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Trial Court No. 15-2-00384-5

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

EMPRESS ESTATE LLC, a Washington limited liability company; and,
ZOHIER SALEEM,

Appellants,

v.

TIMOTHY J. DOYLE and TERRI DOYLE, husband and wife and the
marital community comprised thereof,

Respondents/Cross-Appellants.

**APPELLANTS EMPRESS ESTATE LLC AND ZOHIER
SALEEM'S OPENING BRIEF**

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I. INTRODUCTION

This appeal asks whether a trial judge can impose punitive sanctions for alleged violations of a preliminary injunction issued without the applicant posting an injunction bond required under RCW 7.40.080 or CR 65(c). It also asks whether a servient owner can maintain a permanent fence within an easement.

The Appellants/Cross-Respondents Empress Estate, LLC and Zohier Saleem (collectively, “Empress”) operate an event center served by a private road easement that crosses over the Respondents/Cross-Appellants’ (Timothy and Terri Doyle) property.

Empress sued to have the Doyles remove a gate they had placed across the easement to prevent Empress’ guests from accessing the event center. Empress also wanted the Doyles to quit harassing its guests. The Doyles countered that Empress’ guests were harassing them and that Empress’ business exceeded the scope of the easement.

Both sides requested preliminary injunctions to protect their respective interests pending a final resolution. The trial court accommodated both sides by granting reciprocal preliminary injunctions.¹ However, Empress was the only party required to post an injunction bond, which it did. The Doyles never posted a bond.

The April 22, 2015, preliminary injunction prohibited Empress from parking more than 30 vehicles on its property. CP 91-92. Despite not

¹ The court issued at least two Orders of Injunction. The April 22, 2015, Amended Order of Injunction is at issue here. CP 91-92.

having posted a bond, the Doyles filed multiple motions for contempt that included claims that Empress allowed more than 30 vehicles to park on its property.²

Twice, the trial court found Empress in contempt. The first Order of Contempt led to a \$500 fine, and was entered with no findings regarding the alleged violation(s). CP 330-31. The second Order of Contempt was based on Empress allowing more than 30 cars to be parked on its property, even though many of these cars were parked on the adjoining property. CP 625-27. This second contempt resulted in a \$1,500 “damages” award, even though there was no evidence of actual damages suffered by the Doyles.

The law regarding preliminary injunctions is clear: No preliminary injunction may be granted until the party asking for injunctive relief furnishes security in an amount fixed by the court. CR 65(c); RCW 7.40.080. Because the Doyles never posted a bond, the trial court lacked the authority to enforce the preliminary injunction against Empress.

The law regarding punitive sanctions is likewise clear: Punitive sanctions are meant to punish past contempt of court. Unless the contemptuous act occurred in the court’s presence, the contempt statute requires that a complaint or information be filed by the prosecuting authority; punitive sanctions cannot be imposed: “Only monetary sanctions that accrue from the date of the contempt finding are remedial

² The undisputed evidence was that most of the cars were not parked on Empress property and therefore the court erred in finding a violation. CP 203-205.

because only to this extent is the act that the court seeks to coerce within the person's power to perform." *State v. Sims*, 1 Wn. App. 2d 472, 6 P.3d 649 (2017); RCW 7.21.040; RCW 7.21.040.

Here, the trial court imposed punitive fines against Empress for past violations of a preliminary injunction in violation of RCW 7.21.040. The court also erred when it found Empress in contempt for cars parked on an adjoining property, not subject to the preliminary injunction.

Finally, the court erred in issuing a permanent injunction that permitted the Doyles to retain a fence within the easement in direct violation of this court's holding in *Littlefair v. Schulze*, 169 Wn. App. 659, 278 P3d 218 (2012).

II. ASSIGNMENTS OF ERROR

1. The trial court erred in allowing the Doyles to enforce a preliminary injunction without having posted an injunction bond. CP 72-76.

2. The trial court erred in imposing punitive sanctions and fines against Empress and Saleem for violating the Amended Order for Preliminary Injunction. CP 74-76.

3. The trial court erred in finding Empress and Saleem in contempt of the Amended Order for Preliminary Injunction when there was insufficient evidence that more than 30 cars were allowed to park on Empress property. CP 74-76.

4. The trial court erred in allowing the Doyles to maintain a permanent fence within the easement area. CP 277-286.

5. The trial court erred in awarding the Doyles \$1,500 in damages for contempt of the Amended Order for Preliminary Injunction. CP 272-76.

6. The trial court erred in entering the Amended Judgment of Contempt against Empress Estate, LLC and Zohier Saleem. CP 272-76.

7. The trial court erred in entering the Amended Final Order on Preliminary Injunction. CP 277-286.

III. STATEMENT OF ISSUES

- A. A preliminary injunction cannot be granted without an injunction bond. Here, the Doyles never posted a bond. Did the court error when it allowed the Doyles to enforce the preliminary injunction?
- B. Except as provided in RCW 7.21.050, an action to impose punitive sanctions for contempt must be commenced by the appropriate prosecuting authority.
- C. Here, the court punished Empress by imposing a \$500 fine, and later \$1,500 in “damages,” even though there was no evidence of damages. Did the trial court error when it imposed punitive sanctions?
- D. A finding of contempt must be supported by substantial evidence. Here, the preliminary injunction prohibited more than 30 cars from being parked on the Empress Property.
- E. The undisputed evidence showed that most of the 30 cars complained of were parked on an adjoining parcel.
- F. Did the court error in finding Empress in contempt?
- G. Under *Littlefair v. Schulze*, 169 Wn. App. 659; 278 P.3d 218 (2012) servient landowner cannot maintain a permanent fence within an easement if that structure might interfere with the easement holder’s future expansion of that easement. Here, the

court ruled that the Doyles could retain their fence until there is a need for the easement holder to expand the width of easement.

- H. Does the court's ruling violate the court's decision in *Littlefair v. Schulze*?

IV. STATEMENT OF THE CASE

A. **Saleem purchases Empress Estates**

Zohier Saleem purchased Empress Estates, in Woodland, WA in 2012. CP 122. Saleem knew Empress had long been used as a multi-event facility, including as a bed-and-breakfast and for weddings. *Id.* Access to Empress Estate was via a 60-foot easement called Empress Lane, a private paved road crossing the Doyles' property. *Id.* the Doyles' property is located approximately .25 miles from Empress' property. *Id.*

B. **The Doyles' attempts to shut down Empress by interfering with events, harassing guests, blocking the easement, and threatening the safety of guests**

Even though it pre-existed them, the Doyles did not appreciate living next to a multi-event facility. They began to cause problems for Empress by placing a gate across the road. *Id.* They would also maintain various signs to discourage guests from accessing the business. *Id.* They kept junk vehicles/trailers, farm animals, carcasses, and feces within the easement area to deter Empress' guest, hoping Empress would fail. *Id.* After the interference began to impact its business, Empress sued to stop the Doyles' unlawful interference. *Id.*

C. **The Empress files Complaint for Injunctive Relief**

Saleem and Empress sued the Doyles in 2013. SCP ____; *Complaint for Injunctive Relief*. Both parties then sought preliminary injunctive relief. On June 19, 2013, Judge Stephen Warning issued a preliminary injunction to: (1) prohibit the Doyles from blocking the access easement; (2) require Empress to take steps to not disturb the Doyles; and, (3) restrain both parties from harassing one another. CP 72-73.

Empress had to post a \$5,000 bond, which it did. SCP. However, the Doyles did not have to post a bond, nor did they post a bond. CP 72-73.

D. In 2017 Contempt hearing, Court finds both parties in contempt, and orders Saleem to forfeit his bond. On Saleem's motion for reconsideration, Court changes contempt order and allows Saleem to "purge" portion of contempt

Empress and Saleem filed a second lawsuit in 2015 against the Doyles alleging interference with easement, tortious interference with business expectancy, damage to property, nuisance, outrage, and intentional infliction of emotional distress. CP 1-13. These cases were later consolidated. SCP _____, *Order Granting Motion to Consolidate*.

Shortly after filing the new lawsuit, the Doyles again moved for contempt against Saleem and Empress. SCP __, *Amended Order for Preliminary Injunction*.

On April 22, 2015, Cowlitz Commissioner David Nelson found both parties in Contempt and issued an Amended Injunction that contained additional restrictions that applied to both parties. This Amended Order

was intended to supplement the 2013 Injunction (the “2015 Injunction”). SCP __.

The Amended Injunction contained 4 express provisions enjoining Saleem and Empress (paragraph 3(a)-(d)). However, in violation of RCW 7.40.080 and CR 65(c), the Commissioner did not require the Doyles to post an injunction bond. SCP __. The Doyles have never been required nor have they posted an injunction bond. The motions for contempt continued after the 2015 Injunction.

On January 5, 2017, the Doyles moved for contempt against Saleem and Empress. CP 14-42. Saleem and Empress objected to the Doyles’ contempt motion, and presented evidence showing that the motion was just the latest misguided effort to harass them. CP 47-52. The trial court held a summary hearing on January 18, 2017.

At the hearing, the court orally ruled that both parties violated the 2015 Injunction. CP 74-75 (a written order was never entered based upon the Court’s oral ruling, the citations are to the Order Denying and Granting Defendants’ Motion for Reconsideration and Denial of Stay of Proceedings). The Court orally ordered that Empress had to forfeit its \$5,000 bond by February 1, 2017. *Id.* The Court only imposed a nominal \$5 penalty against Doyle. *Id.*

The Empress moved for reconsideration of the court’s oral ruling and to stay the proceedings. CP 60-71. Empress argued that the court’s ruling that the bond is forfeited was a punitive sanction and was not

allowable under the contempt statutes. *Id.* However, the trial court still imposed a \$500 “fine.” CP 74-75.

The trial court issued an Order Denying and Granting Defendants’ Motion for Reconsideration and Denial of Stay of Proceedings on March 22, 2017. CP 74-75. In the Order, the trial court ruled that the April 22, 2015 Injunction was valid because it supplemented the 2013 Injunction. CP 75.

Strangely, the court also ruled that because Empress, and not Doyle, had posted a bond to secure the 2013 Injunction, the 2015 Injunction was valid and enforceable. *Id.* In other words, the trial court relied upon the bond posted by Saleem and Empress to find that the preliminary injunction against Saleem and Empress was valid.

The trial court vacated its punitive sanction that required Empress to forfeit its \$5,000 bond because “[t]he purpose of the injunction bond is to reimburse a wrongfully enjoined party from damages if the Court determines that the injunction was wrongfully issued.” CP 75. But the court denied reconsideration of the civil contempt, stating the “Court’s intention in imposing a civil fine for [Saleem’s] civil contempt was and is to coerce [Saleem’s] future obedience to the amended preliminary injunction, and to a lesser extent, punish [Saleem] for his violation.... The contempt fine is aimed at coercing [Saleem] to comply now and in the future with the Court’s order.” CP 75.

Saleem was provided an opportunity to purge the majority of the suspended civil fine upon “no further violations of the preliminary

injunction, [Saleem] can purge \$4,500 of the \$5,000 contempt fine. For now, [Saleem] must pay a civil fine of \$500.” *Id.* Empress and Saleem timely filed a Notice of Appeal of the Court’s Order. SCP ___, *Plaintiffs’ Notice of Appeal*.

the Doyles were not finished. They continued to file motions for contempt to try and shut down Empress. Saleem objected to each motion for contempt, and requested that the motions be deferred to Commissioner Nelson as he entered the 2015 Injunction. Further, Saleem continued to state that he could not be in contempt of the injunction since the Doyles never posted a bond. CP 81-94.

On July 17, 2017, Commissioner Nelson issued an Order regarding the Doyles’ Motions for Contempt. CP 229-232. Based solely upon the Doyles’ unsubstantiated declarations, Commissioner Nelson imposed \$1,500 in damages against Saleem for having more than 30 cars on Empress property on April 10, 24, and June 7, 2017. CP 274. Again, the Doyles never posted a bond to secure the 2013 or 2015 Injunctions.

This was in error. The undisputed evidence showed that fewer than 30 cars were actually parked on Empress property. Instead, most of the cars were parked on an adjoining property owned by Embratora, LLC³. It is also undisputed that this property was acquired after the court’s April 22, 2015 Amended Order of Injunction and therefore was not part of the court’s order. CP 188, 191-192, 203,139,141.

³ Embratora, LLC is solely owned by Mr. Saleem.

Also on July 17, 2017, Commissioner Nelson granted Empress' Motion for Permanent Injunction and Motions for Summary Judgment regarding the scope of the easement. CP 233-239.

While it can accept most of the conditions, the Motion for Permanent Injunction allowed the Doyles to maintain an existing wire fence within the easement area, even though the court ordered that another fence be removed. CP 235-36.

the Doyles then filed yet another motion for contempt against Saleem on August 10, 2017 alleging contempt of the 2015 Injunctions. CP _____. Again, the Doyles failed to request that a bond amount be fixed, nor had they posted an injunction bond. the Doyles' motions for contempt were again denied by Commissioner Nelson. CP 269. On October 2, 2017, the Court entered an Amended Judgment of Contempt against Empress and Saleem, which included the award of \$1,500 in damages against Empress, and a Final Order on Permanent Injunction. CP 272-286. Empress and Saleem timely filed a Notice of Appeal of these rulings. SCP *Plaintiffs' Notice of Appeal*. the Doyles timely cross-appealed. SCP *Defendants' Notice of Cross-Appeal*.

V. ARGUMENTS

A. Standard of Review

An appellate court reviews de novo a trial court's authority to impose contempt sanctions. *In re Dependency of A.K.*, 162 Wn.2d 632, 644, 174 P.3d 11 (2007). The error of law standard also applies to this

court's review of the trial court's decision allowing a permanent fence to remain within the easement area.

B. The Trial Court erred in allowing the Doyles to enforce a preliminary injunction issued without the required injunction bond

The Doyles sought injunctive relief from the trial court in 2013 after Empress filed his motion for preliminary injunction. SCP __; *Defendants Memorandum in Support of Answer to Complaint*. The trial court granted injunctive relief to both parties, but only Empress had to post a bond. The injunction restraining Saleem could therefore not be enforced until the Doyles posted a bond as set by the court.

RCW 7.40.080 and CR 65(c) are clear: No preliminary injunction may be granted until the party asking for injunctive relief furnishes security in an amount fixed by the court.

Thus, private litigants, such as the Doyles, cannot seek to enforce an injunction unless (1) the court has set a bond amount, and (2) the party seeking to enforce the injunction has posted that bond amount. Any injunction issued without a bond is legally ineffective thereby depriving the court of jurisdiction to enforce.

The purpose of the bond is to guard against the potential wrongful issuance of the injunction and to “provide indemnification for parties who are wrongfully restrained or enjoined.” *Cedar-Al Prods. v. Chamberlain*, 49 Wn. App. 763, 765, 748 P.2d 235, 236 (1987). Thus, no bond is

required for a permanent injunction, but a bond is required for a temporary restraining order or preliminary injunction. *Id.*, n.1.

“The security requirement as it exists today accomplishes two things. First, it is a condition to obtaining injunctive relief between private parties. Second, it provides a remedy to the restrained party if it is later determined restraint was erroneous in the sense that it would not have been ordered had the court been presented all the facts.” *Swiss Baco Skyline Logging Co. v. Haliewicz*, 14 Wn. App. 343, 345, 541 P.2d 1014, 1016 (1975) (internal citations omitted). The bond is a condition to obtaining injunctive relief between private parties—without the bond, a party is not entitled to injunctive relief. Thus, a party cannot be held in contempt of an injunction where no bond was posted.

The Washington Supreme Court addressed the issue in *Evar, Inc. v. Kurbitz*, 77 Wn.2d 948, 950, 468 P.2d 677, 678 (1970), where the Court reviewed whether an injunction issued without a bond having been set by the trial court was effective. In *Evar*, the stockholder, Kurbitz, was restrained from voting his stock during the pendency of an action and was directed to transfer his stock to the corporation, Evar, Inc. Several separate injunctions were entered in cases eventually consolidated. Kurbitz was later cited in for contempt of court for allegedly violating the terms of the injunction. *Id.* at 949-50. On appeal, Kurbitz challenged the validity of a later injunction because it was issued without requiring a bond or other security. *Id.* at 950. The Supreme Court agreed with Kurbitz, stating, “[n]o bond having been fixed by the trial court, the order of March 21, 1969 is

invalid.” *Id.* at 951. Similarly, the trial court did not fix a bond for the Doyles’ requested injunctive relief, thus the order restraining Saleem was invalid. Saleem and Empress cannot be held in contempt of an invalid order.

the Doyles may argue that they did not affirmatively seek injunctive relief in 2013; however, such an argument is misguided as the Doyles’ responsive papers indicate they also requested that the trial court restrain Empress and its clients from disturbing the Doyles. SCP ___, *Memo in Support of Defendant’s Answer to Complaint*, p.10.

These facts are undisputed: (1) the Doyles sought injunctive relief in 2013, the 2013 Injunction granted their request to not be disturbed; (2) the 2015 Injunction granted further relief, but did not set a bond; (3) the Doyles never requested a bond be set, nor did they post a bond; and, (4) Saleem and Empress were held in contempt of the 2015 Injunction, and fines and damages were levied against Saleem and Empress on at least two occasions.

Commissioner Nelson’s April 22, 2015, injunction order includes no reference to a bond for the relief afforded the Doyles. the Doyles have never posted a bond, nor have they requested that the trial court fix a bond. The 2015 Injunction could not be enforced by the Doyles, and by logical extension, Saleem and Empress could not be held in contempt. Saleem and Empress preserved these arguments throughout the case by objecting to the Doyles’ motions for contempt and raising the bond issue each time to the trial court. Despite Saleem and Empress’ objections, the Doyles failed

to request the trial court fix a bond amount, and the trial court found Saleem and Empress in contempt of an invalid order. The trial court's rulings of contempt must be reversed as a matter of law.

C. The trial court's award of sanctions against Saleem and Empress were punitive and therefore in violation of RCW 7.21.040

The court's oral order requiring Saleem and Empress to pay a \$5,000 fine was a penalty for their alleged failure to comply with the Amended Injunction. On Saleem and Empress' motion for reconsideration, the trial court reduced the fine to \$500 stating the "Court's intention in imposing a civil fine for [Saleem's] civil contempt was and is to coerce [Saleem's] future obedience to the amended preliminary injunction, and to a lesser extent, punish [Saleem] for his violation.... The contempt fine is aimed at coercing [Saleem] to comply now and in the future with the Court's order." CP 75.

The trial court provided Saleem and Empress an opportunity to purge the majority of the civil fine through "no further violations of the preliminary injunction," but "[f]or now, [Saleem] must pay a civil fine of \$500." CP 75. The trial court violated RCW 7.41.040 when it imposed a punitive sanction against Saleem and Empress.

There are two forms of statutory contempt sanctions, remedial and punitive. A "remedial sanction" is "a sanction imposed for coercing performance when the contempt consists of the omission or refusal to perform an act that is yet in the person's power to perform." RCW

7.21.010(3). A remedial sanction must contain a purge clause or it loses its coercive character and becomes punitive. *In re Structured Settlement Payment Rights of Rapid Settlements, Ltd.*, 189 Wn. App. 584, 613, 359 P.3d 823 (2015), *review denied*, 185 Wn.2d 1020, 369 P.3d 500 (2016). Further, remedial monetary sanctions can only accrue from the date of the contempt finding, and there must be purge clause included to avoid being a punitive sanction. *See State v. Sims*, 1 Wn. App. 2d 472, 476, 406 P.3d 649, 651 (2017).

A “punitive sanction” is “a sanction imposed to punish a past contempt of court for the purpose of upholding the authority of the court.” RCW 7.21.010(2). Such sanctions do not allow the party to purge the contempt. *State v. Buckley*, 83 Wn. App. 707, 711, 924 P.2d 40 (1996). A court may punish the past contemptuous act with a fine and/or imprisonment. RCW 7.21.050(2). Because of due process concerns, RCW 7.21.040 provides a procedure to ensure that a person facing such a sanction actually committed the contemptuous act. *In re Interest of M.B.*, 101 Wn. App. 425, 453, 3 P.3d 780 (2000).

“Unless the contemptuous act occurred in the presence of the court, the procedure requires the county prosecutor or city attorney to file a complaint or an information and for a trial to occur before a neutral judge. RCW 7.21.040(2), .050(1); *see also In re Interest of Mowery*, 141 Wn. App. 263, 276, 169 P.3d 835 (2007).” *State v. Sims*, 1 Wn. App. at 480.

Here, the trial court did not afford Saleem or Empress the process required under RCW 7.21.040(2), rendering the trial court without authority to impose punitive sanctions. *See Id.* The trial court's only remedy for contempt by Saleem and Empress, with the posting of a bond by the Doyles, was a remedial sanction for violation of the 2015 Injunction.

“In determining whether sanctions are punitive or remedial, courts do not look to the ‘stated purposes’ of a sanction, but to whether it has a coercive effect – whether “the contemnor is able to purge the contempt and obtain his release by committing an affirmative act.” When a contempt involves the prior conduct of an isolated, prohibited act, the resulting sanction has no coercive effect.” *In re Dependency of A.K.*, 162 Wn.2d 632, 644-45, 174 P.3d 11 (2007) (citing *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 827 n.2, 114 S. Ct. 2552, 129 L. Ed. 2d 642 (1994)).

At their core, punitive and remedial sanctions can be described as follows: a sanction is civil (remedial) if the contemnor can purge the contempt by performing an act within the contemnor's power to perform, but, if a sanction is determinate and imposed to punish a past disobedience, the contempt is criminal (punitive) and the prosecutor must file an information before the sanction may be imposed.

Here, the court issued punitive sanctions by imposing a \$5,000 fine upon Saleem and Empress based upon the court's ruling that they violated the terms of the 2015 Injunction. The fact that the fine was reduced to

\$500, with \$4,500 suspended for no further violations of the 2015 Injunction, does not transform the nature of the sanctions from punitive to remedial. The alleged acts leading to imposing the fine occurred outside the presence of the Court, and Saleem and Empress were afforded no opportunity to purge the \$500 contempt. The trial court's Order reflects as much when it stated the purpose of the fine was to "punish [Saleem] for his violation...." CP 75.

Similarly, Commissioner Nelson's imposition of \$1,500 in damages was a punitive sanction and not a remedial sanction as it was to punish Saleem and Empress for acts that again occurred outside the presence of the Court with no ability to purge the contempt. Commissioner Nelson did not award sanctions, but used the term "damages" presumably in an attempt to avoid the same concerns with the trial court's Order. "Only monetary sanctions that accrue from the date of the contempt finding are remedial because only to this extent is the act that the court seeks to coerce within the person's power to perform." *State v. Sims*, 1 Wn. App. 2d 472, 476, 406 P.3d 649, 651 (2017). Again, Commissioner Nelson attempted to punish Saleem and Empress for past violations of the 2015 Injunction. The \$1,500 damages constituted an impermissible punitive sanction, and similar to the \$500 fine imposed by the trial court, should be reversed and the decisions vacated.

D. There was insufficient evidence that the Appellants violated the April 22, 2015 Preliminary Injunction

“Contempt of court” requires an “intentional...disobedience of any lawful...order...of the court.” RCW 7.21.010(1). If a superior court bases its contempt finding on a court order, “the order must be strictly construed in favor of the contemnor,” *Stella Sales, Inc. v. Johnson*, 97 Wn App 11, 20, 985 P2d 391 (quoting *State v. Boatman*, 104 Wn. 2d 44, 46, 700 P2d 1151 (1985), *rev. den.* 139 Wn 2d.1012 (1999)); and the facts found must constitute a plain violation of the order. *Johnston v. Beneficial Mgmt. Corp. of Am.*, 96 Wn.2d 708, 713, 638 P.2d 1201 (1982).

Here, the court’s April 22, 2015 Order only prohibited more than 30 cars being parked on the “Plaintiff’s” property at the same time. It is undisputed that, when the Amended Order was entered, the adjoining parcel was owned by Julius Leggett and that the parcel was later acquired by Embratora, LLC. CP 188, 203. It is also undisputed that most of the complained about cars were not parked on Empress property—they were parked on the Embratora property. So, applying the above principals regarding strictness Empress cannot be found to have violated the Amended Injunction for cars parked on an adjoining property owned by a separate entity.

The Doyles will obviously argue that the appellants circumvented the court’s Order. While clever, there is no evidence to support this allegation. Regardless, Empress is entitled to the benefit of the doubt when facing contempt charges.

E. Under *Littlefair v. Schulze*, the Doyles cannot be permitted to maintain a fence within the easement

The Doyles maintained substantial improvements within the easement area, including fencing, cars, trailers, and equipment. While it required the Doyles to remove most encroachments, it also found that because the road is only 12-14 feet wide, the Doyles could maintain their current wire fence within the remaining 46 to 48 foot easement area. This ruling directly conflicts with this court's holding in *Littlefair v. Schulze*, 169 Wn. App. 659, 278 P.3d 218 (2012), *rev. den.*, 176 Wn.2d 1018, 297 P.3d 706 (2013).

In *Littlefair*, the dominant landowner had a 40-foot-wide easement across a neighboring property, but the actual road varied in width and was generally a one-lane roadway. 169 Wn. App. at 662-63. The servient landowner constructed a fence on his property which lay within the 40-foot-wide reserved easement area, but away from the actual roadway. *Id.* The evidence at trial showed the current roadway, which was 12-14 feet wide, was sufficient for the purposes and uses by the parties. *Id.*

The trial court concluded that it could not force the servient owner to remove the fence since the current usage of the roadway served the parties' purposes and the servient owner's use was reasonable. However, this Court disagreed and reversed the trial court. *Id.* at 662 by finding that the potential future uses of the easement must be considered.

Regardless of the fact that the fence did not interfere with the dominant holder's current use of the easement, this Court was concerned

that failure to require removal of the fence could trigger the elements of adverse possession thereby creating a risk that any future expansion of the easement could be extinguished. *Id.* at 665. The court held:

The “servient owner, is entitled to enjoy the full use of his property, but he cannot build structures that although arguably not interfering with current easement use, would by adverse possession principles deny the easement owners their right to the future expanded easement use.[citations omitted] It follows that a dominant estate owner has the right to protect his rights in the easement by requiring the servient estate owner to remove any structure that could deny the easement owner his full easement rights.[citations omitted].” *Id.*

So even though a servient owner may use his land in a reasonable manner, the owner cannot interfere with the easement’s purpose or potential expansion lest the dominant owner may lose his rights to later expand upon the easement. *Id.* at 665.

As in *Littlefair*, the Doyles can’t be allowed to place a permanent or semi-permanent structure or improvement within the easement. CP 280. The trial court therefore erred in finding that the Doyles could retain their fence within the easement area.

VI. CONCLUSION

A party may not enforce a preliminary injunction unless he has posted an injunction bond. Moreover, a punitive sanction cannot be imposed unless the prosecuting authority has commenced a criminal proceeding. The trial court also erred when it found that the Doyles could maintain a fence within the easement area.

This court should therefore reverse and vacate the trial court's contempt judgments and reverse and remand on the issue of the permanent injunction to order that the Doyles be barred from maintaining a fence within the easement.

DATED this 26th day of January, 2018.

Respectfully Submitted,

LANDERHOLM, P.S.



PHILLIP J. HABERTHUR, WSBA # 38038
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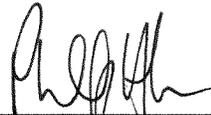
Attorneys for Appellants

STATE OF WASHINGTON)
) ss.
County of Clark)

I, Phillip J. Haberthur, being first duly sworn on oath, depose and state that I am now and at all times herein mentioned was, a citizen of the United States, a resident of the State of Washington, and over the age of 21 years.

On the 26th day of January, 2018, a copy of the APPELLANTS EMPRESS ESTATE LLC AND ZOHIER SALEEM’S OPENING BRIEF was delivered via first class United States Mail, postage prepaid, to the following person(s):

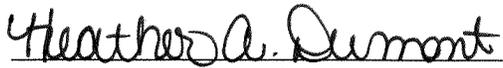
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PHILLIP J. HABERTHUR

SUBSCRIBED AND SWORN to before me this 26th day of January, 2018 by Phillip J. Haberthur.





NOTARY PUBLIC for the State of Washington, Residing in the County of Clark.
My Commission Expires: May 6, 2020

LANDERHOLM, P.S.

January 26, 2018 - 4:18 PM

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