Quirnbach's injuries.*

*A more apt appellate decision that appears to be on point in the immediate case involving a shared driveway is Drake v. Smersh, 122 Wn. App. 147, 89 P.3d 726 (2004). In this case, which was tried to the court, no error was assigned to the findings of fact. The appellate court said at page 155 that the shared driveway was located entirely on the defendant's property but was used by the plaintiff "as the owner himself would, entirely disregarding the claims of others, asking permission from no one, and using the property under claim of right." The appellate court also commented that the plaintiff extended the driveway, maintained it, and that the driveway was the sole access to plaintiff's property. All of these facts are true in the immediate case. Moreover, the court said in Drake v. Smersh, supra, at page 154-155, that there did not appear to be any relationship between the adjoining property owners from which one could infer permissive use. This is also true in the immediate case.*

*In the immediate case, plaintiff testified in deposition (CP 122), that plaintiffs used the driveway over defendant's land for more than nineteen years, and that (CP 124), plaintiff had maintained the driveway by putting gravel on the road several times, and the driveway furnished the only access to plaintiff's home. The defendant several times acknowledged that the driveway belonged to the plaintiff, (CP 165, declaration of defendant).*

*Defendant argues (response brief at page -16-), that plaintiff presented "no specific facts showing that Ms. Ross had notice that the Beers were using her property in a way that was adverse to her interest." To support this argument defendant cites to testimony of defendant in her declaration, "I had no idea that he was even using my property," (CP 166, Declaration of defendant appended to defendant's motion, at page -3-). It appears defendant was confused about where the driveway was located because at one point she testified in her declaration, "I started using the Beers' driveway immediately after I bought my property because I did not have a driveway of my own." (Declaration of defendant, page -2-, CP at 165) At another point, defendant stated, "I spread gravel over the Beers' driveway, next to my garage, and in my turnaround area." (Declaration of defendant, page -2-, CP at 165) At another point defendant stated, "In the area next to the Beers' driveway, my property is*

*covered with grass. The grass extends onto the Beers' driveway, which also does not look like it has been disturbed." (Declaration of defendant, page -3-, CP 166)*

*The testimony of defendant is consistent with the plaintiff's testimony and plaintiff's declaration. In plaintiff's declaration, (236-237), plaintiff stated: "All I can testify to is when I moved to my property the road was established, and around the utility pole and from the utility pole northward it was considerably more than fifteen feet." In deposition testimony, plaintiff several times referred to the driveway as wider than 15 feet. For example, at page 18 of plaintiff's deposition, (CP 268), he testified that "I have used twenty to twenty-two feet of that driveway." At page 17 of the plaintiff's deposition testimony, (CP 118, being Exhibit D, appended to defendant's summary judgment motion, plaintiff testified that the driveway was wide enough that "two cars was able to pass each other up and down the driveway without pulling over onto the grass." The material facts, according to both plaintiff's statements in deposition and plaintiff's declaration, and in the defendant's own declaration, establish that the driveway was used continuously for more than 19 years and was used openly, continuously, notoriously, and plaintiff never requested permission nor did plaintiff believe permission was required.*

*Defendant acknowledged the established driveway belonged to the plaintiff even if defendant did not recognize the driveway encroached on her land.*

III. IN REPLY TO DEFENDANT'S ARGUMENT THAT THE TRIAL COURT WAS CORRECT TO DISMISS THE PLAINTIFF'S CLAIM FOR TRESPASS DAMAGE.

*The defendant argued before the trial court, (CP at 77), and renews the argument in the response brief (at page -23-), that plaintiff's claim for trespass should be dismissed because plaintiff has not shown that plaintiff suffered any damage. This argument is based on the supposition that defendant owned the gravel that she removed from plaintiff's driveway. The defendant's argument before the trial court was that defendant owned the gravel she excavated from plaintiff's driveway, and therefore she had the right to relocate it where she saw fit, (CP 77).*

*Again it appears that the appellate decisions which defendant offers to support her argument are not in point on the issue defendant is raising. An example is Ketchum v. Albertson Bulb Gardens, 142 Wash. 134, 252 Pac. 523 (1927), which defendant cites at page -23- of the response brief. The Supreme Court in Ketchum v. Albertson Bulb Gardens, reversed a trial court's judgment on verdict rendered for the plaintiff on complaint alleging a breach of contract for sale of flower bulbs. The holding was that the trial court erred in giving an instruction to*

*the jury on the measure of damages. The Supreme Court reversed and remanded for new trial, The Court did not order a dismissal of the case as the defendant's response brief implies at page -23-. The quotation defendant refers to at page -23- of the response brief is taken by the Court in Ketchum supra, at page 139, from Woodhouse v. Powles, 43 Wash. 617, 624, 86 Pac. 1063 (1906) But the holding in the latter case does not support defendant's argument for the Court's holding in Woodhouse supra, is stated at page 623: "[W]e hold that there must be some evidence that such injuries actually followed from the libel before a recovery may be had, as they are not to be inferred from the mere fact that a libel has been proven."*

*Similarly, the case of Obrien v. Larson, 11 Wn. App. 52, 521 P.:2d 228 (1974), which defendant cites at page -22- of the response brief, does not support defendant's argument that plaintiff suffered no provable damage. The appellate court ruled in Obrien v. Larson, that the trial court's order dismissing the plaintiff's complaint at the conclusion of plaintiff's case in chief would be upheld because the trial court correctly concluded that plaintiff had offered no evidence to show the measure of prospective profits for which a claim of loss was alleged. The appellate court's holding in Obrien v. Larson supra, at page 55 is "[T]here was absolutely nothing by which to measure the prospective profit or loss*

which would result from the venture if undertaken.” The other case cited by defendant, Ahmann-Yamane, L.L.C. v. Tabler, 105 Wn.App. 103, 19 P.3d 436 (2001) is no more enlightening for the immediate case. In Ahmann-Yamane, the issues of the measure of damages and whether any damages had been proved were not discussed. The issue was stated in Ahmann-Yamane, supra, at page 110: “[W]e must decide the result of the land use petition.” Having determined that the final result of the filing of the land use petition, i.e. dismissal, would have occurred even if the attorney filed the petition in the proper county, the appellate court ruled that plaintiff failed to sustain the plaintiff’s burden of proof that plaintiff was harmed by his attorney’s act of malpractice. Neither the trial court nor the appellate court discussed the issue of the sufficiency of plaintiff’s evidence to sustain a claim of damage in Ahmann-Yamane, supra.

The issue before the court in the immediate case is not as simple as defendant would suggest by asking plaintiff whether he knew the value of a few potholes or missing grass. (Response brief at page -24-) The issue is whether plaintiff is entitled to recover the cost of restoring the road by replacement of rock excavated and removed by defendant after she was informed by plaintiff she was no longer permitted to use the driveway. The plaintiff acknowledged she was trespassing on plaintiff’s driveway when she admitted she was not permitted to use the driveway two months

*before she removed the gravel from the plaintiff's road. (CP 165-166, referring to defendant's declaration at pages 2-3, Exhibit H to defendant's motion for summary judgment).*

*The question of the rightful ownership of gravel placed on plaintiff's road more than two years before defendant removed it may well be an issued of mixed law and fact. The Washington Supreme Court stated in Wasser & Winters v. Jefferson Cy., 84 Wn.2d 597, 599, 528 P.2d 471 (1974), that the "chief incidents" of ownership of property are the right to possession, use, and enjoyment, and the right to dispose of it according to the will of the owner. Defendant acknowledged numerous times that the plaintiff owned the road, and this was the more clearly established when defendant acceded to the plaintiff's withdrawal of permission to use the driveway. There is no suggestion in defendant's declaration (CP 164-168) that she had received implied or express permission to remove the gravel on plaintiff's road. Rather, it appears defendant knew she would commit trespass when she entered on plaintiff's property after the plaintiff's permission to use the driveway was withdrawn.*

*Plaintiff, of course, bears the burden of proving that damage was caused by the trespass of defendant. Haase v. Helgeson, 57 Wn.2d 863, 867, 360 P.2d 339 (1961) There must be some data from which the trier of*

*fact can with reasonable certainty determine the amount. Keesling v. Seattle, 52 Wn.2d 247, 254, 324 P.2d 806 (1958); Voorde Poorte v. Evans, 66 Wn.App. 358, 363, 832 P.2d 105 (1992) The plaintiff's declaration furnished evidence (CP 242) to show that the restoration costs for repair of the driveway would exceed \$1,000. The measure of damage for trespass when the injury is not permanent is the reasonable expense of restoring the land. Messenger v. Frye, 176 Wash. 291, 299, 28 P.2d 1023 (1934) The plaintiff has offered sufficient evidence to show that the damage proximately caused by defendant's trespass was more than nominal.*

*IV. IN REPLY TO THE DEFENDANT'S ARGUMENT THAT THE TRIAL COURT WAS CORRECT TO DISMISS THE PLAINTIFF'S CLAIM FOR ERECTING A SPITE FENCE.*

*The defendant argued at the hearing on motion for summary judgment, (CP 80), that the defendant's erection of her fence on her land was a lawful use of her property, and therefore could not be considered a spite fence. Defendant argues in the response brief, (page -26-), that since plaintiff did acknowledge he has no difficulty in driving to and from his home on the altered driveway, there is no evidence of injury or any significant damage caused to plaintiff by the much narrower entrance to the plaintiff's land and extremely constricted width of the road passing a utility pole mid-way up the driveway. Both parties cite to Baillargeon v. Press, 11 Wn. App. 59, 521 P2d 746 (1974), but the parties have different*

*different interpretations of the appellate court's holding in the case. Defendant urges that since plaintiff knew defendant could or perhaps would install a fence on her property, and since plaintiff also acknowledged he has not experienced any difficulty driving on the driveway, there is no evidence of damage and no material fact in dispute.*

*The plaintiff, on the other hand, would ask the court to consider that the trial court in Baillargeon v. Press, supra, took evidence in trial, visited the premises pursuant to stipulation of the parties, and entered findings of fact at the conclusion of trial. Further, the holding of the appellate court, reversing the trial court, was that the issue of whether or not the appellant's proposed fence would serve a really useful or reasonable purpose is a question of material fact. In reversing the trial court's order granting an injunction to the respondent, the appellate court held in Baillargeon v. Press, supra, at page 67:*

*We hold that the question of whether or not the appellant's proposed fence would serve a really useful or reasonable purpose is a question of material fact, and therefore the failure of the trial court to resolve the question in an express finding in favor of respondents, who had the burden of proof, requires reversal.*

*In the immediate case plaintiff presented sufficient evidence to show the court that the defendant's fence severely restricted not only the entrance to the driveway but also the portion of the driveway passing a*

*telephone utility pole. The driveway is too narrow to allow for more than one vehicle at a time, whereas previously two cars could pass each other up and down the driveway, (CP 118). Dale Schmidt, who operates a refuse truck, said that with the fence in place, it makes it “real bad to get in the driveway,” (CP 230). Joe V. Howard, a frequent guest of plaintiffs, said the driveway was “approximately 5’ to 6’ feet wider than it is now,” (CP 231-232) Cheryl Chandarais stated that the driveway “is considerably narrower since the addition of the fence.”*

*The trial court in this case not only failed to enter any findings, but failed to conduct an oral hearing where witnesses may be examined and cross-examined. The plaintiff urges that the circumstance the defendant put the fence up almost immediately after the defendant trespassed on the plaintiff’s road is a circumstance that should be weighed in considering the defendant’s true motive. The circumstance that defendant put the fence exactly on her boundary when she could obtain the same result and move the fence a few feet distant to allow for traffic on plaintiff’s road is another circumstance to consider. . The trial court erred by not allowing plaintiff to present the plaintiff’s witnesses and by not allowing plaintiff to examine defendant under oath concerning defendant’s real motives when she installed her fence in the location she selected.*

V. IN REPLY TO DEFENDANT'S ARGUMENT THAT THE TRIAL COURT WAS CORRECT TO DENY PLAINTIFF'S MOTION TO FILE A LATE REPLY TO THE DEFENDANT'S COUNTERCLAIM

*The issue whether a reply to an amended counterclaim*

*may be filed after ten (10) days from the date the counterclaim is served will be reviewed on appeal de novo. See e.g., Spokane County v. Specialty Auto, 119 Wn.App. 391, 396, 79 P.3d 448 (2003), holding that a trial court's interpretation of a court rule is reviewed de novo and not for an abuse of discretion.*

*The interpretation of court rules and their application to the facts, being an issue of law, the plaintiff urges that CR 55(a) permits a party, who has appeared, but who has failed "to plead or otherwise defend" to "respond to the pleading or otherwise defend at any time before" the hearing of a motion for default.*

*Defendant cites to Hays v. Mercantile Inv. Co., 73 Wash. 586, 591, 132 Pac. 406 (1913). This case is quite clearly distinguishable from the immediate case, as pointed out in plaintiff's brief (appellant's brief at pages 30-31, and will not be further discussed. The court's refusal to allow a reply to the counterclaim was based on res judicata.*

*The defendant's other citation is Jansen v. Nu-West, Inc., 102 Wn.App. 432, 6 P.3d 98 (2000), but this case is very clearly distinguished from the immediate case. The appellate court in Jansen v. Nu-*

*West, Inc., supra*, said that the counterclaim had been filed by defendant in 1996, and that summary judgment for foreclosure of defendant's mortgage was entered in August, 1997. Almost two years post-judgment on defendant's counterclaim for decree of foreclosure, plaintiff attempted to raise the issue of usury by serving a reply to the counterclaim. Like the court's holding in *Hays v. Mercantile Inv. Co., supra*, the court held in *Jansen v. NuWest, Inc. supra*, at page 439, that plaintiff's reply was properly rejected by the trial court's order because the issue had been decided on the hearing for summary judgment. The plaintiff's attempt to litigate the issue of usury was barred by *res judicata*.

Plaintiff urged the trial court to conclude that until the defendant has moved for a default or given notice of the request to preclude further pleading in response to the counterclaims, the plaintiff is permitted under CR 55(a)(2) to respond to the pleading at any time before the hearing on the motion. The interpretation urged by plaintiff is supported by the provision in CR 55(d): The provisions of this rule apply whether the party entitled to judgment by default is a plaintiff, a third party plaintiff, or a party who has pleaded a cross claim or counterclaim. As to the counterclaim, the plaintiff is really a defendant. *Caine v. Seattle & Northern Ry. Co.*, 12 Wash. 596, 598 (1895) The plaintiff does not believe the term "party" under CR 55(a)(2) ["Any party may respond to any pleading..."]

*is limited to defendant because plaintiff is a defendant on a counterclaim.*

VI. REPLY TO DEFENDANT'S ARGUMENT THAT THE TRIAL COURT PROPERLY CANCELLED THE LIS PENDENS.

*Defendant's argument appears to be that the lis pendens recorded by the plaintiff imposes a cloud on the defendant's land title. (Response brief, page 40) The Supreme Court wrote in Thurston County v. City of Olympia, 151 Wn.2d 171, 175, 86 P.3d 151 (2004), "We will adopt the interpretation of statutes which best advances the legislative purpose."*

*The focus of the court should be on ascertaining the legislative purpose in enacting the statute, RCW 4.28.320 which is quoted verbatim in plaintiff's brief at page 46 thereof. The statute provides that in an action "affecting title to real property" the plaintiff may file a notice "of the pendency of the action." Webster's New World Dictionary, College Ed., defines the word "pendency" to mean "a state or condition of being pendent or pending." In the same dictionary, the word "pendent lite" is defined to mean "while a lawsuit or action is pending."*

*The question that must be answered is whether the lawsuit is pending after the trial court grants summary judgment when one of the parties has filed notice of appeal. The plaintiff urges the Court to conclude the action is still pending until a final judgment, after appeal, has been entered. This interpretation conforms with the authority vested in the trial court to cancel the lis pendens when the action is "settled,*

*discontinued, or abated.” These terms imply that plaintiff voluntarily or involuntarily has withdrawn from the litigation. Further, it would seem inconsistent with the purpose of giving notice of the action to all persons interested if the lis pendens is cancelled by the trial court’s order, and on appeal the trial court is reversed, whereupon the lis pendens is reinstated. If the lis pendens is no longer effective pending decision by the appellate court, and thereafter the lis pendens is reinstated, there will be added confusion if the lis pendens is effective as notice retroactively to persons acquiring interests in the real estate during the pendency of the appeal. There is no less reason to impart notice that an action is pending while the case is on appeal than there would be when the case is first filed. The lis pendens is not a cloud on title to land, it is simply notice of litigation pending final judgment. In fact, the lis pendens does not impose a lien nor could it be considered an encumbrance to the owner’s title since it has no legal force or effect beyond notice of litigation pending.*

VII. PLAINTIFFS’ REPLY TO DEFENDANT’S ARGUMENT THAT THE TRIAL COURT WAS CORRECT TO AWARD ATTORNEY FEES FOR DEFENDING THE WHOLE CASE.

*The defendant’s response brief has misstated or misconstrued the plaintiff’s assignment of error to the trial court’s award of attorney fees. The plaintiff’s argument is not that the trial court erred by awarding the defendant fees because defendant did not propose a settlement on her*

counterclaims. (Response brief at 34-35) RCW 4.84.260 stipulates that a party seeking relief shall be deemed a "prevailing party" when the recovery, exclusive of costs, is as much or more than the amount offered in settlement by the party seeking relief. RCW 4.84.280 requires offers of settlement to be served on the adverse party. Defendant makes no showing an offer of settlement was served on plaintiff, therefore defendant is deemed the "prevailing party" only for "resisting relief" against plaintiff's claim "seeking relief in an action for damages." The plaintiff's argument is that defendant's attorney fees are recoverable only for defending the plaintiffs' claim for relief in an action for damages and not for defending plaintiffs' claim for equitable relief.

The defendant offers no case authority to support the defendant's argument that segregation between fees allocated to defending a legal claim for damages and an equitable claim for injunction and prescriptive easement is not necessary to determine the reasonableness of requested fees. The decision in Lay v. Hass, 112 Wn. App. 818, 51 P.3d 130 (2002) is not helpful to the defendant in this case because the plaintiff in that case was shown to have prevailed on the case after making a settlement offer to defendant who rejected the offer. Defendant did not make a settlement offer and, it will be observed, (CP 326-333), the plaintiffs' offer to

*stipulate to dismissal of all plaintiffs' claims was rejected by the defendant.*

*VIII. CONCLUSIONS.*

*1. Plaintiff did not waive assignment of error numbered two by not devoting a section of appellant's brief to an order denying reconsideration.*

*2. Plaintiff made a sufficient showing of evidence to establish an easement by prescription over a portion of defendant's land used for driveway purposes. Drake v. Smersh, 122 Wn. App. 147, 89 P.3d 726 (2004) is directly on point to the facts in this case.*

*3. Plaintiff made a sufficient showing of evidence to establish a prima facie claim for trespass damage caused by defendant's act of removing gravel, and for recovery of the cost of restoration.*

*4. Plaintiffs' claim for injunction to relocate a spite fence requires a trial on issues of material fact concerning defendant's motive or purpose, the use or utility of the fence, and the harmful effect on the plaintiff's land.*

*5. Plaintiff is permitted to file a response or reply to the defendant's counterclaims prior to a hearing on a motion for default.*

*6. The lis pendens plaintiff recorded should not be cancelled while the case is pending on appeal.*

*Date: May 15, 2006*

*Alan Rasmussen*  
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