

FILED
Court of Appeals
Division II
State of Washington
3/12/2018 11:15 AM
No. 50843-5-II

Court of Appeals, Div. II,
of the State of Washington

Audrey B. Webster, Trustee of the Audrey
Webster Revocable Living Trust, UTD
7/20/06 and Mary J. Hodge,

Appellants,

v.

Murphy Resources, Inc., a Washington
corporation; Sean M. Murphy and Jill A.
Murphy, husband and wife Greg Murphy and
Jolynn Murphy, husband and wife,

Respondents

Appellants' Reply Brief

Jon E. Cushman
Attorney for Appellants

Cushman Law Offices, P.S.
924 Capitol Way South
Olympia, WA 98501
360-534-9183
WSBA # 16547

Table of Contents

1. Introduction.....	1
2. Reply Argument	2
3. Conclusion.	15

Table of Authorities

Table of Cases

<i>Anfinson v. FedEx Ground Package Svs., Inc.</i> , 174 Wn.2d 851, 281 P.3d 289 (2012)	3, 10
<i>Berg v. Hudesman</i> , 115 Wn.2d 657, 801 P.2d 222 (1990)	4
<i>Burris v. General Insurance</i> , 16 Wn.App. 73, 553 P.2d 125 (1976)	13
<i>Dussault v. Seattle School District</i> , 69 Wn.App. 728 (1993)	4
<i>Gunn v. Riely</i> , 185 Wn.App. 517 (2015)	15
<i>Hodge v. Development Services</i> , 65 Wn.App. 576 (1992)	4
<i>Leland v. Frogge</i> , 71 Wn.2d 197, 427 P.2d 724 (1967)	13
<i>Lietz v. Hansen Law Offices</i> , 166 Wn.App. 571 (2012)	4
<i>Seaborn Pile Driving Co. v. Glew</i> , 132 Wn.App. 261 (2006)	4
<i>Seattle W. Indus. v. David A. Mowat Co.</i> , 110 Wn.2d 1, 750 P.2d 245 (1988)	12

Statutes/Rules

CR 56.....	13
CR 68.....	4, 9, 11

RCW 4.24.630	6, 11, 13-15
RCW 64.12.030	11, 13, 14
RCW 64.12.035	15
RCW 64.12.040	15

1. Introduction

Respondents would have this Court treat Sean Murphy as a principal of his agent, Greg Murphy, at the time Webster and Hodge accepted Greg Murphy's offer of judgment, but Respondent cannot do that because Respondent had successfully, albeit incorrectly, convinced the trial court judge that Sean was not Greg's principal, and Greg was not Sean's agent.

Respondents would have the offer of judgment thus accepted as to Greg Murphy operate to release Sean Murphy. A review of the offer of judgment process engaged below, as set forth in the e-mail exchanges which are now part of the record in this case, reveals that the offer of judgment was intended to operate solely as to Greg Murphy and his company. It was not intended to end the case as to Sean Murphy or as to any issues improperly resolved below on summary judgment.

Respondents incorrectly argue that Appellants never put any evidence of Sean Murhy's own breaches of duty before the trial court, for which Sean Murphy would have direct liability. Citations to the record belie this argument. Sean Murphy's own breaches were always before the trial court.

Finally, Respondents seek to avoid the imposition of triple damages as a matter of law by arguing that the issue was not properly noted for summary judgment by Appellants. Appellants

properly raised the issue in response to both summary judgments brought by Respondents, and formally sought that relief by cross motion for summary judgment during Respondents' second motion for summary judgment. A trial court can enter summary judgment for a non-moving party when all facts are admitted, and when, as a matter of law, the non-moving party is entitled to judgment. Such is the case here.

2. Reply Argument

Respondents cannot now claim that Sean Murphy was dismissed as Greg Murphy's principal when they invited the trial court to erroneously rule that Sean and Greg were not in a principal/agent relationship.

Respondents are judicially estopped from now reversing field and saying that at the time the offer of judgment was made by Greg, it would also operate to release Sean. Had they acknowledged Sean was Greg's principal, they could make this argument, but at the trial court, they argued that Sean was not Greg's principal and that no principal/agent relationship existed between Sean and Greg. The trial court judge incorrectly agreed with them.

Simply because Appellants stated in their opening brief that "arguably the release of Greg released Sean" does not

foreclose Appellants from pointing out that arguably it does not release Sean.

Respondents convinced the trial court judge to make a fundamental error: to rule that Sean Murphy was not the principal of Greg Murphy, and that no agency relationship existed.

In regard to the doctrine of judicial estoppel, the Supreme Court of Washington, en banc, held:

Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position. There are two primary purposes behind the doctrine: preservation of respect for the judicial proceedings and avoidance of inconsistency, duplicity, and waste of time. A trial court's determination of whether to apply the judicial estoppel doctrine is guided by three core factors: (1) whether the party's later position is clearly inconsistent with its earlier position, (2) whether acceptance of the later inconsistent position would create the perception that either the first or the second court was misled, and (3) whether the assertion of the inconsistent position would create an unfair advantage for the asserting party or an unfair detriment to the opposing party.

Anfinson v. FedEx Ground Package Svs., Inc., 174 Wn.2d 851, 861-862, 281 P.3d 289, 294-95 (2012) (internal punctuation and citations omitted). Judicial estoppel applies to questions of law as well as questions of fact. *Id.*, at 296-297.

CR 68 offers of judgment and acceptances of such offers are reviewed using ordinary contract law principles. *Hodge v Development Services*, 65 Wn. App. 576, 581, 582 (1992); *Dussault v Seattle School District*, 69 Wn. App. 728, 733 (1993). Division Two of the Court of Appeals has thoroughly discussed the legal principles that apply to interpreting the contractual nature of an offer of judgment. *Lietz v. Hansen Law Offices*, 166 Wn. App. 571 (2012). The Court therein cited to *Seaborn Pile Driving Co. v Glew* 132 Wn App 261 (2006), which, at page 270 cites to *Berg v. Hudesman*, 115 Wn. 2d 657, 669 (1990) where the Supreme Court held “We hold that extrinsic evidence is admissible as to the entire circumstance under which the contract was made, as an aide to ascertaining the parties’ intent.” The *Berg* court then said “We thus reject the theory that ambiguity in the meaning of the contract language must exist before evidence of the surrounding circumstances is admissible. Cases to the contrary are overruled.” *Berg, supra* at 669.

With those principles in mind, the new documents accepted into this record showing the entire circumstance under

which the contract was made must be considered to determine the parties' intent.

On July 26, 2017, at 3:36 p.m., the attorneys for the only remaining Defendants in the case (Murphy Resources, Inc. and Greg and Jolynne Murphy) send counsel for Webster the Offer of Judgment attached to the Motion to Supplement the Record as Exhibit A. Sean and Jill Murphy were no longer Defendants as they had been previously dismissed on Defendants' summary judgment motion. *Id.*

On August 2, 2017, at 9:48 a.m., Webster's attorney sent Defendants' attorneys a request to see the Judgment Defendants sought to be entered if the Offer of Judgment was accepted. *See* Exhibit B to Motion to Supplement the Record.

On August 2, 2017, at 1:19 p.m., Defendants' attorneys sent Webster's attorney the Judgment they proposed be entered upon an acceptance of the offer of judgment. The Order contemplated by Defendants included a dismissal of the case with prejudice, and no fees and costs to either party; to wit: "The parties shall bear their own attorneys' fees and costs. In addition, upon satisfaction of this judgment, all plaintiffs' claims

that were (or could have been) asserted in this case shall be dismissed with prejudice.” *See Exhibit C* to Motion to Supplement the Record.

On August 2, 2017, at 2:51 p.m., Webster’s attorney responded and stated that the proposed judgment “does not track the judgment offered”, and asked for the document in WORD so he could send a proposed judgment he thought tracked the offer of judgment. *See Exhibit D* to Motion to Supplement the Record.

On August 2, 2017, at 4:24 p.m., Webster’s attorney sent Defendants’ attorney a proposed judgment that tracked the offer of judgment. It changed the judgment Defendants had proposed in two ways: it dropped out the part that “dismissed with prejudice”; and it dropped out the part that addressed attorney fees and costs, as the only statutory basis for attorneys’ fees, RCW 4.24.630, had been dismissed from the case previously on Defendants’ summary judgment motion. *See Exhibit E* to Motion to Supplement the Record.

On August 3, 2017, at 12:43 p.m., Webster’s attorney sent Defendants’ attorney an acceptance of the offer of judgment

“provided the judgment I sent back in WORD yesterday is entered, as the one you sent down first was slightly inconsistent with the offer.” *See* Exhibit F to Motion to Supplement the Record.

On August 3, 2017, at 1:45 p.m., Defendants attorneys sent back an email stating “I’m working to get authority for the revised judgment you emailed me yesterday . . .” *See* Exhibit G to Motion to Supplement the Record.

On August 4, 2017, at 8:18 a.m., Defendants attorney wrote Webster’s attorney “We have an agreement. The judgment you sent back to me is acceptable. . . .” *See* Exhibit H to Motion to Supplement the Record.

On August 4, 2017, at 10:24 a.m., Webster’s attorney sent Defendants attorneys the signed acceptance of offer of judgment. That acceptance stated explicitly that the offer was accepted “provided, as the parties have agreed, the attached form of judgment is entered.” That attached form of judgment omitted the portion that the parties would bear their own fees and costs, and that the case would be dismissed upon satisfaction of the

judgment being entered. *See* Exhibit I to Motion to Supplement the Record.

On August 7, 2017, at 2:37 p.m., Defendants attorneys sent Webster's attorney a form of the judgment which they had slightly modified which was the final form used, but which still omitted the parts pertaining to fees and costs and dismissal of the case. *See* Exhibit J to Motion to Supplement the Record.

On August 7, 2017, at 3:03 p.m., Webster's attorneys sent Defendants attorneys the final form of the judgment requested by Defendants attorneys, signed. *See* Exhibit K to Motion to Supplement the Record.

On August 11, 2017, the Lewis County Superior Court sent the attorneys for both parties an email asking for an Order of Dismissal. *See* Exhibit L to Motion to Supplement Record.

On August 11, 2017, at 11:00 a.m., Webster's attorney answered the Court, and copied Defendants attorneys, stating "An order of dismissal is not needed nor contemplated. Just the judgment." *See* Exhibit M to Motion to Supplement Record.

On August 15, 2017, at 9:08 a.m., Defendants' attorneys' office sent the signed judgment to the Court by "reply all" to the

email sent by Webster's counsel on August 11, 2017 at 11:00 a.m.
See Exhibit N to Motion to Supplement the Record.

On August 24, 2017, at 11:55 a.m., the Court sent a copy of the judgment entered, by "reply all" to the email sent by Defendants' attorney's office on August 15, 2017 at 9:08 a.m.
See Exhibit O to Motion to Supplement Record.

From this series of exchanges, the intent of the parties to the contract formed by the CR 68 offer and acceptance can be ascertained. That contract did not dismiss "all plaintiffs' claims that were (or could have been) asserted in this case." The contract did not provide that each party bear its own fees and costs. Instead, that contract only provided that the remaining defendants, Murphy Resources and Greg and Jolynne Murphy, would have judgment entered against them in the amount of \$40,000. That occurred.

What did not occur was settlement and dismissal of "all plaintiffs' claims that were (or could have been) asserted in this case". Plaintiffs were very careful, and fully candid, in informing Defendants that Plaintiffs would not release their claims against Defendants, Sean and Jill Murphy, which claims

had been previously dismissed, erroneously. Nor would Plaintiffs release their claims that RCW 4.24.630 applied for the damage to their land or the cutting of their trees, which claims had been previously dismissed, erroneously. Nor would Plaintiffs release their claims to attorneys' fees and costs pursuant to RCW 4.24.630, which claims had been previously dismissed, erroneously.

Thus, given the judicial estoppel pursuant to *Anfinson v. FedEx Ground Package Svcs., Inc.*, 174 Wn.2d 851, 861-862, 281 P.3d 289, 294-95 (2012), which applies to questions of law as well as questions of fact, (*Id.*, at 296-297), and which bars Respondents from claiming that Sean Murphy was released by the release of his brother Greg Murphy, and given Sean Murphy's clear status as the principal of his agent brother Greg, as well as his own independent bad acts, Sean Murphy remains in the case, and this Court must reverse the second order on summary judgment which dismissed him.

If this Court reverses the order on the first summary judgment, and restores Appellants' claims under RCW 4.24.630,

Appellants are entitled to seek fees against Greg Murphy and his company, which were not resolved in the CR 68 procedure.

If this Court reverses the order on the second summary judgment, and restores all of Appellants' claims against Sean Murphy, he will face liability for damages caused by the trespass under RCW 64.12.030 (even if the first summary judgment is not reversed) and also under RCW 4.24.630 (if this Court reverses the first order on summary judgment).

Besides the estoppel that bars Respondents from claiming a release of Sean Murphy due to his status as principal, a status they wrongfully convinced the trial court he did not have, Respondents also argue incorrectly that Sean Murphy's direct liability was not before the trial court in Appellants' response. On page 3 of Appellants' Response to the Motion for Summary Judgment, at lines 12-17, Appellants identified several breaches of duty by Sean Murphy. CP 350. Likewise, pages 1-8 of the Declaration of Jon Cushman sets forth the deposition testimony of Sean Murphy identifying duties he himself breached. CP 358-365. Finally, in the Motion for Reconsideration, at page 6, Appellants argued that Sean Murphy was directly liable for

failing to exercise his authority and require his agent to exercise ordinary care in locating the boundary. CP 430.

This misunderstanding by Respondents arises out of Respondents' efforts to fix sole blame on Greg Murphy, as a contractor, when the facts put before the trial court show he conclusively was not a contractor, and showed numerous breaches of duty by Sean Murphy, as well as by Greg Murphy.

In contrast to vicarious liability, claims of direct liability against a principal are not affected by release of an agent. *See Seattle W. Indus. v. David A. Mowat Co.*, 110 Wn.2d 1, 5, 750 P.2d 245 (1988) (rejecting a *Glover* argument where there were direct claims against the alleged principal).

Respondents also argue that the trial court was correct in not hearing Appellants' cross-motion for summary judgment that damages be tripled as a matter of law. Respondents err in this regard. If the relief sought in the cross-motion for summary judgment was pled as part of Respondents' original claims, and is based on undisputed facts, such a cross-motion is properly before the Court, and can be granted. *See, generally*, Editorial Comment on CR 56 regarding cross-motions; *Leland v. Frogge*,

71 Wn.2d 197, 201,427 P.2d 724 (1967); *Burris v. General Insurance*, 16 Wn.App. 73, 75-76, 553 P.2d 125 (1976).

It was error for the trial court to disregard the cross motion. Appellants pled for this relief in their Complaint; they identified this relief as required as a matter of law in response to Respondents' first motion for summary judgment; they raised the same issue in their Motion for Reconsideration filed after the trial court entered judgment for Respondents on the first summary judgment motion, and argued that, as a matter of law, the damages in this case of an admitted trespass were required to be tripled under either statute (RCW 4.24.630 or RCW 64.12.030); and Appellants raised the issue again as a cross-motion in response to Respondents' second motion for summary judgment and in the Motion for Reconsideration filed thereafter.

By the time the second motion for summary judgment was being heard, Sean and Greg Murphy had been deposed and had admitted the trespass, admitted that neither knew where the boundary was located, admitted that no survey had been done and admitted that no effort had been made to reach agreement with Appellants as to a boundary line location. CP

358-378. On these admitted facts, damages were required to be tripled as a matter of law regardless of which statute applied.

The claim was made in Appellants' Complaint; the issue was briefed four times; and by the second motion for summary judgment, Sean and Greg Murphy had been deposed and had admitted that there were no undisputed facts regarding this trespass: it occurred, the common boundary was not known to either Murphy, no survey was done, and no agreement was even attempted with the adjoining property owners (Appellants).

Although Appellants seek reversal of the trial court's order dismissing claims under RCW 4.24.630, for damage to land as well as for the cutting of trees, even if this was a correct determination, the exception that Respondents rely upon at RCW 4.24.630 (2) forces a defendant seeking refuge from RCW 4.24.630 to acknowledge liability under the only statute cited as providing the exception: RCW 64.12.030. That statute provides only triple damages and there is no mitigation allowed.

If the Legislature wanted to provide the opportunity for mitigation to a trespasser taking refuge under this exception at RCW 4.24.630 (2), it knew how to cite to RCW 64.12.040. *See*

RCW 64.12.035, which provides immunity for electric utilities removing vegetation in close proximity to electric facilities: “An electric utility is immune from liability under RCW 64.12.030, 64.12.040, and 4.24.630.” (emphasis added).

3. Conclusion.

Sean Murphy was not released when Plaintiffs settled with Greg Murphy. Defendants are estopped from claiming Sean was Greg’s principal, and therefore was released. They successfully persuaded the trial court to make an error when they insisted that Sean was not Greg’s principal, and the trial court dismissed Sean. They cannot now claim Sean was Greg’s principal.

There were facts showing damage to land before the trial court, and it was improper, under *Gunn v. Rieley*, 185 Wn.App. 517 (2015), footnote 6, to dismiss claims under 4.24.630. There was damage to land at issue. Galen Wright and Audrey Webster both testified in declaration that there was damage to land.

The exception found at RCW 4.24.630(2) does not amend the statute. RCW 4.24.630 provides relief not available under RCW 64.12.030 (damage to land, restoration costs, expert costs,

and attorneys' fees), so by its own terms RCW 4.24.630(2) does not require dismissal of the claims made here under RCW 4.24.630. RCW 4.24.630 unequivocally allows claims for cutting trees alone, even in the absence of damage to land. Even if the exception at RCW 4.24.630(2) applied, the result is liability under RCW 64.12.030, which is for triple damages.

This Court should reverse and remand. The claims under RCW 4.24.630 should be restored, and Sean Murphy should not be dismissed. Instead a trial should be held on damages alone, and the trial court should be instructed to triple all damages found at trial.

On remand, Appellants should be allowed to seek an award of attorney's fees and costs against Greg Murphy, as such relief was reserved by them in the parties' contract formed under the CR 68 procedure, and RCW 4.24.630 allows for such fees and costs.

Respectfully submitted this 12 day of March, 2018.

/s/ Jon E. Cushman
Jon E. Cushman, WSBA #16547
Attorney for Appellants
joncushman@cushmanlaw.com

CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on the date indicated below, I caused the foregoing document to be filed and served by the method indicated below, and addressed to each of the following:

Court of Appeals, Div. II 950 Broadway, #300 Tacoma, WA 998402	<input type="checkbox"/> U. S. Mail <input type="checkbox"/> Legal Messenger <input checked="" type="checkbox"/> Electronic Filing
David J. Russell Mirén C. First Keller Rohrback, L.L.P. 1201 Third Avenue, Suite 3200 Seattle, WA 98101 drussell@kellerrohrback.com mfirst@kellerrohrback.com mjohnston@kellerrohrback.com akliemann@kellerrohrback.com	<input type="checkbox"/> U. S. Mail <input type="checkbox"/> Legal Messenger <input checked="" type="checkbox"/> Electronic Mail

DATED this 17 day of March, 2018.

/s/ Rhonda Davidson
Rhonda Davidson, Legal Assistant
rdavidson@cushmanlaw.com
924 Capitol Way S.
Olympia, WA 98501
360-534-9183

CUSHMAN LAW OFFICES, P.S.

March 12, 2018 - 11:15 AM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 50843-5
Appellate Court Case Title: Audrey B. Webster, et al., Appellants v. Murphy Resources, Inc., et al.,
Respondents
Superior Court Case Number: 15-2-00791-1

The following documents have been uploaded:

- 508435_Briefs_20180312111411D2654640_2897.pdf
This File Contains:
Briefs - Appellants Reply
The Original File Name was Reply Brief.pdf

A copy of the uploaded files will be sent to:

- akliemann@kellerrohrback.com
- drussell@kellerrohrback.com
- mfirst@kellerrohrback.com
- mjohnston@kellerrohrback.com

Comments:

Sender Name: Rhonda Davidson - Email: rdavidson@cushmanlaw.com

Filing on Behalf of: Jon Emmett Cushman - Email: joncushman@cushmanlaw.com (Alternate Email:)

Address:
924 Capitol Way S.
Olympia, WA, 98501
Phone: (360) 534-9183 EXT 360

Note: The Filing Id is 20180312111411D2654640