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DIVISION II

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STATE OF WASHINGTON
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NO. 36877-3-11
TRIAL COURT NO. 01-2-04256-8

COURT OF APPEALS FOR DIVISION TWO
STATE OF WASHINGTON

VICTOR and VIORECA MURESAN
husband and wife

Appellants,

vs.

BRIAN and CARI FISH
husband and wife

JEFFERY and JANE DOE PILBY
husband and wife

Respondents

APPELLANTS AMENDED BRIEF

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1. ASSIGNMENTS OF ERROR

A. Assignments of Error

(1) The trial court erred in its order of May 30, 2007 dismissing Defendants' Counter Claim and Third Party Complaint.

(2) The trial court erred in its order of May 30, 2007 finding that Defendants and Third Party Plaintiffs, VICTOR MURESAN and VIORECA MURESAN, (hereinafter "Defendants") trespassed upon the property of the Plaintiffs, Brian and Cari Fish.

Finding of Fact No. 11 and Conclusion of Law No. 18.

(3) The trial court erred in its order of May 30, 2007 finding that Defendants should pay triple damages.

Finding of Fact No. 14 and Conclusions of Law No. 22.

(4) The trial court erred in its order of May 30, 2007 finding that the Plaintiffs should have "the exclusive right to maintain the road and easement on the Defendants property."

Finding of Fact No. 15 and Conclusion of Law No. 23.

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B. Issues Pertaining to Assignment of Error

(1) Did the trial court err in dismissing Defendants Counter Claim and Third Party Complaint given the undisputed evidence that Defendants names had been forged on the Application Summary and Grading Permit No. GR 960124 on July 29, 1996 and issued to Jeffery Pilby 14 months after he wrongfully excavated 400 cubic yards of Defendants top soil in June of 1995?

(Assignment of Error No. 1)

(2) Did Defendants trespass upon the property of the Plaintiffs when Defendants filled the ditches (holes) that run on the roadway easement on Defendants' property with top soil and not with debris as alleged by Plaintiffs ?

(Assignment of Error No.2)

(3) Should Defendants pay Plaintiffs treble damages pursuant to RCW 4.24.630 for supposedly removing 4 railroad ties from the roadway easement on Defendants' property when removal of the railroad ties did not interfere with Plaintiffs' use of the roadway easement and the 4 ties, unless removed, constituted a public attractive nuisance?

(Assignment of Error No.3)

(4) Should Defendants be liable to Plaintiffs for damages for

removing 40 railroad ties, which they in fact did not move, and for filling in the holes located on the easement along the roadway on Defendants' property for purposes of improving Defendants property and protecting Defendants property from flooding with previously diverted surface water?

(Assignment of Error No. 4)

(5) Should Plaintiffs have the exclusive right to maintain the roadway and easement on the Defendants' property when Defendants are the true owners of the property underlying? Under Washington law Hendrickson v. Sund 105 Wash. 406, 177 P. 808 (1991), Defendants can use this property in any manner they wish so long as their use does not interfere with the easement rights of the dominant estate.

(Assignment of Error No. 5)

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11 INTRODUCTION

Defendants/ Appellants are filing this appeal Pro-se because they are faced with the difficulty of finding and paying an attorney to pursue all claims against Third Party Defendants Jeffery and Jane Doe Pilby for Trespass and Conversion as pointed out in their letter of April 11, 2008 to their former attorney Charles H. Buckley.

The Defendants/ Appellants are foreign born and have a difficult time expressing themselves and communicating with and understanding what others say. On May 30, 2007, the hearing date on the underlying Appellants believed the only matter before the court was the hearing on their Motion to Lift the Temporary Injunction. When the Appellants appeared in court they observed that only Grant Clark Broer, the attorney for the Plaintiffs and Third Party Defendants was present. The Appellants observed Mr. Broer going in and out of the judges chambers absent the Appellants. The judge had denied Appellants prior request for an extension of time to obtain the services of an attorney. See CP 132.

The Appellants believed that the purpose of the hearing was to hear their Motion to Lift the Preliminary Injunction. When the judge said at the May 30, 2007 hearing he knew nothing about the Injunction, Appellants,

with their limited understanding of English and in a stressed and confused state of mind, left the hearing believing the Injunction had already been lifted as related in the Response to the Citation. See CP 140.

In their absence, the court proceeded without considering the undisputed evidence documenting the criminal conduct of the Pilbys and the complicity in his wrongdoing by the Fishs hereinafter set forth.

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111 STATEMENT OF CASE

In 1995 the Defendants purchased property which included a 60 foot wide easement with a 12 foot wide ingress and egress gravel road down the middle leading to property then owned by Third Party Defendants' Jeffrey and Jane Doe Pilby, Plaintiffs Brian and Cari Fishs' predecessors in interest. The Defendants moved on to their property on June 1, 1995. On June 2, 1995, the day after Defendants moved onto their property, Third Party Defendant Pilby, without a Clark County Permit, See CP 11 EX L, or the approval of the Defendants dug 2 holes (ditches) each 20 feet wide by 2 feet deep along each side of the 12 foot roadway leading to their property. Jeffrey Pilby feloniously removed 400 cubic yards of earth, 300 cubic yards in excess of the 100 cubic yards maximum allowed by the permit fraudulently obtained by Pilby on July 29, 1996, nearly 14 months after doing the excavation work on Defendants' property. The top soil wrongfully removed by Pilby was used to grade and enhance the value of another adjacent piece of property owned by Pilby. See CP 125 EX 8-9, EX 3, EX 7 and CP 20 EX D, EX E, EX F, EX G.

On July 25, 1996, 4 days before Pilby filed his application for his Clark County Grading Permit, See CP 125 EX 7, his attorney

Richard Johnson, sent to Defendants a letter, See CP 11 EX L acknowledging that Pilby had already, quote “installed drainage ditches on each side of the road so as to prevent further road erosion and flooding all pursuant to the county code.” This letter, as noted above, was sent four days before Pilby filed his application containing the forged names of the Defendants with Clark County for the Grading permit. See CP 125 EX 7.

On July 29, 1996 Third Party Defendant Pilby forged on the Clark County Application Summary Grading Permit No. GP960124 the names “Muresan Victor and Vioreca” as applicants. See CP 125 EX 7.

On the same day, July 29, 1996 Third Party Defendant Pilby submitted a Clark County Grading Permit Application

On August 2, 1996, Clark County Department of Community Development inspector, Dennis Carlson did a site visit and inspected the excavation performed by Pilby and noted on his inspection report “work done without permit”. See CP 11 EX. L.

On August 6, 1996, Muresan’s attorney Albert Schlotfeldt, 7 days after Pilby submitted his Grading Permit Application and 28 days before the application was approved, sent a letter, See CP 11 EX L, to Dennis Carlson with the Clark County Department of Community

Development protesting the action taken by Pilby in overburdening the easement by: digging 20 foot wide holes (ditches) down each side of the easement; not reseeding the excavated areas; installing low voltage lighting along the easement; installing railroad ties along the easement.

On September 4, 1996, Clark County, without notice to the Muresan's, issued Pilby a Grading Permit, See CP 11 EX L, to Jeffrey D. Pilby which required the following:

- (1) G001-Grading shall not redirect water to county ditch without written approval from County Maintenance Dept. Disposition of graded soil is a matter between the owner and applicant. Grading not to overburden the easement or deny access to adjoining properties.

A- The grading was in violation of the permit which only allowed, quote "sloping ditches to drain storm water to street" and did overburden the easement by including a culvert not allowed by the grading permit and did deny access to adjacent property owners. (See Exhibits E, F, G, H, I, J)

- (2) GR05-All erosion and sediment control measures are to be in place prior to any disturbance caused by grading and shall conform to the requirements of Clark County Erosion Control Ordinance 13.27.

A-Grading was in violation of the permit and did not conform to the County Soil Erosion Control Ordinance 13.27.

- (3) GR31-All exposed and unworked soils shall be established by suitable application of BMPs. From October 1 to April 30, no soils shall remain unstablized for more than 2 days. From May 1 to September 30, no soils shall remain unstablized for more than 7 days.

A- None of the soils, in violation of the permit, were stabilized.

On November 9, 2001, the trial court heard Plaintiffs Motion for Preliminary Injunction. The Appellants did not appear and had moved, before the hearing, for a postponement because of a family emergency (fathers illness) in Europe. See CP 14 . A timely request to Judge Woolard was sent but the court denied Appellants letter/ motion to postpone the hearing and granted the Preliminary Injunction enjoining the Appellants from “placing dirt, debris or other materials in the drainage ditches lining the access road and from interfering with Plaintiffs attempts to maintain the ditches by removing weeds and other materials from them”

Appellants filed an Answer and Counterclaim with the trial court on December 6, 2001 and filed an Amended Answer, Affirmative Defenses, Counterclaim and Third Party Complaint asserting claims for Waste and Trespass with the court on April 2, 2002. The court granted Partial Summary Judgment for the Plaintiffs on March 15, 2006 dismissing Appellants Waste claims. On May 18, 2007, the Appellants filed a Motion to Dissolve the Preliminary Injunction. See CP 124. However, because the Appellants were without funds and unable to retain an attorney and did not know the local rules, the Appellants did not file a Citation as required by local rules

Plaintiff's claims came before the trial court on May 30, 2007. Only the

Plaintiffs and Third Party Defendants attorney Grant Broer, appeared at the hearing. Neither Plaintiffs Fish nor Third Party Defendants Pilby appeared for the hearing at the time the hearing was set to commence. Appellants observed attorney Broer going repeatedly in and out of the Judges chambers without requesting the Appellants attendance. When Judge Wulle entered the court room at 9:10 A.M. the Appellants believed that the purpose of the hearing was to hear their Motion to Dissolve the Injunction that had been wrongfully entered against them on November 9, 2001. As noted above that Injunction had been entered when the Appellant was out of the country on a family emergency in Europe.

The Motion to Dissolve the Injunction had been filed by the Appellants on May 18, 2007 and Appellants believed that the purpose of the May 30th hearing was to hear the Motion to Dissolve the Injunction. The reason the Appellants believed the hearing was to Dissolve the Injunction was because the Appellants had received a letter from Judge Wulle, filed with the clerk on May 30, 2007, and received by them only a few days before the May 30th hearing, advising them of the hearing on what they believed was their Motion to Dissolve the Injunction.

After Judge Wulle entered the courtroom Appellant Vioreca Muresan asked him to please Dissolve the Injunction. Judge Wulle acted

surprised and said he knew nothing about an Injunction even though the Muresan's had filed the Motion to Dissolve the Injunction with the court on May 18, 2007.

The Appellants, without having an attorney with them, and having a limited understanding of the English language and in a stressed and confused state of mind, believing that the Injunction had been lifted left the courtroom believing the purpose of the hearing had been concluded. The Muresan's were so convinced of this that they proceeded to purchase from H & H Wood Recycler's Inc., which Victor Muresan picked up, 240 cubic yards of dirt on June 2, 2007 to fill in the holes on his property believing the Injunction had been lifted and work could proceed.

Adding to the reasons why the Muresan's mistakenly believed there was no hearing scheduled on their Counterclaim and Third Party Complaint was the fact that as they entered the courtroom, before the hearing, there was nothing posted about their case on the court room door as they had experienced in the past. Further, the Muresan's mistakenly believed the purpose of the hearing had been concluded, and left the courtroom. The reason they believed the hearing concluded was the fact that they had paid for a jury trial only on the issues of whether the Injunction should be dissolved and there was no jury present.

Further the Muresan's believed that they were the owners and responsible for the easement in accordance with the letter they received July 22, 2005 from Clark County Weed Management Director Phil Burgess which point-blank stated; "You have a duty as an owner/agent of the above property to control said noxious weeds by 10 days after receipt of this Notice of Violation." Yet, the Plaintiffs Fish, in allegiance with Clark County are prohibiting the access of Defendants Muresan's because of a Preliminary Injunction by Fishs and refusal by Clark County to issue a grading permit while the property is in litigation because of the damage by Pilby in 1995.

Neither of the parties, Brian and Cari Fish or Jeffrey and Jane Doe Pilby were present in the courtroom. The Muresan's received no response when they asked Grant Clark Broer, the attorney for the Pilby's and the Fish's, the whereabouts of his clients. Vioreca Muresan's Response to Citation addressed to Judge Wulle explains this fully. See CP 140.

Based on the testimony of Plaintiffs witness's only, and the exhibits and the arguments of Plaintiffs counsel only, the court wrongfully found for the Plaintiffs, Brian and Cari Fish, on their claims against the Appellants for Waste, Trespass and Declaratory Judgment and wrongfully granted Plaintiffs and Third Party Defendant Motions to dismiss the Defendants Counterclaim and Third Party Complaint. // // //

IV ARGUMENT OF THE CASE

(1) The trial court erred in its order of May 30, 2007 dismissing Defendants Counter Claim and Third Party Complaint.

The trial court would never have found for the Plaintiffs had he heard all of the facts in this case. Had the trial court heard all the evidence it would have heard how the Third Party Defendant Pilby criminally trespassed on Appellants property and stole 400 cubic yards of top soil to enhance the value of the adjacent piece of property he owned. Later in 1998, Pilby sold the property in a "Sale by Owner" transaction directly to the Plaintiffs, Brian and Cari Fish. No personal property was accounted for or excise tax paid on personal property at the time of the sale. To cover up his theft of Muresan's property, Pilby, 14 months after stealing Muresan's top soil, made an application for a grading permit. On the same day that Pilby made his application for the grading permit, See CP 11 EX. L, he forged the Appellants names "Victor and Vioreca Muresan" as the applicants on the Clark County Application Summary. See CP 125 EX. 7. On the Grading Application, signed by Pilby on July 27, 1996, Pilby wrote where it says "Documentation of Work", "sloping ditches to drain storm water". This is not what Pilby did: given that the "sloping ditches"

were 20 feet wide and 2 foot deep holes (ditches) that did not drain, running almost the entire 454.8 foot length of the easement roadway. This excavation by Pilby is the cause of the rampant flooding on the Muresan's property and in the surrounding area on adjacent property owners' westerly down-stream land as well!

A party is liable for Trespass if he or she intentionally or negligently intrudes onto the property of another. See Olympic Pipeline Co v. Thuemy 101 P 3rd 430, 124 Wash. App.38

The Plaintiffs and Third Party Defendants Pilby are also liable to Third Party Plaintiffs for converting 400 cubic yards of topsoil. A party is liable for Conversion if he willfully and without legal justification deprives another of ownership of his property. Demelesh v. Ross Stoves Inc. 20 P 3rd 447, 105 Wash. App 508.

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(2) Defendants did not trespass upon the property of the Plaintiffs when Defendants filled in the ditches that run on the roadway easement on their property with soil and supposed debris, and did not remove railroad ties from the easement.

“When the trial court has weighed the evidence, (appellate court) 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.” Standing Rock Homeowners Assn. v. Misich, 106 Wn. App. 231, 239, 23 P.3d 520 (2001) (citing Panorama Vil. Homeowner’s Ass’n. v. Golden Rule Roofing, Inc., 102 Wn. App. 422, 425, 10 P.3d 417 (2000))

The trial court erred in its order of May 30, 2007 finding that Defendants trespassed upon the property of the Plaintiffs. Finding of fact No.11 and Conclusions of Law No.18. Defendants own the land on which the easement runs See CP 2 EX B 1 and B 2. A trespasser is a person who enters or remains upon the premises of another without permission or invitation, expressed or implied. Winter v. Mackner, 68 Wn.2d 943, 945, 416, P.2d 453 (1966) Since Defendants remained on their property when filling the ditches (holes) and removing the 4 railroad ties from the roadway easement to prevent an attractive nuisance, they did not trespass on Plaintiffs’ property. Therefore, the trial court erred when it ruled that Defendants had trespassed on the property of the Plaintiffs. //

(3) Defendants should not pay Plaintiffs treble damages pursuant to RCW 4.24.630 for supposedly removing approximately 40 used railroad ties that ran on the roadway easement on Defendants' property since the Defendants did not remove the ties and did not interfere with Plaintiffs' use of the roadway easement

Defendants are being falsely accused of the theft of 40 of the 125 railroad ties that were listed on a Real Estate Information Sheet prepared in 1998 by Jeffery Pilby, when he prepared to sell his property in a for "Sale by Owner" transaction. See CP 125 EX 8, 9 There is no evidence that the used railroad ties that the Muresan's were charged with converting were present when Plaintiffs Brian and Cari Fish completed the purchase of the property on July 13, 1998.

A recent search of the Chicago Title Insurance Company that insured Plaintiff's title has not revealed any inventory of personal property railroad ties nor any excise tax that would be due on any personal property railroad ties that were included in the sale. Plaintiffs have asserted the ties were taken to the Defendants church and used there. This is an absolute falsehood because the Defendants have not belonged to a church since 1994 and only once have been in a church since that date for their daughters wedding .

Plaintiffs have been continuously video taping the Defendants daily activities since the commencement of the Plaintiffs' legal action against

the Defendants for the purpose of intimidation and taking advantage of the Defendants. The trial court erred when finding for the Plaintiffs when there was no credible evidence of the existence of the used railroad ties presented to the court.

Since Defendant's assignment of error pertaining to Plaintiff's Waste claim hinges on a material issue of fact, again, appellate review is limited to determining whether the court's findings are supported by substantial evidence and support the court's conclusions of law and judgment. See Standing Rock Homeowners Assn., 106 Wn. App. at 239 (citing Panorama Vil. Homeowner's Ass'n, 102 Wn. App. at 425)

In this case the trial court erred when it granted Plaintiff's Waste claim against Defendant and determined that Plaintiff should be awarded treble damages pursuant to RCW 4.24.630. Findings of Fact No. 14 and Conclusions of law No. 22. RCW 4.24.630 states in part:

Every person who goes into the land of another and who wrongfully injures personal property or improvements to real estate on the land, is liable to the injured party for treble the amount of the damages caused by the removal, waste or injury. For purposes of this section, a person acts "wrongfully" if the person intentionally and unreasonably commits the act or acts while knowing, or having some reason to know, that he or she lacks authorization to so act. Damages recoverable under this section include, but are not limited to, damages for the market value of the property removed or injured, and for injury to the land, including the costs of restoration. In addition, the person

is liable for reimbursing the injured party for the party's reasonable costs, including but not limited to investigative costs and reasonable attorneys' fees and other litigation costs.

The statute "is premised upon the wrongful invasion or physical trespass upon property of another, a commission of intentional and unreasonable acts upon another's property and subsequent destruction of..... another's property..." Colwell v. Etzell, 119 Wn. App 432, 438, 81 P.2d 195 (2003

In the Colwell case the court found that the claim for attorney's fees under the same statute was misplaced due to the fact that the alterations to the easement made by the owner of the servient tenement did not rise to the level of "intentional interference" with the dominant tenement owners use of the easement. Colwell, 119 Wn. App. at 441-2. While recoupment of attorneys fees and costs as opposed to treble damages was the issue on appeal, the courts interpretation of what constitutes "intentional interference" under RCW 4.24. 630 (1) is just as applicable to the issue of treble damages in this case. See id at 442.

In Colwell, the plaintiff brought an action to quiet title to an easement, claiming that the defendants intentionally interfered with plaintiffs use of the easement. Id. at 435. The parties owned adjoining pieces of land, and the Colwell's were deeded a permanent nonexclusive

easement or roadway over defendant's adjoining parcel for ingress and egress, and utilities. Id. Heavy runoff from a different adjoining parcel to defendant's property caused several drainage problems on defendant's property, requiring him to ditch and culvert a portion of the roadway to avoid serious damage. Id. at 436. Defendant claimed that he did not know he was repairing an existing easement, and that, while the repair work was being done, plaintiffs "was able to use the road at all times to access his property. Id. The plaintiffs, on the other hand, claimed that they could not use the roadway for ingress and egress to and from their property during the road work, and filed a summary judgment motion to quiet title to their easement based upon a survey marking the property boundaries and easement. Id. The court granted partial summary judgment in favor of plaintiff's quieting title to their easement and reserved for trial the issue of damages. Id.

The appellate court granted review de novo on the issue of defendant's intentional interference with the easement. Id. at 437. The court gave a careful reading to Standing Rock Homeowners Ass'n. v. Misich, 106 Wn. App. 231, 23 P.3d 520 (2001), the authority both parties relied upon in their arguments, to clarify that "the statute's premise is that the defendant physically trespassed on the plaintiff's land."

Colwell, 119 Wn. App. at 439. The court found physical trespass to exist in Standing Rock when defendants entered onto the roadway easement, located on plaintiff's property and destroyed the gates that the plaintiffs had placed there. See id. at 438-9. By contrast, the court did not find physical trespass in Colwell as defendants owned the land on which the easement was located. Id. at 439.

The court further reasoned that "the owner of a servient estate has the right to use his land for any purpose not included with its ultimate use for reserved easement purposes." Id. at 439 (citing Beebe v. Swerda 58 Wn. App. 375, 384, 793 P, 2d 442 (1990)). In this case, the deed granting the easement was silent on the subject of maintenance and repair. Id. at 440. Following its reasoning in Standing Rock, the court held that the defendant, the owner of the servient estate, "could maintain the road on his land in a reasonable fashion necessary for its protection. Even if Mr. Ezzell (defendant) had been confident this particle road was the Colwells' (plaintiff's) easement, his actions in providing drainage and avoiding further erosion were not inconsistent with the future use of the easement." Id.

As evidenced by the Defendants' deed in this case, the property on which the easement is located belongs to the Defendant. See CP 2 EX B1, B 2. See also Beebe, 58 Wn. App. at 384 ("The property

(on which an easement runs) remains in the ownership of the servient estate, and the owner is entitled to use it for any purpose that does not interfere with the proper enjoyment of the easement.”) The Plaintiff merely has a right to use the easement on Defendants property. See C P 125 EX 1, 2. Since Plaintiff does not own the property on which the easement is located, plaintiffs waste claim does not fit within the purview of the statutory construction of RCW 4.24.530 (1). For Defendants’ actions in filling in the ditches (holes), and being accused of removing used railroad ties which he did not do, to fall within the statute, they must rise to the level of “intentional interference.” See Colwell, 110 Wn. App. at 441-2. In other words defendants must have physically trespassed onto Plaintiffs’ land. See id. at 439. Since Defendants own the land on which the easement, and the ditches (holes) and the used railroad ties are located, Defendants could not have physically trespassed on Plaintiff’s land when filling in the holes called ditches and Defendants deny taking the used railroad ties. See CP 20 EX B3- B4.) Moreover, even if the Plaintiffs owned the land on which the ditches (holes) and used railroad ties are located, (75 railroad ties were all taken by Fish in 1999 to his own property) Defendants’ supposed actions still could not be characterized as “ intentional interference” since the record is void of evidence

showing that Defendants' supposed actions prevented Plaintiffs from using the easement. See VP 27-9. Consequentially, the trial court erred in granting Plaintiffs' Waste claim against the innocent Defendants.

(4) Defendants are not liable to Plaintiffs for damages for supposedly removing 40 railroad ties and for filling in the ditches located on the roadway easement on Defendants' property for purposes of improving Defendants' property and protecting Defendants' property from the flooding surface water considering Defendants' right to "control, manage or improve his own land" under the "common enemy doctrine"

The "common enemy doctrine" is a well-settled law in Washington. Colwell, 119 Wn. App. at 440. "If one in the lawful exercise of his right to control, manage or improve his own land finds it necessary to protect it from surface water flowing from higher land, he may do so, and if damage thereby results to another, it is "damnum absque injuria" Id. at 440-1 (quoting Cass v. Dicks, 14 Wash. 75, 78, 44 P. 113 (1896) The Washington Supreme Court recognizes three exceptions to the doctrine, and only one that arguably applies to both the Colwell facts and the facts at hand: "due care exception." Id. at 441. This exception requires that the landowner act in good faith with due care to avoid unnecessary damage to the property of others. Id. (citing Currens v. Sleek, 138 Wn. 2d 858, 862, 983 P. 2d 626, 993 P. 2d 900 (1999). The Currens court held that the landowner will avoid liability as long as he acts in good faith and any damage is not in excess of that called for by the particular project. Id.

(citing Currens, 138 Wn. 2d at 864) Since the record was without evidence that Plaintiff repaired the road in bad faith, and any damage caused was temporary, the Colwell court ruled that he was entitled to protect his property by ditching and installing culverts to the easement. Id.

As evidenced by Defendants' property deed, the property on which the easement is located belongs to the Defendants. See CP 2 EX., B1-B2

Again the Plaintiff merely has a right to use the easement on Defendants' property for ingress, egress and utilities. See CP 3; see also Beebe, 58 Wn. App. at 384. The "common enemy doctrine" gives Defendants the right to control, manage or improve his own land, including the property on which the easement sits. See Colwell, 119 Wn. App. at 440-1. In fact in this particular case, Defendants took actions to fill the ditches (holes) in order to protect their property from excessive water run-off from another adjacent property and to gain access to the rear portion of their field.. See VP 7-13: 25-7. Defendants acted in good faith and did not cause excessive damage in their actions such that Plaintiffs could not use the easement, as the record is without evidence showing that Plaintiffs were ever prevented from using the easement. See VP 27-9. It follows that the "common enemy doctrine" justifies Defendants' actions in this case, and the trial court erred in ruling otherwise under the Waste claim statute.

(5) Plaintiffs do not have the exclusive right to maintain the road and easement on the Defendants' property when Defendants are the true owners of the property where the easement is located and Defendants can use this property in any manner they wish so long as their use does not interfere with the easement rights of the dominant estate under Washington State Law.

When a case turns on the interpretation of a statement of the law, this court should review de novo the statement of the law and the application of that law to the facts at hand. See Berger v. Sonneland, 144 Wn.2d 91, 104-05, 26 P 3d 257 (2001); see also Franklin County Sheriff's Office v. Sellers, 97 Wn.2d 317, 330, 646 P.2d 113 (1982).

The trial court held that the Plaintiff shall have exclusive rights to maintain the road and easement across the Defendants' property, and that the Defendants shall not interfere with this right. Findings of Fact No. 15 and Conclusion of law No. 23. The trial court erred in its ruling as a matter of law. Washington State Law is clear in regards to the limited rights of the owner of the dominant tenement pertaining to an easement. When faced with the issue of whether the dominant tenement owner's installation of unlocked gates on a roadway easement unreasonably interfered with the serviant tenements owner's use of a roadway easement, the court of appeals decided that the trial court did not err in deciding that the gates posed a reasonable burden. Standing Rock Homeowners Assn., 106 Wn. App at 242. Specifically, the court held:

“ ‘If the easement is ambiguous or even silent on some points, the rules of construction call for examination of the situation of the property, the parties, and surrounding circumstances.’ (citations omitted) “When the owner of a servient estate is being subjected to a greater burden than that originally contemplated by the easement grant, the servient owner has the right to restrict such use and to maintain gates in a reasonable fashion necessary for his protection, as long as such gates do not unreasonably interfere with the dominant owners use.”

Id. (quoting Rupert v. Gunter, 31 Wn. App. 27, 31, 640 P2d 36, 1982)

In other words, the servient estate remains the true owner of the property where the easement is located and the servient estate owner can use the property in any manner provided, including take steps that are necessary for the protection of his property, as long as he does not interfere with the easement rights of the dominant estate. See Id.

Even the Washington Supreme Court has ruled on this issue. In Long v. Leonard, 191 Wn. 284, 71 P 2d 1 (1937), the court faced the issue of whether the dominant tenement owner could erect gates on an easement. Here, the subject easement was a roadway appurtenant to the defendant’s property and ran with the land. Id. at 290. Plaintiffs easement served as a means for ingress and egress to and from their property, and plaintiffs sought to enjoin defendants from interfering with plaintiffs’ use of the roadway. Id. at 285. Specifically, the defendants had installed and maintained gates at points where the road crossed over the

defendants boundary lines. Id at 286. The court held that defendants' maintenance of gates on the easement was a "reasonable and natural limitation on the use of a private way." Id at 296. The court made its ruling based on its previous ruling in Wasmund v. Harm, 36 Wn. 170, 78, P. 777 (1904), involving similar facts, due to a finding that the owner of the easement had not interrupted or attempted to interrupt the respondents' use of the roadway easement. Id. at 296.

Recent case law promulgated by the court of appeals confirms the Law in Washington that the owner of a servient estate has the right to use his land for any purpose not inconsistent with its ultimate use reserved for easement purposes. Drake v. Owen, 136 Wn. App 1021 (2006) (citing Walton v. Capital Land, 252 Va. 324, 326-27, 477 S.E. 2d 499 (1996) (owner of the servient estate may use the easement in a manner that will not interfere with ingress and egress to the highway)). In Drake v. Owen, issues were raised concerning the respective rights of owners of the dominant and servient estates in a driveway easement. 136 Wn. App. 1021. The Drake court found that:

"the owner of the servient estate that is subject to Burgess's (the dominant tenement owner's) driveway easement, has the right to use that easement, provided such use does not materially interfere with Burgess's use as the dominant estate. This right exists regardless of whether the driveway easement is legally characterized as either exclusive or nonexclusive." Drake at 139.

Clearly, case law grants the owners of the property the unlimited right to use the property in any way they see fit provided that it does not unreasonably interfere with the dominant estate's easement rights. See Long v. Leonard 191 Wash. at 296; Hendrickson v. Sund, 105 Wash. 406, 177 P. 808 (1991); Colwell, 119 Wn. App at 439 (owner of servient tenement did not interfere with road easement by ditching and installing culverts to protect his land)

In the present case, the established roadway is approximately twelve feet (12 ft.) wide. VP 22. The ditches (holes) on either side of the roadway were illegally excavated by Third Party Defendant Pilby as there were no ditches when Pilby purchased the adjacent property. By his unlawful action Pilby confiscated a 60 foot wide segment of Defendant's property. This criminal trespass and widening resulted in the theft of 400 cubic yards of topsoil from Defendants property. Defendants filled in these holes with topsoil to level them out as they were before the damages were done by Third Party Defendant Pilby. The fill in was also an attempt to stop the flooding of Defendants property and several adjacent owners property as well. Defendants did not remove railroad ties from the easement except for 4 to avoid an attractive nuisance liability, as stated before. Plaintiffs have not alleged that filling in the holes on

Defendants property by the Defendant has prevented Plaintiffs from being able to use the easement. Rather, Plaintiffs' were concerned with water run-off on the roadway during heavy rain, and also concerned regarding Defendants' objection to allow Plaintiffs to maintain the easement. Defendants had an engineering study done by William J. Sobolewsld in February 2002 that states the holes are only compounding the water problem. Defendants also have been notified the county holds them liable for the maintenance of the easement for weed control. Plaintiffs are calling law enforcement officials when Defendants try to maintain the easement for purposes of gathering the livestock feed that grows there for their livestock; which is their right as long as it does not interfere with Plaintiffs ingress and egress. Plaintiffs Fish have at numerous times also interfered and called the Clark County Sheriffs Office and other law enforcement officials when Defendants used the easement roadway to access the back of their property to carry on farming obligations and install a gate in their own boundary fence for that purpose. The Washington Supreme Court has held that the placement of unlocked gates on a roadway easement was a "reasonable and natural" limitation on the use of an easement. See Long, 191 Wn. at 296. If obstructions placed on a roadway easement, like gates, do not unreasonably interfere with the

dominant tenement owner's easement rights, then it follows that Defendants' alterations to the roadway easement in this case, which do not affect Plaintiffs ability to use the easement, must be characterized as a "reasonable and natural" limitation. See id.

As already discussed, the law in Washington is clear that the Defendants have the unlimited right to continue to use and maintain the property on which the easement sits, even if their actions cause a "reasonable and natural" limitation to Plaintiffs' use of the easement. The trial court permanently enjoined Defendants from being able to maintain the road and easement that runs on their own property. CP 7-8 (See Findings of Fact No. 15 and Conclusions of Law no. 23.)

This, the trial court cannot do under the clearly established law in Washington. Therefore, the trial court erred as a matter of law in holding the same.

For all the reasons set forth herein, the trial court must be reversed and trial granted on Third Party Plaintiffs Counterclaim and Third Party Complaint.

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V. ATTORNEYS FEES AND EXPENSES

Pursuant to RAP 18.1, defendants request their reasonable attorney fees and expenses. Attorney fees and costs are permitted only if based on statutory, contractual, or equitable grounds. Colwell, 119 Wn. App. at 442. On equitable grounds, a party may recover fees reasonably incurred in dissolving a wrongfully issued injunction or restraining order.

Ino Ino Inc., v. City of Bellevue, 132 Wn. 2d 103, 143, 937 P. 2d 154 (1997) (citing Alderwood Assocs. V. Washington Env'tl. Council, 96 Wn. 2d 230, 247, 635, P. 2d 108 (1981); Cecil v. Dominy, 69 Wn. 2d 289, 291-92, 418 P. 2d 233 (1966) The purpose of the equitable rule permitting recovery for dissolving a preliminary injunction or restraining order is to deter plaintiffs from seeking relief prior to a trial on the merits. Id. (citing White v. Wilhelm, 34 Wn. App. 763, 773-74, 665 P 2d 407, review denied 100 Wn. 2d 1025 (1983)

Defendants sought to dissolve the Order Granting Plaintiffs Motion for Preliminary Injunction at the trial level. CP 124. The Order granting Plaintiffs' motion was entered on November 9, 2001. CP 15. Defendants filed their Motion to Dissolve Preliminary Injunction on May 18, 2007. CP 124 Defendants attempted to argue their motion to dissolve the injunction at trial on May 30, 2007, to no avail. See VP 7-14. Defendants

did not stay to participate in the trial for reasons set out in this appeal. The trial court found for the Plaintiffs and entered its Findings of Fact and Conclusions of Law on August 31, 2007, which included a permanent injunction against Defendants. CP 142 see VP 54-5. Since Defendants filed a motion to dissolve the preliminary injunction that was wrongfully issued by the trial court, and for the purpose of deterring the Plaintiffs from seeking relief at trial on the merits, Defendants were entitled to recover reasonable attorneys' fees at the trial level.

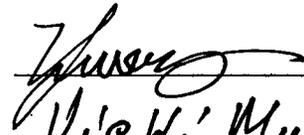
Furthermore, the court of appeals has allowed for the recovery of attorney fees incurred at the appellate level when an appeal was necessary to dissolve a currently effective temporary restraining order. Ino Ino. Inc., 132 Wn. 2d at 144-5 citing Alderwood Assocs., 96 Wn.2d at 247 (allowing fees on appeal because the wrongfully issued temporary restraining order had not been dissolved previously by trial, motion, or hearing.) The permanent injunction that the trial court issued against Defendants, for all practical purposes, has the same effect on Defendants as a temporary restraining order, except that its terms are permanent in nature. CP 4 see VP 54-5. Moreover, the Permanent Injunction is essentially a continuation of the Preliminary Injunction issued against Defendants in 2001, as both injunctions impose the same limitations on

Defendants' action: pertaining to use and maintenance of the easement.
See CP 1-3 and 7-8. An appeal was necessary to dissolve the Permanent Injunction that has been issued against Defendants in error. Therefore, Defendants are entitled to their reasonable attorney fees on appeal.

V1 CONCLUSION

The court must reverse the trial courts decision including the lifting of the permanent injunction because of the criminal conduct of Jeffery Pilby, who Plaintiff Fish's were in privity with, in criminally trespassing on Appellants property to steal 400 cubic yards of Appellants topsoil, to grade and enhance other property that Pilby owned and later sold directly to the Fish's. Further the criminal act of Jeffery D. Pilby forging the Muresan's name on the Clark County Application form and fraudulently describing the excavation work he had previously completed shows his criminal intent and requires that the court reverse the trial courts decision and remand the case back to the trial court for hearing on Appellants Counterclaim and Third Party Complaint.

Dated Oct. 31 2008



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