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DIVISION II
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STATE OF WASHINGTON
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NO. 45927-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

GWYNETH POPE and DANIEL STACEY,

Appellants (Plaintiffs),

v.

BRUCE and PATRICIA GARDNER,

Respondents (Defendants).

APPELLANTS' OPENING BRIEF

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I. INTRODUCTION

This is a trespass lawsuit involving a dispute between neighbors. In 2012, nearly eight years after the Gardners were first notified of their encroachment upon the Pope/Stacey property, the parties entered an Agreed Interim Judgment of Injunctive Relief. This Agreed Interim Judgment was entered by Pierce County Superior Court Judge Lisa Sutton on August 18, 2012. Under this agreement, the Gardners agreed to remove all of the encroachments across the Pope/Stacey property line, which had been identified in a 2012 survey, conducted by Bracy & Thomas Land Surveyors and attached to the agreement as Exhibit 1. The Agreed Interim Judgment further noted that within fourteen days of its entry, the Gardners would apply for any necessary permits to begin to remove the encroachments and would provide two calendar days notice prior to commencing the work.

The Gardners delayed remediation for a full year after the Agreed Interim Judgment, causing even further delays and damages to Pope/Stacey, who were unable to proceed with their property improvements as a result.

The trial court erred in dismissing the request for damages as a result of the nine (9) years of encroachment onto the Pope/Stacey

property. There are sufficient issues of material fact to allow the case to proceed to trial. Additionally, the trial court erred in granting attorneys' fees to the Gardners.

The Gardners are also alleging sanctions are appropriate under CR11. In failing to remove the encroachment when first given notified and then subsequently failing to honor the terms of the Agreed Interim Judgment, the Gardner's initiated the need for continued litigation and have continued to cause damages to be incurred. As such, there is no basis for an award of CR11 sanctions.

The trial court's rulings should be reversed and the case remanded for determination of damages incurred by Pope/Stacey.

II. ASSIGNMENTS OF ERROR

1. The trial court erred by granting summary judgment in favor of the Gardners and dismissing Pope/Stacey's trespass and development delay damages claims.

2. The trial court erred by finding the Gardners as the prevailing party and entering an award of attorney fees in their favor.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was summary judgment appropriate where there were genuine issues of material fact in dispute as to actual and substantial damages incurred by the Gardners' continuing encroachment upon the Pope/Stacey property?
2. Did the trial court err in awarding attorney fees to the Gardners?

IV. STATEMENT OF THE CASE

A. Factual Overview

The Gardners and Pope/Stacey own neighboring parcels of property on Summit Lake in Thurston County, Washington. The Gardners purchased their parcel in 2002. In 2003, the Gardners began a construction project to build a residence on their property.

Pope/Stacey purchased two parcels, 1703 and 1705 Summit Lake parcels, in August 2004, sharing a property line with the Gardners. There is a lake cabin on the 1703 Summit Lake parcel, and an A-frame and dock on the 1705 Summit Lake parcel. Pope/Stacey intended to remodel both the lake cabin and A-frame into new residences. (CP 207, 337).

In 2004, the Gardners began a construction project to build a residence on their property. Pope/Stacey began concerned that the Gardners had built a portion of their residence over the property line. In December 2004, Pope/Stacey had a survey done by Apogee Land

Surveying, Inc. The survey showed that the Gardners had built a concrete retaining wall, utility poles, and multi-tory deck that encroached upon the Pope/Stacey property. CP 208.

In 2008, the extent of the damage of the Gardner's encroachment upon the Pope/Stacey property was more clearly demonstrated when their own remodeling projects were determined to be impossible unless the encroachment were removed. CP 208. Jim Hunter of Hunter & Associates had advised building placement and septic system design could not be determined with the encroachments. Additionally, they were advised that applications to Thurston County for building permits would be delayed or denied until the encroachments were removed and development plans were finalized. CP 118-120: Declaration of Jim Hunter.

Pope/Stacey contacted the Gardners, personally and through attorneys, in an attempt to have the encroachments removed. But the Gardners refused to do so. In 2010, Pope/Stacey had another survey conducted by Bracy & Thomas Land Surveyors. This survey also confirmed that: (1) the Gardners' deck, utility poles, and retaining wall encroached onto Pope/Stacey's property and (2) the deck, retaining wall, and outside stairway of the house violated Thurston County setback rules. CP 121-123: Declaration of Bruce Studeman.

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The agreement specifically did not address the damages incurred by Pope/Stacey as a result of the Gardner's encroachment. Instead, it noted that the Plaintiff's, i.e., Pope and Stacey, reserved their rights to raise any remaining issues of damages. In December 2013, the Gardners filed a motion for Summary Judgment. The trial court granted the Gardners motion for Summary Judgment in January 2014. CP 154-155. The trial court further ruled that the Gardners were entitled to attorney fees in the amount of \$6,643.75. CP 231-234.

V. STANDARD OF REVIEW

A. Summary Judgment

This Court reviews de novo a summary judgment order, and the appellate court performs the same inquiry as the trial court. *Hisle v. Todd Pacific Shipyards Corp.*, 151 Wn.2d 853, 9 P.3d 108 (2004), *Jones v. Allstate Ins Co.*, 146 Wash.2d P.3d 854 (2002), *Loeffelholz v. Univ. of Wash.*, 175 Wn.2d 264, 285 P.3d 854 (2012). A party moving for summary judgment bears the burden of demonstrating that there is no genuine issue of material fact. *Atherton Condo Apartment–Owners Ass'n Bd. of Dir. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). In determining whether summary judgment was proper, the appellate court should consider all facts, and the reasonable inferences therefrom, in the light most favorable to the nonmoving party. *Vallandigham v. Clover Park*

B. Procedural History

After unsuccessfully attempting to have the Gardners remove the encroachments, Pope/Stacey filed an action in October 2010 seeking an Injunction and Damages For Trespass And Quiet Title For Prescriptive Easement. CP 266-271. The claims regarding the prescriptive easement were dismissed through an order for partial summary judgment. CP 69-70.

The remaining encroachment claims were resolved through mediation, with the parties entering an Agreed Interim Judgment of Injunctive Relief signed by Judge Lisa Sutton on August 10, 2012. CP 335-339. Under this agreement, the Gardners agreed to remove all of the encroachments across the Pope/Stacey property line and that within fourteen days of its entry, the Gardners would apply for any necessary permits to begin to remove the encroachments.

During all of the proceedings, to include mediation, and the drafting and entry of this Agreed Interim Judgment, the Gardners were represented by counsel. Yet, despite the clear language and terms of the agreement, the Gardners failed to remove the encroachments until the summer of 2013. CP 81.

Sch. Dist.No. 400, 154 Wn.2d 16, 26, 109 P.3d 805 (2005). A court should grant summary judgment only if reasonable persons could reach but one conclusion from all the evidence. *Id.*, 154 Wn.2d at 26.

B. Attorney Fees

Whether a party is entitled to attorney fees is a n issue of law and is reviewed de novo. *North Coast Electric Co. v. Selig*, 136 Wn.App.636, 642-643, 151 P.3d 211 (2007). The inquiry is a two prong analysis, with the first determination being as to whether the prevailing party was entitled to attorney fees; the second inquiry being whether the amount of fees awarded was reasonable. The second inquiry is reviewed for abuse of discretion. *Ethridge v. Hwang*, 105 Wn.App. 447, 459-460, 20 P.3d 958 (2001).

VI. ARGUMENT

A. The Trial Court Erred In Granting The Gardners Summary Judgment When There Were Questions Of Material Fact As To The Amount Of Damages Incurred For The Gardners Failure To Remove Their Encroachment Onto The Pope/Stacey Property

1. The encroachment constituted a continuing trespass for which damages are recoverable three years before filing until abatement.

The two types of trespass claims in Washington, permanent and continuing, are distinguished by whether the trespass can be reasonably abated or in other words, reasonably cured. See *Fradkin v. Northshore Util. Dist.*, 96 Wn.App.118, 977 P.2d 1265 (1999). The significance of

More critically and directly relevant to the present case, the court concluded, "it remains an issue of fact for the jury to decide whether Northshore trespassed, and, if so, whether the trespass was continuing or permanent. If the jury finds a continuing trespass, Fradkin is not time-barred from recovering damages occurring after May 12, 1994." *Id.* at 126.

Here, the Gardners' encroachment was an intentional continuing trespass, which under established case law, allows Pope/Stacey to seek damages incurred for the time period of at least up until three years before filing until July 2013, the time at which the encroachment was finally removed. CP 81).

Assuming arguendo that the first notice of the encroachment was given to the Gardners in 2007, it still took them more than five years later, with the Agreed Interim Judgment, to make concrete efforts to resolve the issue. Even that effort was undermined by their subsequent failure to abide by the terms to which they had agreed. Thus, the matter was still not yet resolved until almost a full year later in July of 2013, when the Gardners finally honored the terms of the agreement and removed the encroachment.

2. Pope/Stacey presented evidence of actual and substantial damages and as such there existed genuine issues of material fact that were in dispute.

Pope/Stacey's architect, septic designer, and geologist all provided evidence that, given the steep slope of the property toward the lake, the encroachments prevented the development of design plans that would be able to properly designate the placement of a new dwelling and the septic system. The argument by the Gardners that any proposed development was merely hypothetical is disingenuous and inconsistent with the record that includes testimony by experts who specifically advised that development should not begin until the encroachments were removed. Both experts advised Pope/Stacey that any attempt to pursue applications for redevelopment would be futile. Pope/Stacey requested that the Gardners remove the encroachment as early as 2004, after the Apogee Survey.

Evidence of actual and substantial damages was offered by Todd Wilmovsky, expert real estate appraiser. Wilmovsky offered testimony regarding damages and determined that the costs to Pope/Stacey was \$56,000. CP 402-417, 531-541. Neither Wilmovsky's testimony or the figures he presented were hypothetical. Rather, his estimate was based upon his training, experience, evaluation of the property, and calculation of loss of use.

the type of trespass is the determination of the statute of limitations. Under RCW 4.16.080(1), an action for a permanent trespass must be brought within three years of the trespass. Additionally, the nature of the trespass action allows impacts the scope of recovery for damages.

If the trespass is a continuing trespass, then the statute of limitations does not run from the date the tort begins; rather, it is applied retrospectively to allow recovery for damages sustained within three years of filing. Further, damages are recoverable from three years before filing until the trespass is abated or, if not abated, until the time of trial. *Woldson v. Woodhead*, 159 Wash.2d 215, 149 P.3d 361 (2006).

Whether there is a trespass and whether such is a continuing or permanent trespass is a question of fact for the jury. See *Fradkin v. Northshore Util. Dist.*, 96 Wn. App 118, 977 P.2d 1265 (1999). In *Fradkin*, a trespass claim was brought against a utility company for negligently installing a sewer line causing water to flood the plaintiff's property. The utility district claimed the action was barred by the statute of limitations. The court noted the initial injury occurred seven years prior to filing the suit. It held that if the action were for a continuous trespass then recovery for the three years of trespass prior to filing *was not* barred by the statute of limitations.

Damages allowed for continuing trespass include the value of the use of the property, reasonable cost of repair or restoration to the property's original condition, and the costs of recovering possession. The disagreement regarding the source and extent of damages creates an issue of material fact that precludes summary judgment.

B. The Trial Court Erred In Awarding The Gardners Attorney Fees As The Prevailing Party Since Summary Judgment Should Not Have Been Granted.

Because the Gardners were not entitled to summary judgment as a matter of law, they should not be able to recover attorney fees as the prevailing party.

VII. ATTORNEY FEES

Pope/Stacey are requesting attorney fees for this appeal under RAP 18.1(b). Where a statute or contract allows an award of attorney fees at trial, an appellate court has authority to award attorney fees on appeal. *Bloor v. Fritz*, 143 Wash.App. 718, 180 P.3d 805, Wash.App.Div. II (2008).

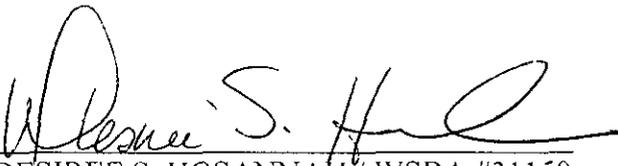
The issue of attorney fees under RCW 4.24.630 for this intentional trespass should have been reserved for after the trial scheduled for February 2014. Pope/Stacey paid for two surveys and incurred attorney fees over the nine year period from 2004 until abatement in 2013. The

expenses of this intentional trespass are reimbursable under RCW
4.24.630.

VIII. CONCLUSION

Plaintiffs/Appellants respectfully requests that this Court reverse
the superior court's granting of summary judgment and entry of attorney
fees. It is also respectfully requested that this Court award attorney fees to
Pope/Stacey on appeal.

RESPECTFULLY SUBMITTED this 20th day of August, 2014.



DESIREE S. HOSANNAH / WSBA #31150
Attorney for Plaintiffs/Appellants

CERTIFICATE OF SERVICE

I certify that on the date indicated below, I served a true and correct copy of the foregoing document on all parties or their counsel of record as follows:

- United Parcel Service, Next Day Air
- ABC Legal Messenger
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DEPUTY

To the following individuals:

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1201 Pacific Avenue, Suite 1900
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I certify under penalty of perjury that the foregoing is true and correct.

EXECUTED this 20th day of August, 2014 at Lakewood, Washington.



Shirley Mitchell-Nelson, Legal Assistant