NO. 34571-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON
BY DEPUTY

ROBERT DUNN and SHIRLEY DUNN,
Appellants,

v.

HAROLD ROBERTS and ENID ROBERTS,
husband and wife,

Respondents.

RESPONDENTS' BRIEF

Timothy L. Ashcraft, WSBA #26196
WILLIAMS, KASTNER & GIBBS PLLC
Attorneys for Respondent

1301 A Street, Suite 900
Tacoma, WA 98402
(253) 593-5620

ORIGINAL

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ISSUES RELATED TO APPELLANTS' ASSIGNMENTS OF ERROR

1. Does res judicata preclude the claims in this case when: (1) the defendants failed to raise this issue with the trial court; (2) the prior litigation in 2000 was based on breach of contract, not tort claims, and the evidence in the present case consists primarily of evidence that occurred after the year 2000; and (3) the statute on which the previous anti-harassment claim is based explicitly provides that it does not preclude other civil claims and allows the victim to seek additional harassment relief? No.

2. Did the trial court err in allowing the plaintiffs to go forward on their anti-harassment claim (RCW 10.14) when the defendants did not raise this issue below, and can defendants raise this issue for the first time on appeal? No.

3. Did the trial court err in any of its findings regarding nuisance, trespass, outrage and harassment? No.

4. Did the trial court abuse its discretion in ordering injunctive relief? No.

5. Did the trial court err in awarding damages and attorneys' fees and costs? No.

COUNTERSTATEMENT OF THE CASE

A. Introduction

This is a dispute between two sets of neighbors, plaintiffs Harold and Enid Roberts, and defendant Shirley Dunn, along with her adult son Robert M. Dunn. For the last several years, the Roberts were subjected to the harassing activities of the Dunns, from trespass to nuisance, and worse. Some of these offenses were somewhat minor; others were much more serious.

The case was tried in front of the Honorable Gary Tabor. After considering the evidence, Judge Tabor largely agreed with the plaintiffs, finding multiple instances of conduct by the defendants to be a trespass, nuisance, harassment or outrageous. Judge Tabor awarded the plaintiffs both monetary damages and injunctive relief.

The defendants now seek to have that judgment and injunctive relief overturned, but the trial court's decision is supported by substantial evidence, and there is no error. The trial court's decision should be affirmed.

B. Summary of Facts

Plaintiffs Harold and Enid Roberts were longtime friends of Charles and Shirley Dunn. (RP 66-71). In August of 1994, Charles and Shirley Dunn sold the Roberts beachfront land in the Bliss Beach

neighborhood of Olympia, which was directly adjacent to the Dunn residence and land. (RP 71-73). In September 1998, the Roberts began building their dream home on this land, which was completed in February 2000. (RP 74)

Charles Dunn died in February of 2000, just as the Roberts were occupying their newly completed dream home. (RP 74). Shortly thereafter, Charles Dunn's adult son Robert began to frequent the Dunn residence. (RP 79-80). This was a new occurrence, as he had not been visiting his parents very often in the preceding years due to a strained relationship between Charles and Robert Dunn. (*Id.*). Robert Dunn also took over his late father's business, Capitol Alarm Company, located in the city of Olympia. (RP 482).

As the Roberts' home was being constructed, a sand filter, part of a septic system, was installed on the Dunn property. (RP 337). The Roberts have an easement that allows them to place this sand filter on the Dunn property as well as having access to inspect, maintain and repair that sand filter. (*Id.*). Following the installation of the sand filter, defendant Robert Dunn would either personally, or at his direction, have large vehicles parked on top of the sand filter. (RP 86, 135. 343-44; Exhibit 11). These vehicles both prevented access to the sand filter and were damaging to the filter itself. When the Roberts asked Robert Dunn not to park vehicles on

top of the sand filter, he stated that he would park where he pleased. (RP 344).

In April 2002, the Dunns put two feet of heavy clay on top of the sand filter. (RP 116; 118-20, 349-50). This was eventually ordered by Judge Strophy in Thurston County Superior Court (Cause No. 00-2-01644-9) to be returned to its original condition, but the Dunns' restoration left much to be desired. (RP 117-19;Exhibit 13). Also in April of 2002, the Dunns dug a trench right next to the Roberts' wall, extending the full length of the wall. (RP 121-124). During the digging of this trench, the Dunns cut a water line and the sand filter electric alarm line to the Roberts' property. (*Id.*) The breaking of the water line flooded the Roberts' property and the cutting of the electric alarm line that went to the sand filter disconnected the alarm that was attached to the sand filter. (*Id.*) This alarm is required as part of the sand filter's operation, as it alerts the Roberts if there is a malfunction. (RP 122-124).

Additionally, the Dunns began placing garbage cans and compost waste right against the Roberts' wall, which was not anywhere near the area where garbage and compost were collected. (RP 92-93). The Roberts complained to the Health Department who made an investigation. (RP 132). Health Department employee John Libby investigated the claim and made notes. (RP 246-52, Exhibit 2). For example, on October 6,

2000, Mr. Libby notes that while on the Roberts' residence and walking near the wall he detected some odors and observed flies in the air. He then spoke to Mrs. Dunn about this problem, telling her that the problems included odors, leachate, flies, etc., and that property owners are responsible for their own waste. While Mr. Libby offered to help her move the compost bin, she declined the offer, and mentioned that the Roberts' building project has been very disruptive, noisy, etc. Mr. Libby's notes indicate that Mr. Libby detected some bitterness in Mrs. Dunn's voice. (*Id.*).

In the summer of 2001, Robert Dunn began placing a compost bin directly adjacent to the Roberts' Wall. (RP 131-32; Exhibit 2). This compost bin was only seven feet from the Roberts' patio, which was adjacent to the Roberts' bedroom. The compost attracted numerous flies, rodents and other vermin as well as causing an unbearable stench. The compost bin again was placed in the same place on the property in the summer of 2002. (RP 132).

In the summer of 2002, the Dunns erected a 12' high scaffold, covering it with a large blue muddy tarp. The scaffold was placed right against the Roberts' wall, and the tarp and dirt from the tarp flew into the Roberts' backyard and swimming pool, causing the swimming pool's filter system to malfunction. (RP 132-133, Exhibit 13).

Robert Dunn has never liked the wall that the Roberts erected on their own property. In 2002, Mr. Dunn spray painted the words "remove wall" on the asphalt pavement with an arrow pointing to the Roberts' wall. (RP 126). Showing his disdain for the wall, Mr. Dunn as well as Shirley Dunn, have, on several occasions, backed into the wall with their own vehicles, or caused the Capitol Alarm employees to back into the wall, causing damage to the wall. The results of these activities caused cracks in the wall as well as holes in the wall that the trial court found was caused by the Dunns. (RP 127-129; Exhibit 14; CP 1104).

In addition to damaging the wall, Mr. Dunn did his best to make the wall unsightly. On numerous occasions he has stacked garbage and other materials up against the wall in an attempt to create an eye sore and to prevent visitors to the Roberts' residence from seeing the address number that is located on the wall. The piling of garbage and debris along the Roberts' wall was without purpose except to harass, as the Dunns garbage was not picked up along the wall, but right next to their residence dozens of yards from the wall. (RP 124-127).

Even an item as mundane as the Roberts' mailbox did not escape the Dunns' wrath. As in many neighborhoods, the mailboxes for the residents in Bliss Beach all exist in one location. The Roberts were regularly experiencing mail theft and so obtained a locking metal mailbox

that was installed inside the regular mailbox. This locking mailbox was "taken over" by Robert Dunn, as he painted his name on the mailbox and began to receive his own mail in that mailbox. (RP 141; 423-28).

Any doubt to who removed the mailbox and stole the Roberts' mail was answered by a letter written by Robert Dunn that was distributed to all the neighbors, including the Roberts after the events took place. (Exhibit 25). In this letter which was distributed in approximately March of 2003, Mr. Dunn wrote:

> Harold Roberts has informed me that they will be moving. I am sure that most of you are as eager for their exodus as I am.

Regarding the mailbox, Mr. Dunn wrote:

> It has also been as a courtesy that the Roberts have used the Dunn mailbox as if it was part of the purchase of their property, this is not the case, this is the Dunn property and the Roberts have no right to use our property. Furthermore, their mailbox will not be on our property. It can go up on top of the road where is should have been in the first place. We will considering returning these common courtesies when the Roberts remove the wing wall that impedes the turning radios that is guaranteed in our court order.

Because the Roberts and other residents live down a long road, a signpost offers visitors assistance to find their way to various people's residences. This post contained the names of each of the residences and

arrows pointing visitors to the proper direction. The Roberts' sign was removed three times by Robert Dunn. (Exhibit 25; RP 428). This was confirmed in the March 2003 letter (Exhibit 25) in which Mr. Dunn wrote that:

> As a common courtesy it has been that all our good neighbors have been able to have their names on the post we have provided on our property at the fork in the road. Common courtesy is not the case with the Roberts! This signpost is the property of the Dunn family, not the property of the community or neighborhood. The Roberts do not have permission to post anything on the Dunn property.

The Dunns also decided to float large logs in, onto and in front of the Roberts' beach. For example, in the summer of 2002, the Dunns towed in a very large tree. Despite requests from the Roberts, the Dunns anchored the log on the Roberts' property. (RP 95, 110-13, 148-49, 344-45; Exhibits 13-15).

Additionally, the Dunns have dogs that they allowed to roam onto the Roberts' property. These dogs caused the Roberts to not allow their grandchildren and other visitors to go outside or play on the beach for fear of their safety. (RP 152-55; Exhibit 14).

The Dunns also had a large commercial logging truck cross the Roberts' property in order to pick up these logs and then haul them out of

the area. (RP 149-51, Exhibits 14, 17. This truck caused damage to the paver driveway of the Roberts. (*Id.*). The trial court found the Dunns responsible for this damage. (CP 1105).

In addition to the other mail problems previously described, Robert Dunn admitted that he committed the outrageous act of filling out magazine subscriptions, product requests and other document requests in the Roberts' name. (RP 144-46; 351-55, 416-25; Exhibits 4-9). The Roberts received over 70 magazine or product subscriptions that they did not order, as well as merchandise that they did not order. Some of the magazines that have been ordered for the Roberts, without their knowledge, include "Playboy," "Out" and "Child." The subscription forms are not simply filled out with Enid and Harold Roberts, but are much more sinister in nature. For example, some of the magazine subscription forms are filled out with the name of "Evil Enid," while others list the names of "Enard Roberts" "Eniel Roberts" or "Ms. Roberts Mayknot." Of course, for each of these fraudulent subscriptions, the Roberts had to deal with the publishers who wanted to be paid for their magazines and merchandise. (*Id.*).

In 2004, the Dunns built a "firewood wall" along the edge of their property that blocked access to the sand filter. This "wall" extended many feet and completely encased the sand filter. (RP 158-161; Exhibit 15).

Despite the defendants' assertion that the "log wall" the Dunns constructed around the Roberts' sand filter did not block access to the sand filter (Appellants' Brief at p. 22) and that the Roberts never testified that their access to the sand filter was blocked, Enid Roberts provides testimony that is directly contrary to this assertion. (RP 158-161). Mrs. Roberts testified that the log wall was eight feet high in some areas and it completely surrounded the Roberts' sand filter. (RP 160).

Photographic documentation also exists showing that the sand filter was completely blocked off by this log wall. (Exhibit 15). Additionally, Mrs. Roberts testified that the wall prohibited the Roberts' access to their sand filter to such an extent that they were unable to repair or maintain the sand filter. (RP 161).

As to the Dunns' counterclaim, the evidence showed that Shirley Dunn herself told Jim Dickinson, the septic designer for the Roberts, to leave the system where it was and to take no action. (RP 612-14; 623-24). This was confirmed by Jim Dickinson in a letter dated December 9, 2002. (Exhibit 24). Robert Dunn also admitted that he said to leave the sand filter where it was. (RP 541).

Additionally, the plaintiffs would like to alert the Court to an error in the Report of Proceedings. Pages 545 to 557 of the Report of Proceedings contain a record of the direct examination, cross examination,

and redirect examination of Mr. Steven W. Peterson. However, these pages are marked as "Robert Dunn/Direct Examination."

In addition to being annoying and harassing, the Dunn's activities also affected the physical and emotional health of the Roberts. (RP 220-225; 386-92). Enid Roberts testified that as a result of the Dunns' activities, she is worried, nervous, anxious and stressed. She has nightmares and feels trapped in her own home. (RP 221). Both Mr. and Mrs. Roberts testified that they entertain far less than they used to, due to the Dunns' actions. (RP 223-24; 387). The Dunns, undeniably aware of Harold Roberts' asthma, routinely built bonfires so that the smoke blew right into the Roberts' backyard and into their home. (RP 2214-219; 390; Exhibit 16).

ARGUMENT

A. Standard of review

> "When findings of fact and conclusions of law are entered following a bench trial, appellate review is limited to determining whether the findings are supported by substantial evidence, and if so, whether the findings support the trial court's conclusions of law and judgment. *Holland v. Boeing Co.*, 90 Wash.2d 384, 390-91, 583 P.2d 621 (1978). Evidence is substantial if it is sufficient to persuade a fair-minded person that the declared premise is true. *Nguyen v. Dep't of Health, Med. Quality Assurance Comm'n*, 144 Wash.2d 516, 536, 29 P.3d

> 689 (2001), *cert. denied*, 535 U.S. 904, 122 S.Ct. 1203, 152 L.Ed.2d 141 (2002

Sunnyside Valley Irr. Dist. v. Dickie, 111 Wn. App. 209, 214, 43 P.2d 1277(2002). The challenging party bears the burden of showing that the findings are not supported by the record. *Id.*; *Standing Rock Homeowner's Ass'n v. Misich*, 106 Wn. App. 231, 243, 23 P.3d 520 (2001).

As to injunctive relief,

> [a] suit for an injunction is an equitable proceeding addressed to the sound discretion of the trial court, to be exercised according to the circumstances of each case. *Steury v. Johnson*, 90 Wash.App. 401, 405, 957 P.2d 772 (1998) (citing *Fed. Way Family Physicians, Inc. v. Tacoma Stands Up For Life*, 106 Wash.2d 261, 264, 721 P.2d 946 (1986); *Rupert v. Gunter*, 31 Wash.App. 27, 30, 640 P.2d 36 (1982)). "Appellate courts must give great weight to the trial court's decision, interfering only if it is based on untenable grounds, is manifestly unreasonable or is arbitrary." *Steury*, 90 Wash.App. at 405, 957 P.2d 772 (citing *Fed. Way*, 106 Wash.2d at 264, 721 P.2d 946; *Rupert*, 31 Wash.App. at 30, 640 P.2d 36).

Standing Rock, 106 Wn. App. at 240-41. The appellate court reviews the injunction decision for an abuse of discretion. *City of Bellingham v. Chin*, 98 Wn.App. 60, 66, 988 P.2d 479 (1999). "The trial court has broad discretion to fashion an injunction that is appropriate to the facts, circumstances, and equities before it . . . ." *Id.*

B. The previous litigation between the parties is not res judicata to the present action, and any res judicata defense was waived by the defendants.

One of the defendants' primary arguments is that previous litigation between some of the parties is *res judicata* to the present lawsuit. This argument flows throughout the appellant's brief. But this argument fails, both legally and factually, for the following reasons: First, the defendants waived any *res judicata* defense. Though they pled *res judicata* as an affirmative defense, they never brought a motion on this issue. Therefore, it cannot be raised on appeal. Second, the defendants cannot prove each and every element of *res judicata*. The previous litigation was both earlier in time and had different claims and remedies sought. Though some of the facts overlapped, the subject matters of the previous litigation was different than the present litigation. As such, *res judicata* cannot apply.

1. The defendants waived the affirmative defense of *res judicata*.

Res judicata is expressly listed as an affirmative defense. CR 8(c). The failure to urge an affirmative defense at the trial level precludes its consideration on appeal. *Impero v. Whatcom County*, 71 Wn.2d 438, 446, 430 P.2d 173 (1967); *see also*, *Wesche v. Martin*, 64 Wn.App. 1, 6-7, 822 P.2d 812 (1992).

It is true that defendants pled the affirmative defense of *res judicata*. But they never made a motion to the Court on this issue. In defense counsel's opening statement, he even alluded the fact that there was no valid *res judicata* defense. (RP 50). The failure of the defendants to properly raise this issue in front of the trial court results in a waiver.

Regarding this issue, the defendants contend that the trial court allowed testimony concerning previously litigated matters. (Appellant's Brief at p. 18). Included in this contention is the assertion that the court heard testimony on items placed near the Roberts' wall in 2001 and 2002; items near the BLA in 2002; manure in a trench that was adjacent to the Dunns' wall in 2002; scaffolding on the Dunn Property in 2002; 2003 unsolicited magazine subscriptions; wood chips deposited on the Roberts' property in 2002; and numerous fires lit on the Dunns' property from 2002 forward. (*Id.*, citations to record omitted). What the plaintiffs fail to note however is the only objections lodged by defendants to prevent admission of the above referenced evidence was based on the incidents being beyond the applicable statutes of limitation and objections that the evidence should be inadmissible on the basis that they concern evidence of prior bad acts. (RP 82-84).

No objection was made at the time that this evidence should be excluded based on a res judicata argument. (*Id.*). The trial court

considered the defendants' objections to the evidence referred to above. It chose to admit the evidence, admitting some evidence for the limited purpose of providing background information. (*Id.*).

2. Even if the defendants did not waive the res judicata defense, they failed to carry their burden of proving each element of the defense.

As the party asserting res judicata, the defendants have the burden of proof. *Hisle v. Todd Pacific Shipyards, Corp.*, 151 Wn.2d 853, 865, 93 P.3d 108 (2004). Additionally, "res judicata does not bar claims arising out of different causes of action, or intend to 'deny the litigant his or her day in court.'" *Id.* (internal citations omitted). "The purpose of the doctrine of res judicata is to ensure the finality of judgments. Under this doctrine, a subsequent action is barred when it is identical with a previous action in four respects: (1) same subject matter; (2) same cause of action; (3) same persons and parties; and (4) same quality of the persons for or against whom the claim is made." *Hayes v. City of Seattle*, 131 Wn.2d 706, 712, 934 P.2d 1179 (1997).

Defendants cannot come close to meeting this burden here because the previous litigation involved different causes of action and different facts. First, the defendants refer to the 2000 litigation, Thurston County Superior Court Cause Number 00-2-01644-9. But the only references to the causes of action in that litigation show that it was a breach of contract

and specific performance case designed to enforce the previously agreed to boundary line adjustment and septic easement. (RP 333-340, especially 337; RP 102). It did not contain the allegations of nuisance, trespass, outrage and harassment contained in the litigation at issue here. (*See id.*). Thus, the 2000 litigation was about a different subject matter (septic and boundary line issues vs. various acts of harassment and nuisance) and contained different causes of action (breach of contract vs. tort-style claims including nuisance, trespass, outrage and harassment). The first two elements are not met.

Additionally, that lawsuit was filed in 2000, and most of the evidence presented in the present case was after 2000. By definition, *res judicata* cannot apply to claims that are based on facts that occur after the prior lawsuit. Here, the plaintiffs gave testimony and submitted photographs of conduct in 2001-2005. (*See, e.g.*, Exhibits 12- 16; RP 110-169; 196-220).

As to the "anti-harassment" litigation, the only cause of action was the anti-harassment statute, RCW 10.14, et seq. The statute itself provides that it is not preclusive of any other claim or cause of action. RCW 10.14.140. Moreover, the statute provides that a party may seek additional relief after the original harassment order expires. RCW 10.14.180. Additionally, as with the 2000 litigation, some of the evidence presented

occurred after the anti-harassment case was filed. Finally, Shirley Dunn was not a party to the anti-harassment litigation. (Exhibit 20).

C. The anti-harassment claim was a proper claim in the lawsuit.

Another predominant theme in defendants' brief is the argument that the anti-harassment statute (RCW 10.14) et. seq. can only be brought as a separate case in district court. Defendants are incorrect, and such a ruling would be contrary to the public policy behind the statute.

RCW 10.14.010 provides the legislative intent and indicates that harassment is increasing and "the prevention of such harassment is an important governmental objective. This chapter is intended to provide victims with a speedy and inexpensive method of preventing all further unwanted contact between the victim and the perpetrator."

In *Emmerson v. Weilep*, the perpetrator argued that because the victim did not use the proper forms, as set forth in RCW 10.14.040, the court lacked jurisdiction to enter an order of protection. 126 Wn. App. 930, 939, 110 P.3d 214 (2005). The court of appeals disagreed. "The statute merely requires a petition for relief to 'allege the existence of harassment and ... be accompanied by an affidavit made under oath stating the specific facts and circumstances from which relief is sought.' . . . Although the statute requires the administrator for the courts to develop 'model forms' and 'instructional brochures,' (RCW 10.14.050) and court

clerks to make such forms available, (RCW 10.14.040(3)), the statute does not expressly require petitioners to use these forms. The trial court did not err." *Id.*

In *Ledgerwood v. Lansdowne,* the appellant argued that because the anti-harassment claim was brought in superior court, the court lacked jurisdiction as the statute references the claim being in district court. 120 Wn.App. 414, 419, 85 P.3d 950 (2004) *citing* 10.14.150. The court of appeals disagreed, distinguishing between original jurisdiction and exclusive original jurisdiction. *Id.* at 421-22. The court concluded that the language of 4.12.150 expanded venue rather than limited jurisdiction. *Id.* at 421.

Additionally, CR 18(a) allows a party to join as many claims as that party has against another party. "The Civil Rules encourage the parties to assert all claims against each other in a single lawsuit, for the sake of judicial economy." 3A Tegland, Washington Rules Practice, CR 18 at p. 405 (West 2006). This is consistent with one of the stated purposes of the anti-harassment statute, namely to provide an inexpensive method of obtaining relief.

When all of the above cases and statutes are reviewed, it is clear that this claim can be a separate action, or can be part of a lawsuit with other claims. The *Emmerson* court refused to hold form over substance,

finding that all that was required was "an affidavit made under oath stating the specific facts and circumstances from which relief is sought." *Emmerson*, 126 Wn. App. at 939. In this case, through both the affidavits filed as part of the temporary injunction and the testimony at trial, these requirements were satisfied.

Moreover, the statute contemplates orders that are both longer than one year in nature (RCW 10.14.080(4)) and renewing previous orders (RCW 10.14.080(5). Here, the trial court's oral ruling (RP 735 to 773) as well as the findings of fact and conclusions of law (CP 1102 to 1101) satisfy all of the requirements of the statute.

Finally, this claim was clearly pled by plaintiffs, and the defendants never moved to dismiss the claim. This results in a waiver. To allow the defendants to raise this issue now would prejudice the plaintiffs. If the defendants had successfully moved the trial court to dismiss the RCW 10.14 claim, the plaintiffs could have then filed a separate action pursuing that relief. The defendants did not do so, and did not object to the harassment evidence at trial. They should not be allowed to now argue that the claim was improper.

D. The trial court's decision that the Roberts did not breach the previous settlement agreement was not error.

Defendants brought a counterclaim related to a previous settlement agreement involving a septic system that includes a sand filter on the Dunn property. The Dunns alleged that the Roberts breached that settlement agreement. After hearing the evidence, the trial court found no breach. That decision was not error and is supported by substantial evidence.

Defendants misinterpret the law of contracts as it applies to the present situation. Defendants make much of the concept of contract "construction" while largely avoiding the issue of contract interpretation. In *Denny's Restaurants, Incorporation v. Security Union Title Insurance Company*, 71 Wn. App. 194, 859, P.2d 619 (1993), cited by defendants, the court wrote that "[t]he *Berg* court made a distinction between contract interpretation and contract construction. Interpretation is a determination of fact; it is the process that ascertains the meaning of a term by examining objective manifestations of the parties' intent. Construction is a question of law; it is the process that determines the legal consequences that follow from a contract term." *Id.* at 201. "In order to interpret the original meaning of a contract term, extrinsic evidence is admissible, even if the term appears unambiguous." *Id.*

In this case one issue is contract interpretation, that is the meaning of the contract terms. Contract construction is not at issue in this case. More important, however, is the issue of whether the contract was breached. Like other factual determinations, the standard of review for reviewing a trial court's determination of whether a breach has occurred is substantial evidence. "When the trial court has weighed the evidence [in determining whether a roofing construction contract was breached], our review is limited to determining whether the court's findings are supported by substantial evidence and, if so, whether the findings support the court's conclusions of law and judgment." *Panorama Village Homeowners Ass'n v. Golden Rule Roofing, Inc.*, 102 Wn.App. 422, 425, 10 P.3d 417 (2000).

In this case, the court heard testimony from Harold Roberts, (RP 371-373) as well as the Dunns, on the contract issue. Moreover, the court also heard testimony from Steven Peterson, a Thurston County employee, and Jim Dickinson, (RP 612-25) a septic system designer. Steve Peterson testified that he met with Mr. Roberts, Robert Dunn, and Jim Dickinson regarding alternatives to the current septic system. (RP 546-547). He testified that there was no aerobic treatment device approved at that time (RP 548) and that it was "unlikely we would waive the requirement for a sand filter." (RP 548).

After considering the evidence, the trial court concluded that no breach occurred. As noted above, the standard of review for this decision is substantial evidence. There can be no doubt that substantial evidence supports this decision.

Moreover, in addition to the Roberts exploring options as required under the contract, the Dunns waived any requirements under the contract. The testimony of Jim Dickinson was that Shirley Dunn said to leave the sand filter where it was. (RP 612-614; 623-224; Exhibit 24).

The defendants selectively cite the record regarding the testimony of Jim Dickinson. While claiming that Jim Dickinson does not support the argument of waiver, the defendants intentionally leave out the following reference to Mr. Dickinson's testimony:

> Q. ...Now, did I understand that you heard Rob Dunn make some statement to the effect of leave it where it is? And I'm just talking about Rob Dunn, not Rob and Shirley [Dunn] collectively. Did you hear Rob Dunn say something to the effect of, just leave it where it is?
>
> A. I didn't hear Rob Dunn say that.
>
> Q. You didn't hear him say anything to that effect; is that correct?
>
> A. I don't recall him saying that.
>
> Q. So then, you recall Shirley Dunn saying something to that effect?

A. I do recall that.

(RP 6 23-24). Thus it is clear that Jim Dickinson recalled more than merely the passage cited by the defendants. In fact, he recalled the meeting where Shirley Dunn instructed the septic designer to leave the system where it was.

Additionally, Robert Dunn himself admitted that he stated to leave the septic system where it was. (RP 541). The Dunns claim that the admitted statement of Robert Dunn regarding leaving the septic system in its place is not valid because he did not own the home. First, it is disgenuous of the defendants to argue that for the purpose of *res judicata* Robert Dunn should be considered the same party as Shirley Dunn (Appellant's Brief at p. 27), but claim that his admission should not be considered regarding the septic settlement issue. More importantly, Robert Dunn moved back into the house with his mother after his father died (RP 491-492) and he is a beneficiary and trustee of the Dunn Trust, which nows owns the property. (Appellant's Brief at p. 27).

In addition to the statements by both Shirley and Robert Dunn resulting in a waiver, they are also equitably estopped from claiming otherwise. Equitable estoppel requires "(1) an admission, statement or act inconsistent with a claim later asserted; (2) reasonable reliance on that admission, statement, or act by the other party; and (3) injury to the

relying party if the court permits the first party to contradict or repudiate the admission, statement or act." *Dept. of Ecology v. Theodoratus*, 135 Wn.2d 582, 599, 957 P.2d 1241 (1998).

Here, both Shirley Dunn and Robert Dunn told the Roberts to leave the septic system where it was. Based on those statements, the Roberts took no further action, in reliance on those statements. (RP 373). The Dunns now seek to injure the Roberts by repudiating those statements.

E. The trial court's rulings regarding nuisance and harassment, as well as the injunctive relief, are not error and are supported by substantial evidence.

The defendants further claim that the court erred in finding that the "firewood wall" and "vertical log wall, " as well as certain landscaping, were nuisances and/or harassment and that the court erred in awarding permanent injunctive relief. The defendants are incorrect.

A nuisance is an unreasonable interference with the use and enjoyment of land. *Grundy v. Thurston Co.*, 155 Wn.2d 1, 6, 117 P.3d 1089 (2005). A party suing for nuisance may seek damages, injunctive relief, or both. *Id.*; RCW 7.48.020. Like any other factual determination, the trial court's finding of a nuisance or harassment is reviewed for substantial evidence. As noted above, the standard of review for injunctive relief is abuse of discretion. *City of Bellingham v. Chin*, 98 Wn.App. 60, 66, 988 P.2d 479 (1999).

As to the firewood wall, the trial court heard evidence (RP 158-161; Exhibit 15) regarding its existence and its effects on the Roberts, including fear that the wall would fall on Mrs. Roberts and blocked access to the sand filter. Likewise the trial court heard evidence on the vertical log wall (RP 196-98; Exhibit 15). Contrary to the defendant's assertions, the Roberts did not claim a view easement, but rather that the log wallswere a nuisance, that is that they were an unreasonable interference with the use and enjoyment of property.

The defendants claim that no injunctive relief was appropriate because the log wall was entirely on the Dunn property. But nuisance law does not require a "breaking of the close," as would a trespass claim. In any event, the "firewood wall," did hinder the Roberts' ability to get to their sand filter, which is located on the Dunn property. (RP 158-61). The law also gives the court great latitude on fashioning injunctive relief to fit the circumstances of each case.

After hearing the evidence, the trial court found the log walls, as well as certain landscaping and other acts of the defendants to be a nuisance and/or harassment and issued appropriate remedies. Those findings are supported by substantial evidence and as to the injunctive relief, is not an abuse of discretion. The defendants want this court to

substitute its judgment for the judgment of the trial court, which is not appropriate. The trial court did not err.

F. The contempt orders are valid regardless of how this court rules on the injunctive relief ordered by the trial court.

Defendants argue that because they claim that the injunctive relief was improper, the contempt orders issued by the court must necessarily be reversed by this court. Defendants are incorrect.

First, it should be noted that "[w]hether contempt is warranted in a particular case is a matter within the sound discretion of the trial court; unless that discretion is abused, it should not be disturbed on appeal." *In re King*, 110 Wn.2d 793, 798, 756 P.2d 1303 (1988). *Moreman v. Butcher*, 126 Wn.2d 36, 40, 891 P.2d 725 (1995).

The case cited to support their argument, *Kerl v. Hofer*, 4 Wn. App. 559, 565, 482 P.2d 806(1971), does not support their position. In *Kerl*, the court held that pending contempt proceedings must be terminated if the basis for the contempt order is vacated or reversed. It did not address the issue before this Court, namely whether a prior contempt order is valid if the underlying injunctive relief is reversed. First, plaintiffs believe the injunctive relief was proper. But regardless of how this Court rules on that issue, the contempt orders must stand. The permanent injunction was valid and enforceable when the violating conduct occurred.

It would vitiate any authority of the trial court if a party could simply not comply with a valid order of the trial court and later argue that the original order was not valid. Indeed, the defendants moved this Court to stay the permanent injunction in this case. This Court stayed some items, and refused to stay others . Thus, the defendants were obligated to comply, regardless of their feelings of whether the injunction was proper. This argument must be rejected.

G. The trial court did not err in denying the motion for leave to amend and denying the motion to consolidate.

The appellants agree that whether under CR 15(a) or under CR 42, the trial court has broad discretion as to whether to allow or deny motions for leave to amend and motions to consolidate, and that this decision is reviewed for an abuse of discretion. (Appellants' Brief at p. 41; *see also*, *Hines v. Todd Pac. Shipyards*, 127 Wn. App. 356, 373-374, 112 P.3d 522 (2005); *Myers v. Boeing Co.*, 115 Wn.2d 123, 140, 794 P.2d 1272 (1990)).

In this case, the defendants sought to introduce entirely new claims into this litigation. While the case contained claims of nuisance, trespass, outrage and harassment, it did not contain any claims related to the determination of ownership of property rights. Appellants sought to introduce claims that could affect the ownership of and the scope of

easement rights. While it involved the same parties, the subject matter and factual background were different.

Appellants claim that while the trial court denied the motion for leave to amend, it necessarily tried property issues when it found that the defendants had damaged the Roberts' driveway. This claim, however, had nothing to do with easement rights. It was simply a case of damaging someone else's property. Regardless of easement rights, a party does not have the right to damage the property of another. The claims are unrelated and the trial court did not err.

H. The trial court did not err in awarding fees and costs under RCW 10.14.090.

Appellants argue that the trial court erred in awarding approximately $19,600 in attorneys' fees and costs. Appellants seem to acknowledge that under RCW 10.14.090, trial court may award fees and costs. However, they argue that "costs" are limited to the costs enumerated in RCW 4.84.010. Appellants are incorrect.

In *Panorama Village Condominium Owners Association Board of Directors v. Allstate Insurance Company*, the court held that when reasonable attorneys fees and costs are recoverable under a statute, the court is not limited to the RCW 4.84.010 costs. 144 Wn.2d 130, 142, 794 P.2d 1272 (2001). In fact, the court is authorized to award the "other

reasonably necessary expenses of litigation" based on the equitable principles that the court deems appropriate. (*Id.*).

Here the trial court considered the fee petition of the plaintiffs, and awarded only 25% of the requested amount. (Verbatim Report of Proceedings, April 24, 2006, at pp. 17-19). This was within the court's discretion and was not error.

I. The trial court did not err in its award of damages.

In a nuisance case, recoverable damages include sickness, suffering, mental anguish and bodily infirmities, in addition to property damage. *Miotke v. City of Spokane*, 101 Wn.2d 307, 332, 678 P.2d 803 (1984). Likewise, emotional distress damages are available for the tort of outrage. *Chambers-Castanes v. King County*, 100 Wn.2d 275, 288-89, 669 P.2d 451 (1983).

Here, the trial court found Robert Dunn guilty of both outrage and nuisance. The record is more than ample to support the award of $5,000 in general damages (which, in fact, is quite lenient given the circumstances) under either a nuisance or outrage theory.

As to the judgment, it clearly provides that the $5,000 award is against Robert Dunn only. Moreover, the record is replete with examples of Shirley Dunn approving of her son's conduct. (RP 474-79). Moreover, defendants did not raise this issue or object to a joint and several liability

entry to the trial court, and thus that argument is waived. *Bignold v. Carr*, 24 Wash. 413, 417, 64 P. 519 (1901).

J. Request for attorneys' fees and costs.

The respondents request attorneys' fees and costs for this appeal based on RAP 18.1, RCW 10.14, the settlement agreement that formed the basis for the counterclaim, and any other applicable law.

CONCLUSION

For years, the Roberts have endured the numerous actions and taunts of the Dunns. These "activities" are far beyond trivial annoyances, ranging from obnoxious to criminal. Many of the acts were admitted to by the defendants.

After hearing all of the evidence, the trial court issued its ruling, in which it was lenient on the defendants with respect to monetary damages, but also imposed injunctive relief. It is the injunctive relief that provides any hope of a decent future for the Roberts.

The record from this case shows a pattern of conduct that is simply not acceptable in our society. The Dunns must be held accountable for their actions. The judgment and injunctive relief should be affirmed.

DATED: 11/22/06

WILLIAMS, KASTNER & GIBBS PLLC

By _____
Timothy L. Ashcraft, WSBA #26196
Attorneys for Respondents

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 22nd day of November, 2006, I caused a true and correct copy of the foregoing document, "RESPONDENTS' BRIEF," to be delivered by electronic mail and Regular U.S. Mail to the following counsel of record:

Counsel for Appellant(s):

Mailing Address:

John E. Cushman
CUSHMAN LAW OFFICE, P.S.
924 Capitol Way South
Olympia, WA 98501

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STATE OF WASHINGTON
BY

DATED this 22nd day of November, 2006, at Tacoma, Washington.

Karen Steffensen, Legal Assistant to
TIMOTHY L. ASHCRAFT