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NO. 51294-7-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

DAVID COOKE AND KELLY RATZMAN-COOKE,
a married couple,

Respondents,

vs.

CHU-YUN TWU, an individual,

Appellant.

APPELLANT CHU-YUN TWU'S
OPENING BRIEF

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I. INTRODUCTION

Appellant Chu-Yun Twu appeals from the denial of her motion for attorney fee awards under Chapter 4.24 RCW after she prevailed on small damage claims at a bench trial. The case arose from a residential property dispute between Twu and her neighbors, the Cookes, who sued Twu asserting she violated a view easement benefitting their uphill property. The Cookes sought damages under \$10,000 for interference with their view easement. After a two-day bench trial, the Honorable Daniel L. Stahnke rejected the Cookes' interference claim. Ms. Twu was entitled as a matter of law to attorney fees for her successful defense. The Superior Court erroneously denied Twu an attorney fee award.

Additionally, after the Cookes sued her, Twu asserted a timber trespass counterclaim because the Cookes had cut down her cherry tree. She offered to settle her claims for \$2,002.76. CP 39. The Superior Court awarded her damages of \$5,364 on the timber trespass claim, CP 34, 35, entitling her to attorney fees under RCW 4.84.260 for beating her settlement offer. The Superior Court erroneously denied her an award of attorney fees on this claim. The Superior Court refused to reconsider its denials.

This Court should reverse and remand for a determination

and award of Twu's attorney fees incurred on the two small damage claims.

II. ASSIGNMENT OF ERROR

The Superior Court erred when it denied, and failed to reconsider denial of, awards of attorney fees to Twu under RCW 4.84.250 when Twu had (1) successfully defended the Cookes' small damage claim for interference with an easement, and (2) obtained a money judgment on her timber trespass claim that exceeded her settlement offer including the timber trespass claim.

III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Is Twu entitled to attorney fees under RCW 4.84.250 and RCW 4.84.270 as a matter of law because she prevailed in defense of the Cookes' damage claim for interference with an easement?

2. Is Twu entitled to attorney fees under RCW 4.84.250 and RCW 4.84.260 as a matter of law because she recovered more damages on her successful timber trespass claim than she had offered in settlement?

IV. STATEMENT OF THE CASE

Twu purchased a home in Clark County, Washington in June 2009. Her upland neighbors are the Cookes. Interpretation and application of a view easement that burdens Twu's property and benefits the Cookes' property strained their relationship. The Cookes instituted this lawsuit in January 2016. CP 31. The parties

tried their claims to the Honorable Daniel L. Stahnke October 23-24, 2017. CP 31. Twu accepts the Superior Court's resolution of the parties' claims at trial, but appeals the denial of her request for an attorney fee award for prevailing on both small damage claims.

A. When Twu purchased her home in 2009, she agreed to a limited view easement to benefit her neighbors the Cookes to obtain a necessary lot line adjustment.

Twu entered into a purchase and sale agreement for a home in Clark County, Washington in April 2009. Her upland neighbors would be the Cookes. At the time, scrutiny of the property descriptions required a boundary line adjustment, which the parties executed in May 29, 2009 to close the sale transaction. CP 32. See *also* CP 6-9. In order to cooperate on the boundary line adjustment, the Cookes wanted Twu to record a view easement to benefit the Cookes. She agreed to replace an alleged prior view easement agreement between the prior owners of the parcels (see CP 10-15) with a new view easement. CP 69-70. See CP 19-20 (June 2009 "View Easement").

The new view easement agreement specifically excluded Twu's house and existing vegetation older than 10 years from its terms, as follows:

The scope of this easement shall be limited to the right of Cooke to require that the view from the Lot 1 Property [Cooke] over and across the Lot 2 Property [Twu] be free from any new structure or any vegetation in excess of thirty (30) feet measured from the foundation of the existing home on the Lot 2 Property that would obscure or impair such view. **This is not pertaining to any existing structure prior to the signing of this agreement nor existing vegetation that is older than 10 years prior to the signing of this agreement.** Existing structure is defined as any structure in place prior to the signing of this agreement.

CP 19 ¶ 2 (emphasis added); CP 69-70. Issues at trial would include from precisely where the 30 foot easement should be measured and whether Twu's cherry trees were "existing vegetation ... older than 10 years." CP 69-70.

B. The Cookes cut down a cherry tree on Twu's property, then sued Twu in 2016 asserting their interpretation of the view easement and a claim for damages for interference with the view easement.

Without authorization from Twu, the Cookes cut down one of her three blossoming cherry trees that had existed on her property at the time she purchased it in 2009. CP 72. CP 25 (Counterclaim). This resulted in increased conflict. Disagreement about the interpretation of the 2009 view easement ensued. CP 31.

The Cookes initiated this action in January 2016. CP 31. See also CP 1 (Complaint). The Cookes alleged three causes of

action: declaratory relief to determine interpretation of the view easement, damages for interference with the view easement, and injunctive relief to enforce the view easement. *Id.* See also CP 3-4. The Cookes specifically alleged damage from the interference in an amount less than \$10,000. CP 4 (Complaint ¶ 13, Prayer D).

C. Twu denied the Cookes' claims, asserted a counterclaim of timber trespass for the lost cherry tree, and made an offer of settlement prior to trial.

Twu denied the Cookes' claims in her Answer (CP 31; see also CP 21-24), and asserted as a counterclaim the Cookes' timber trespass. CP 31. See also CP 25-27 at ¶¶ 22-27, ¶¶ 31-35. She alleged damages not to exceed \$10,000. CP 28 ¶ 3(b). She alleged a right to attorney fees pursuant to RCW 4.84.250, providing notice to the Cookes of her small damage claim and the right to attorney fees under the statute. CP 28.

Twu offered to settle the lawsuit on July 12, 2017 for the Cookes' payment of \$2,002.76. CP 39.

D. After a bench trial, the Superior Court reached a verdict in Twu's favor on both the Cookes' interference claim and Twu's timber trespass claim.

The Superior Court heard the case at a bench trial from October 23-24, 2017. CP 31. The Superior Court resolved the

issue of how to measure the view easement height restriction by holding in favor of the Cookes that the parties intended the restriction be measured from the front foundation of Twu's house instead of the back. CP 31-32. The Superior Court found in favor of Twu on both small damage claims, and denied injunctive relief.

1. Twu successfully defeated the Cookes' interference claim when they recovered nothing.

The Cookes' claim of interference failed. Where they had pleaded damages in the amount of \$10,000 or less, they recovered nothing. The Cookes failed to prove that Twu interfered with their easement by not trimming her cherry trees.

Based on the terms of the view easement, the Cookes had to prove that cherry trees were included in the easement. The easement only applied to vegetation "planted after 1999" based on its express language. CP 19 ¶ 2 (emphasis added); CP 69-70. The Superior Court found that the view easement proved by the Cookes did not include the cherry trees. The Superior Court stated in the Judgment, "Based on this evidence, or lack of evidence, the court denies any request for view easement trespass damages." CP 33. The Judgment further states, "Cooke's interference with view easement claim is denied." CP 35. The Superior Court ruled

as the trier of fact that the Cookes failed to prove that the cherry trees violated the view easement because, based on its terms, only vegetation planted after 1999 would violate the view easement. The Judgment states, “Cooke failed to meet their burden of establishing that the cherry trees were planted after 1999 and therefore they are exempt. The record includes limited photographic evidence showing which vegetation might have been exempt in 1999, and this evidence establishes that the flowering and two other cherry trees were exempt.” CP 32. This conclusion, along with other evidence, supported the determination that Twu had not interfered with the view easement. CP 33.

The Cookes as plaintiffs sought declaratory and injunctive relief and damages for alleged violations of the view easement. The Superior Court held the Cookes had the burden of proving, therefore, that the cherry trees were planted *after* 1999 to be subject to the express terms of the view easement that excluded vegetation planted prior to 1999. See CP 70; VR 5:6, 5:17-20.

2. Twu prevailed on her timber trespass claim, winning an award of \$5,364.

Twu prevailed on her timber trespass claim. Judge Stahnke awarded Twu \$5,364 for the timber trespass. CP 34; 35 (“Twu

timber trespass claim is granted resulting in a \$5,364 judgment for Twu and against the Cookes.”).

The Judgment includes significant findings in Twu’s favor against the Cookes. “In May 2013, Cooke cut a cherry tree belonging to Twu, on Twu’s property and that action was done willfully.” CP 34. “Cooke had sufficient facts and circumstances to eliminate any reasonable belief that the cherry tree was on their property.” CP 34. This included “significant surveying of the properties and the ultimate reconveyance of 2020 (Twu) and 2018 (Cooke) between the parties to eliminate the encroachment of the 2020 house onto 2018 property and to provide 2018 property up to the hillside from 2020.” CP 34.¹ “Based on this historical evidence and associated survey reports and mapping... there can be no justifiable reliance by Cooke on an alleged incorrect statement from a surveyor.” CP 34. The court rejected the Cookes’ protestations of their subjective belief that they had the right to cut the trees. *Id.*

Judge Stahnke underscored his view of the evidence that the Cookes’ actions were willful at a post-judgment hearing,

¹ This is a reference to each party’s property. Twu’s house address is 2020 NW Sierra Lane, Camas, Washington (“2020”), and is known as Lot 2. The Cookes’ house address is 2018 NW Sierra Lane (“2018”) and is known as Lot 1.

explaining:

Attorney Andersen: So—but what you—you found us guilty of trespass. And you trebled the damages. And the cases that you cited to are cases in which a party knows that there's a disputed area.

Judge Stahnke: I don't have any question in my mind that they knew.

Attorney Andersen: Okay.

Judge Stahnke: Do I need to say that more succinctly?

Attorney Andersen: Well, the –

Judge Stahnke: I have no doubt that they knew, when they went down and chopped Twu's cherry tree, that that was not on their property.

VR 34:7-20. After explaining further to the Cookes' counsel that the evidence showed the Cookes' intimate familiarity with their property, multiple surveys of the properties and multiple interactions by the Cookes involving the properties, Judge Stahnke also said, "So I don't question for a minute that these folks all had it all figured out." VR 35:16-17. He also reiterated his determination that the Cookes' actions were deliberate, as follows:

Judge Stahnke: It was blocking their view—

Attorney Andersen: Yeah.

Judge Stahnke: -- and they wanted it gone.

VR 35:19-21.

E. **The Court denied Twu's post-judgment motion for attorney fees under RCW 4.84.250 though she prevailed on both money damage claims.**

The parties pled damages less than \$10,000 (CP 4 ¶ 13, CP 28 ¶ 3(b)), and Twu specifically prayed for attorney fees under RCW 4.84.250. CP 28. Without any briefing, the Superior Court ruled in the Judgment that it would deny fees, stating,

[B]oth parties plead for an award of attorney fees pursuant to RCW 4.84.010 and 4.84.250. An analysis of the prevailing party requires the court to determine which claims presented by the parties were successful. Cooke prevailed on the declaratory judgment establishing the 30-foot start measurement at the front foundation and **Twu prevailed on the excluded vegetation as well as the trespass for cutting the cherry tree. Twu also prevailed on Cooke's interference with view rights and neither party prevailed on injunctive requests.** Under this analysis, neither party is the prevailing party and therefore each shall be responsible for their own attorney fees and costs.

CP 34-35 (emphasis added). The Superior Court found that Twu had prevailed on the trespass and interference claims, but denied fees by considering all the claims in the litigation and concluding that no party prevailed in the overall litigation.

Twu moved post-judgment for reconsideration of this denial of an award of fees regarding the two money damage claims under RCW 4.84.250, 4.84.260 and 4.84.270. CP 41-47. Twu had successfully defended the Cookes' interference with an easement

claim. The Cookes recovered no damages. On her timber trespass claim, Twu recovered \$5,364, more than she had offered to accept to settle the case. She argued that the Court *must* award fees to the prevailing party under RCW 4.84.250 on both small damage claims at issue, without consideration of which party prevailed on the non-monetary issues. CP 42-47. A declaration supported Twu's motion for reconsideration putting before the Court Twu's pre-trial offer of settlement on the timber trespass claim. CP 39.

The Superior Court denied the motion for reconsideration and an award of fees to Twu. CP 65.

V. ARGUMENT

This Court should reverse the denial of an award of attorney fees to Twu on the small damage claims as the prevailing party under RCW 4.84.250. The Superior Court erred as a matter of law in denying an award. It considered too many claims in the lawsuit, including the non-monetary claims, instead of focusing on which party prevailed on the fee claims at issue under RCW 4.84.250, which are those claims seeking money damages under \$10,000. The Superior Court's legal analysis was incorrect. The Court should have granted as a matter of law attorney fee awards for the

small damage claims on which Twu prevailed.

A. Standard of review is de novo

A party's entitlement to a fee award is reviewed for legal error. *MJD Props., LLC v. Haley*, 189 Wn. App. 963 (2015). Interpretation of a statute is reviewed for legal error. *Williams v. Tilaye*, 174 Wn.2d 57, 61 (2012).

In applying these *de novo* standards of review, this Court should reverse and remand for an award of fees to Twu.

B. Twu is entitled to an award of attorney fees as the prevailing party on the small damage claims pursuant to RCW 4.84.250, RCW 4.84.260 and RCW 4.84.270.

This Court should reverse and hold as a matter of law that RCW 4.84.250, RCW 4.84.260 and RCW 4.84.270 provide for an award of fees to Twu. The Superior Court should have considered only the claims for money damages to evaluate the motion for fees. Twu prevailed in defeating the Cookes' claim for damages under \$10,000 for interference. This entitled her to an award for successful defense of that claim under RCW 4.84.250 and RCW 4.84.260. Twu also prevailed when she beat her money offer to settle the case, including her claim for money damages for timber trespass. She offered to accept \$2,002.76 to resolve the lawsuit, including her sole claim for money damages: the timber trespass

claim. The Cookes refused the offer. The Superior Court then awarded Twu \$5,364 on the timber trespass claim. CP 34; 35. This entitled her to an award for successful prosecution of the timber trespass claim under RCW 4.84.260 and RCW 4.84.270.

The Superior Court denied Twu all fees on the incorrect rationale that no party substantially prevailed in the entire lawsuit. This was an incorrect analysis. The Superior Court should have evaluated each small damage claim on its own pursuant to the applicable portion of the statute. Under the correct legal analysis, Ms. Twu should receive fee awards.

1. The Superior Court erred when it considered all claims to evaluate whether Twu prevailed under RCW 4.84.250 instead of only the relevant small damage claims.

RCW 4.84.250 concerns only claims for small money damages. These provisions do not apply to claims for declaratory or injunctive relief. The Superior Court erred as a matter of law when it evaluated whether Twu had prevailed for purposes of receiving a fee award by considering all claims in the lawsuit, including the declaratory and injunctive relief claims. It denied a fee award because no party substantially prevailed on all issues in the entire litigation. This was not the correct analysis. This Court

should reverse. The Superior Court should have determined whether Twu was the prevailing party under the statute as to each small money damage claim.

The statute allowing a fee award applies only to the claims in the lawsuit that seek small money damages, as follows:

[I]n any action for damages where the amount pleaded by the prevailing party as hereinafter defined, exclusive of costs, is seven thousand five hundred dollars or less, there shall be taxed and allowed to the prevailing party as a part of the costs of the action a reasonable amount to be fixed by the court as attorneys' fees. After July 1, 1985, the maximum amount of the pleading under this section shall be ten thousand dollars.

RCW 4.84.250 (emphasis added). By its plain terms, the statute allows fees on small money damage claims to the party that prevails. The Cookes pleaded their claim for interference with the view easement as a claim for small damages. See CP 4 (Complaint ¶ 13, Prayer D.) Twu pleaded her claim for timber trespass as a claim for small damages. See CP 28 ¶ 3(b). To decide the request for an attorney fee award, the Superior Court should have evaluated these claims independently, not all the claims in the litigation including the declaratory and injunctive relief claims.

The Court of Appeals has rejected an argument that

inclusion of other claims in the action, such as claims for injunctive relief, disqualifies a party from the right to claim fees under RCW 4.84.250 for prevailing on damages claims. *Hanson v. Estell*, 100 Wn. App. 281, 290 (Div. III 2000). “Nothing in the statute prohibits parties from seeking other relief besides damages and this court does not so construe its requirements.” *Id.* *Hanson* holds that pleading other claims in addition to damage claims does not make a statutory fee award unavailable to those parties that prevail on the monetary damage claims. Implicit in this holding is that the monetary damage claims must be evaluated separately from other claims. No case law states otherwise. Based on *Hanson*, the Superior Court should have considered only the small damage claims for purposes of a fee award.

As discussed below, a proper analysis of the outcome of the claims for small money damage—not the entire lawsuit—shows that Twu prevailed. She was, therefore, entitled to a fee award on both claims.

2. An award of fees to Twu is legally due under RCW 4.84.270 for her successful defense of the Cookes’ interference claim for money damages.

The Cookes specifically alleged damage from interference

with the view easement in an amount less than \$10,000. CP 4 (Complaint ¶ 13, Prayer D). They recovered nothing on this claim. CP 71 (“Based on this evidence, or lack of evidence, the court denies any request for view easement trespass damages.”). Pursuant to RCW 4.84.270, Twu is entitled to recover attorney fees for prevailing. This provision does not require that the defendant make an offer, but only requires that the plaintiff recover nothing, as follows:

The defendant, or party resisting relief, shall be deemed the prevailing party within the meaning of RCW 4.84.250, if the plaintiff, or party seeking relief in an action for damages where the amount pleaded, exclusive of costs, is equal to or less than the maximum allowed under RCW 4.84.250, recovers nothing, or if the recovery, exclusive of costs, is the same or less than the amount offered in settlement by the defendant, or the party resisting relief, as set forth in RCW 4.84.280.

RCW 4.84.270 (emphasis added). “A defendant is a prevailing party if the plaintiff recovers nothing....” *Target Nat’l Bank v. Higgins*, 180 Wn. App. 165, 173 (2014), citing RCW 4.84.270. Here, the Cookes as plaintiffs recovered nothing on their claim for interference with the easement. Twu necessarily prevailed. The Superior Court found that she prevailed. CP 34-35. As a matter of law, Twu prevailed and is entitled to an award of fees under RCW 4.84.270.

Twu successfully defended the Cookes' claim for money damages less than \$10,000 for interference. RCW 4.84.270 entitled Twu to an award of fees. This Court should reverse and remand for an award of fees allocated to successful defense of the interference claim.

3. An award of fees to Twu is legally due under RCW 4.84.260 because the Superior Court awarded Twu more on her timber trespass claim than she offered in settlement.

Twu offered to accept \$2,002.76 to settle the money damage claims with the Cookes prior to trial. CP 39. At trial, she won an affirmative judgment of \$5,364. CP 34; 35 ("Twu timber trespass claim is granted resulting in a \$5,364 judgment for Twu and against the Cookes."). Because she prevailed by winning money damages in excess of her settlement offer, she should have been awarded fees under RCW 4.84.260 for prevailing on her affirmative small damage claim.

The Cookes argued that she should not recover fees for her successful award on the timber trespass claims because her offer to settle for \$2,002.76 was not restricted to the timber trespass claim. CP 38-59. The Cookes offered no authority to support this argument showing that Twu could not include an offer on the small

money damage claims in an offer that addressed additional claims. Neither the statute nor case law restricts a settlement offer this way. The Court should reject the Cookes' argument. Twu's offer establishes that Twu won money damages in excess of her offer to settle for payment of only \$2,002.76. Instead, the Superior Court ordered the Cookes to pay her \$5,364. The money damage award shows she beat her offer.

RCW 4.84.280 establishes limitations on settlement offers, and Twu met those limitations. Twu met the limitations set forth in RCW 4.84.280, providing her offer at least 10 days prior to trial and 30 days after service and filing of the summons and complaint. Twu also did not communicate the offer to the Superior Court until after judgment in her motion for reconsideration. See CP 39. She met the conditions of the provision governing offers under the statute. The statute contains no language supporting the Cookes' argument that her settlement offer could not have included the non-monetary claims as well. The offer demonstrates that as to an exchange of money on her small money damage claim, she was willing to accept \$2,002.76. Her timber trespass claim was ultimately successful in a greater amount.

Hanson v. Estell, supra, demonstrates that other claims can

be asserted in the same lawsuit without voiding the right to attorney fees under RCW 4.84.250–.300. Here, the Court can evaluate whether Twu beat her offer on the monetary small money damage claims. She did. She offered to settle the lawsuit, specifically offering to accept \$2,002.76 as to the monetary claims. She prevailed by winning an award of \$5,364. She plainly won more than she had offered for the small money claims. As the prevailing party on her timber trespass claim, she was entitled to an award of fees.

McKillop v. Pers. Representative of Estate of Carpine, 192 Wn. App. 541, 548 (2016), supports an award in these circumstances. In *McKillop*, the plaintiff offered to settle for \$15,392, allocating \$5,000 to damages and \$10,392 to attorney fees and costs. 192 Wn. App. at 546. Her offer, which included attorney fees and costs, was held valid for purposes of an award under RCW 4.84.260. In holding that an award of fees was due under the same statute in the case at bar, the Court of Appeals required that the total amount of an offer (“a lump sum offer”) be compared to the total amount recovered to determine if a party beat her offer. 192 Wn. App. at 548-49. This Court can perform the same exercise. The total of Twu’s offer should be compared to the

total recovered to determine if she beat her offer. She did.

An award to Twu satisfies the goals of the statute. “The purpose of RCW 4.84.250 is to encourage out-of-court settlements and to penalize parties who unjustifiably bring or resist small claims.” *Target Nat’l Bank, supra*, at 173. “The obvious legislative intent is to enable a party to pursue a meritorious small claim without seeing his award diminished in whole or in part by legal fees.” *Id.* at 173-74, citing *Northside Auto Serv., Inc. v. Consumers United Ins. Co.*, 25 Wn. App. 486, 492, 607 P.2d 890 (1980). Here, Twu made a very reasonable offer to settle that included her only claim for money damages if the Cookes paid her the lump sum of \$2,002.76. Denying her a fee award when she received twice that amount would encourage resistance to small claims. Without an award, Twu’s successful pursuit of her meritorious small claim will be diminished by the significant legal fees she spent to prove her counterclaim. The goals of the statute are met by holding that fees should be awarded because she beat her monetary settlement offer, like the plaintiff in *McKillop*.

The Court should reverse and remand for a determination of fees allocated to successful prosecution of the timber trespass claim.

C. Request for attorney fees incurred on appeal.

If Twu wins a reversal and remand on appeal for determination of an award of attorney fees, this Court should award her attorney fees pursuant to RAP 18.1 and RCW 4.84.250 thru RCW 4.84.290.

Washington courts routinely apply RCW 4.84.250 thru RCW 4.84.290 at the appellate level to allow for recovery of fees incurred on appeal. See *Kingston Lumber Supply Co. v. High Tech Dev.*, 52 Wn. App. 864, 867–68 (1988); *Williams v. Tilaye*, 174 Wn.2d 57 (2012). RCW 4.84.290 expressly allows fees on appeal. Here, if Twu prevails regarding fees for successfully defending the Cookes' interference claim, she is entitled to fees on appeal pursuant to RCW 4.84.270. If Twu prevails regarding fees for successfully prosecuting her timber trespass claim, she is entitled to fees on appeal pursuant to RCW 4.84.260.

This Court should award fees incurred on appeal to Twu under these statutes.

VI. CONCLUSION

This emotionally taxing litigation involved two small damage claims that support a mandatory award of attorney fees to the

prevailing party. Twu's neighbors hauled her to court. As a matter of law, Twu prevailed in defeating the Cookes' claim for interference with the view easement. This supported an award of fees in Twu's favor for that claim. This Court should reverse and remand for a determination of the amount.

Further, Twu won her timber trespass claim. She received a money award far in excess of the amount for which she agreed to resolve the lawsuit. This Court should reverse and remand for a determination of reasonable fees on this claim as well.

Dated: June 6th, 2018.

SCHWABE, WILLIAMSON & WYATT, P.C.

By: /s/ Averil Rothrock
Averil Rothrock, WSBA #24248
Paige Spratt, WSBA #44428
*Attorneys for Appellant Chu-Yun
Twu*

APPENDIX A

6
(2)

FILED

2017 NOV 21 PM 2: 55

SCOTT G. WEBER, CLERK
CLARK COUNTY

**Superior Court of Washington
County of Clark**

DAVID COOKE AND KELLY RATZMAN-
COOKE, a married couple,
Plaintiffs,

vs

CHU-YUN TWU, an individual,
Defendant.

No. 16-2-00039-1

**Judgment and Order following trial
findings of fact and decision on
civil claims**

17-9-04114-8

I. Judgment/Order Summaries

1.1 Restraining Order Summary:

Does not apply. Restraining Order Summary is set forth below:

Name of person(s) restrained: _____ Name of person(s)
protected: _____ **See Paragraph 3.8.**

***Violation of a Restraining Order in paragraph 3.8 below with actual knowledge of its
terms is a criminal offense under Chapter 26.50 RCW and will subject the violator to
arrest. RCW 26.26.590.***

1.2 Money Judgment Summary:

Does not apply. Judgment Summary is set forth below:

- A. Judgment creditor Chu-Yun Twu
- B. Judgment debtor David Cooke and Kelly Ratzman-Cooke
a married couple
- C. Total judgment amount \$5,364.00
- E. Interest to date of judgment \$ 0
- F. Attorney fees \$ 0
- G. Costs \$ 0
- H. Other recovery amount \$ 0
- I. Principal judgment shall bear interest at 12% per annum
- J. Attorney fees, costs and other recovery amounts shall bear interest at n/a% per annum
- K. Attorney for judgment creditor Brad Anderson
- L. Attorney for judgment debtor Paige Spratt

Findings of Fact and Judgment

0-000000030

II. BASIS

Plaintiff (Cooke) filed a complaint on January 8, 2016 alleging interference by defendant (Twu) with a view easement entered May 22, 2009. Specifically the Cooke's first cause of action is declaratory establishing the height restriction on the Twu's property to be measured from the lowest point of the Twu house foundation. Cooke's second cause of action is for damages for Twu's interference with the Cooke view rights. Cooke's third cause of action requested an injunction against Twu's violation of the established easement together with rights to enter Twu property and remove obstructions.

Twu answered the complaint and alleged four affirmative defenses: Failure to state a claim, waiver, estoppel and unclean hands. Twu additionally counterclaimed for declaratory judgment, timber trespass and injunction against Cooke from interfering with her use of property.

This matter has come before this court for bench trial on October 23 and 24, 2017. The bench trial was conducted consistent with Plaintiff's January 31, 2017 Notice to Set for Trial. No objection to a non-jury trial was received. Therefore, the court has considered the witness testimony along with exhibits and now enters its findings of fact and conclusions of law.

III. FINDINGS OF FACT

On May 22, 2009 Twu and Cooke entered into a view easement identifying the Twu property as the servient estate and the Cooke property as the dominant estate.

The 2009 view easement restricted the Twu property (Lot 2) from interfering with a Columbia River gorge views from Cooke property (Lot 1). Specifically, Lot 2 was restrained from developing any structure of vegetation in excess of thirty (30) feet measured from the foundation of the existing home on Lot 2.

The 2009 view easement exempted from the view easement the existing structure as well as any vegetation that is older than 10 years prior to signing the agreement.

Evidence was presented to support a finding that the parties intended the front foundation as the measuring point for the 30 foot height restriction. Even though the dominant estate (Martel) failed to exempt the structure from the 1999 view easement supporting an argument that the house was not encroaching on the view and supporting a finding that the 305.32 foot top of foundation was intended. This finding is challenged by the fact that the servient estate (Devry) specifically added an exemption for the structure indicating that her understanding was the house may or was encroaching on the view restriction. In addition, on May 22, 2009 Twu (servient estate) emailed Cooke "As we discussed yesterday, I would like to have the language "not pertaining to any existing structure" as written in the original easement". Although not determinative of the 2009 intentions of the Cooke and Twu agreement it provides evidence of the intention of the 2009 agreement that the house (structure) was again exempted from the view restrictions. Again, if the agreement was to measure the 30 foot height restriction from 305.32 feet there would be no reason to exempt the structure.

As a result of increased conflict, damage to a cherry tree, and disagreement about the interpretation of the 2009 view easement litigation was necessary to establish legal guidelines for the scope of the view easement.

Findings of Fact and Judgment

0-000000031

The parties also entered a May 29, 2009 boundary line adjustment which provided for documented survey maps and calculations outlining the modified boundary line between 2020 and 2018 properties. As of May 2009 there could be no dispute between the parties regarding the established property boundary.

Court finds that the estimate (\$1,788) for replacement of the cherry tree on Twu property by Treewise is the most persuasive. This finding eliminates the need or use of the Holen formula which arrived at a \$2,200.00 value.

IV. CONCLUSIONS:

VIEW EASEMENT:

As identified above, the parties created a dominant and servient estate view agreement of the Columbia River Gorge. A dispute has developed in establishing the height restriction on Lot 2 based upon the validly created view easement. The court must determine the original parties' intent to an easement from the instrument as a whole. If the plain language of the instrument is unambiguous, the court will not look beyond that language nor consider extrinsic evidence.

Based upon the eleven and one-half (11.5) foot difference between the front foundation and the back foundation of Lot 2's house a dispute regarding the point of beginning for the 30 foot height restriction does not and cannot measure up to the clear and unequivocal standard and is, therefore, ambiguous as a matter of law.

The court's primary task in interpreting a restrictive covenant is to determine the drafter's intent and if ambiguous to look to extrinsic evidence and the surrounding circumstances to determine the intent of the view easement. In evaluating the evidence presented in this case, the purpose for which the view easement was created is paramount. The purpose for the view easement was to maintain Lot 1's view of the Columbia River Gorge. Cooke alleges that establishing the starting point for the 30 foot height restriction on Lot 2 at 305.32 feet would increase the easement burdens in its use and enjoyment and/or frustrate the purpose for which the view easement was created. Based upon the evidence and considering the extrinsic evidence of historical use, the establishment of a beginning point for measuring the 30 foot restriction shall be at 293.79 feet. This ruling is consistent with the exemption of the residential structure which exceeded the 30 foot height restriction. Had the structure been below the 30 foot height restriction there would have been no reason to exempt it.

Notwithstanding the above ambiguity where the start point for the 30 foot measurement begins, the balance of the view easement is otherwise clear and unambiguous. There was considerable trial testimony/discussion about category 1, 2 and 3 vegetation which is not relevant to the court's ruling. The 2009 view easement exempts both the residential structure and vegetation planted prior to 1999 from the view restrictions. As such, the cherry trees identified in Exhibit 127 are exempt from the view easement height restriction. Cooke failed to meet their burden of establishing that the cherry trees were planted after 1999 and therefore they are exempt. The record includes limited photographic evidence showing which vegetation might have been exempt in 1999, and this evidence establishes that the flowering and two other cherry trees were exempt.

Findings of Fact and Judgment

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DEFENDANT’S INTERFERENCE WITH VIEW RIGHTS:

Cooke requests an award of damages based upon a finding that Twu has interfered with their view of the Columbia River Gorge. Upon an invasion of Cooke’s view they are entitled to such damages as they could prove. The analysis is whether the encroachment of the vegetation can be regarded as a trespass, or the interference of an easement, the damages, if any, are the same; if the invasion was permanent, the damages would be the reduction in market value due to its presence, and if it was temporary, the damages would be the cost of restoration and the loss of use. The Cooke’s offered no evidence that their property had been reduced in market value, other than their own testimony that use value was diminished when the view was obstructed. Where pecuniary damages are sought, there must be evidence not only of their actuality but also of their extent, and there must be some data from which the trier of the fact can with reasonable certainty determine the amount. The evidence Cooke presented during trial was the loss of enjoyment and view from the developed boccio court at the base of their property. This evidence was punctuated by allegations that the loss of enjoyment, and therefore view, was caused by a third party’s interference, not by Twu. The claim involved a heightened neighbor conflict and excessive and intimidating watering of plants on the hillside. Based upon this evidence, or lack of evidence, the court denies any request for view easement trespass damages. Further, by establishing that the cherry trees are exempt from the view easement provisions, there can be no trespass of the view easement when those trees exceeded any height restriction, associated with new vegetation.

INJUNCTION:

The granting or withholding of an injunction is addressed to the sound discretion of the trial court to be exercised according to the circumstances of the particular case. An injunction does not issue to a petitioner as an absolute right and is granted only on a clear showing of necessity. By establishing view easement height restrictions on the servient estate Cooke has adequate remedies under the law to enforce the restrictions. There is no necessity to allow the Cookes access to the Twu property. There are easement provisions for maintaining trees; however this must be accomplished with permission from the servient estate owner.

TWU AFFIRMATIVE DEFENSES:

Equitable Estoppel: Before the court can apply equitable estoppel, three things must occur:

- (1) an admission, statement, or act inconsistent with the claim afterwards asserted;
- (2) action by the other party on the faith of such admission, statement, or act; and
- (3) injury to such other party resulting from allowing the first party to contradict or repudiate such admission, statement, or act.

Twu argues that Cooke should be estopped from making claim to view easement and vegetation restrictive covenants below the 335.32 foot height from the foundation because of various email discussions. Courts disfavor equitable estoppel; thus, the reviewing court requires the aggrieved party to prove every element with clear, cogent, and convincing evidence, and also to show detrimental reliance. Twu fails to carry this burden. The dispute regarding the 30 foot measuring start point has been ambiguous from the inception of the easement agreement.

Failure to State a Claim or Cause of action: Claim or Cause of action may properly be granted only when it appears beyond doubt that the plaintiff cannot prove any set of facts that would (a) be consistent with the complaint and (b) warrant relief. Thus, a CR 12(b)(6) motion may not properly be granted if even a

hypothetical set of facts is conceivably raised by the complaint and legally sufficient to support a claim. As decided in this ruling, the plaintiff has prevailed on their declaratory claims therefore this affirmative defense is denied.

COUNTERCLAIM:

DECLARATORY JUDGMENT: As identified above, the Cooke claim for declaratory judgment establishing the height restriction resolves this counterclaim.

TIMBER TRESSPASS:

Liability Under RCW 64.12.030 occurs whenever any person shall cut down, girdle, or otherwise injure, or carry off any tree ... on the land of another person ... without lawful authority, in an action by the person ... against the person committing the trespasses. Furthermore, any judgment for the aggrieved party shall be for treble the amount of damages claimed or assessed so long as the trespasser's conduct in removing the tree was both willful and without lawful authority.

Cooke admits that they cut down a cherry tree on Twu's property and defend the action by arguing that the destruction of the tree was not willful. The rule is well established in Washington that there must be an element of willfulness on the part of the trespasser to support treble damages under RCW 64.12.030. In this context, willful simply means that the trespass was not casual or involuntary. Cooke had the burden of proving that a trespass was casual or involuntary once the fact of trespass and the damages caused thereby have been shown by Twu.

Substantial evidence was presented that Cooke was keenly aware of boundary lines between 2020 NW Sierra Lane and 2018 NW Sierra Lane. Primarily, there was significant surveying of the properties and the ultimate reconveyance of 2020 (Twu) and 2018 (Cooke) between the parties to eliminate the encroachment of the 2020 house onto 2018 property and to provide 2018 property up to the hillside from 2020. Based upon this historical evidence and associated survey reports and mapping (as provided in attached exhibits to the Boundary adjustment documents May 2009) there can be no justifiable reliance by Cooke on an alleged incorrect statement from a surveyor. Where a person, with knowledge of a bona fide boundary, intentionally enters the disputed area for purposes of destroying trees, and does destroy them, his acts are neither casual nor involuntary, nor justifiable on the basis of believed ownership, but are without lawful authority and will subject him to treble damages. Mere subjective belief in the right to cut the trees is not sufficient for mitigation of damages pursuant to RCW 64.12.040. Cooke had sufficient facts and circumstances to eliminate any reasonable belief that the cherry tree was on their property.

In May 2013, Cooke cut a cherry tree belonging to Twu, on Twu's property and that action was done willfully. The measure of damages is treble. The court will adopt Scott Clifton (Treewise) assessment of value at \$1,788.00 without utilizing the Holen formula. This award based upon the timber trespass statute will result in a total award of \$5,364.00 awarded to Twu.

ATTORNEY FEES:

RCW 64.12.030, relating to treble damages for timber trespass, does not include attorney's fees. However, both parties plead for an award of attorney fees pursuant to RCW 4.84.010 and 4.84.250. An analysis of the prevailing party requires the court to determine which claims presented by the parties were successful. Cooke prevailed on the declaratory judgment establishing the 30 foot start measurement

Findings of Fact and Judgment

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at the front foundation and Twu prevailed on the excluded vegetation as well as the trespass for cutting the cherry tree. Twu also prevailed on Cooke's interference with view rights and neither party prevailed on injunctive requests. Under this analysis, neither party is the prevailing party and therefore each shall be responsible for their own attorney fees and costs.

IV. ORDER:

It is ordered:

Declaratory judgment is granted to both parties wherein the starting point for measuring the 30 foot Height restriction, except house structure and cherry trees planted before 1999, shall be the front of the 2020 house structure foundation.

Cooke's interference with view easement claim is denied.

Injunctive relief is denied for both parties.

Twu timber trespass claim is granted resulting in a \$5,364.00 judgment for Twu and against Cooke.

Each party shall pay their own attorney fees and costs.

Dated: _____

11/21/17



Judge Daniel L. Stahnke

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SCOTT G. WEBER, CLERK
CLARK COUNTY

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

DAVID COOKE AND KELLY
RATZMAN-COOKE, a married couple,

Plaintiff,

v.

CHU-YUN TWU, an individual,

Defendant.

Case No. 16-2-00039-1

**ORDER DENYING PARTIES'
MOTIONS FOR
RECONSIDERATION AND
PLAINTIFFS' MOTION FOR
ATTORNEYS' FEES**

This matter came before the Court on (1) Plaintiffs' Motion for Reconsideration; (2) Plaintiffs' Motion for Attorneys' Fees; and (3) Defendant's Motion for Reconsideration, Request to Petition for Attorneys' Fees, and Clarification of Judgment. Bradley W. Anderson of Landerholm, P.S. represented Plaintiffs. Paige Spratt of Schwabe Williamson & Wyatt, P.C. represented Defendant.

The Court heard the oral argument of counsel and considered the pleadings and file in this action and the following:

1. Plaintiffs' Motion for Reconsideration;
2. Declaration of Jeff Lindberg in Support of Plaintiffs' Motion for Reconsideration;
3. Defendant's Response in Opposition to Plaintiffs' Motion for Reconsideration;

ORDER DENYING PARTIES' MOTIONS FOR
RECONSIDERATION AND PLAINTIFFS' MOTION
FOR ATTORNEYS' FEES - 1
COOD11-000001-3311942_1.DOC

 **LANDERHOLM**
805 Broadway Street, Suite 1000
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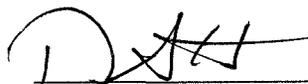
- 1 4. Defendant's Motion for Reconsideration, Request to Petition for Attorneys'
- 2 Fees, and Clarification of Judgment;
- 3 5. Declaration of Paige B. Spratt in Support of Defendant's Motion for
- 4 Reconsideration, Request to Petition for Attorneys' Fees, and Clarification of
- 5 Judgment;
- 6 6. Plaintiffs' Response to Defendant's Motion for Reconsideration;
- 7 7. Plaintiffs' Motion for Attorneys' Fees; and
- 8 8. Defendant's Response in Opposition to Plaintiffs' Motion for Attorneys' Fees.

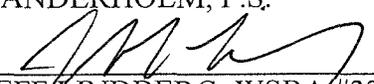
9 Based on the argument of counsel and the pleadings and files,
10 Plaintiffs' Motion for Reconsideration is DENIED.
11 Defendant's Motion for Reconsideration, Request to Petition for Attorneys'
12 Fees, and Clarification of Judgment is DENIED.

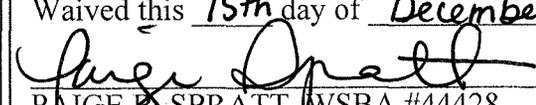
13 Plaintiffs' Motion for Attorneys' Fees is DENIED.

14 IT IS SO ORDERED.

15 ENTERED this 18 day of Dec, 2017.

16 
17 _____
18 HON. DANIEL L. STAHNKE

18 Prepared and Submitted by:
19 LANDERHOLM, P.S.
20 
21 _____
22 JEFF LINDBERG, WSBA #32444
23 Of Attorneys for Plaintiffs

22 Approved as to form, Notice of Presentation
23 Waived this 15th day of December, 2017
24 
25 _____
26 PAIGE B. SPRATT, WSBA #44428
Of Attorneys for Defendant

CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct: That on the 6th day of June, 2018, I arranged for service the foregoing **APPELLANT CHU-YUN TWU'S OPENING BRIEF** on the following parties and/or counsel of record via *Electronic Court E-Service* as follows:

Jeff Lindberg
Email: jeff.lindberg@landerholm.com
Brad Andersen
Email: brad.andersen@landerholm.com
Landerholm, P.S.
805 Broadway Street, Suite 1000
Vancouver, WA 98666-1086

/s/ Averil Rothrock
Averil Rothrock, WSBA #24248

PDX\129684\213854\AAR\22855220.6

SCHWABE WILLIAMSON WYATT

June 06, 2018 - 9:43 AM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 51294-7
Appellate Court Case Title: Chu-Yun Twu, Appellant/Cross-Respondent v. David Cooke, et al,
Respondent/Cross-Appellant
Superior Court Case Number: 16-2-00039-1

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