

FILED
Court of Appeals
Division II
State of Washington
8/27/2018 4:37 PM

Court of Appeals No. 51294-7-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

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

Respondents,

v.

CHU-YUN TWU, an individual,

Appellant.

RESPONDENTS/CROSS APPELLANTS' OPENING BRIEF

BRADLEY W. ANDERSEN, WSBA No. 20640
JEFF LINDBERG, WSBA No. 32444
LANDERHOLM, P.S.
805 Broadway Street, Suite 1000
P.O. Box 1086
Vancouver, WA 98666-1086
(360) 696-3312
Of Attorneys for Respondents/Cross Appellants

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. ASSIGNMENTS OF ERROR	4
III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR	5
IV. STATEMENT OF THE CASE	5
V. ARGUMENTS	22
A. Standards of Review.	22
1. Findings of fact are reviewed for substantial evidence.	22
2. Denial of injunctive relief is reviewed for abuse of discretion.	22
3. A trial court ruling regarding a party’s right to attorney fees is reviewed for legal error.	23
B. Substantial evidence does not support the trial court’s finding that the two trees were planted before 1999.	23
1. <i>Martel and DeVey Testimony.</i>	24
2. <i>Ms. Twu’s pleadings and other filings in this case demonstrated the same.</i>	25
3. <i>Ms. Twu’s trial testimony shows that she believes the two trees were subject to the 2009 view easement.</i>	26
4. <i>Morgan Holen’s testimony supports a finding that the trees were planted in 1999 or later.</i>	27
C. The trial court erred in awarding Ms. Twu treble damages.	29
1. <i>Substantial evidence does not support the trial court’s finding that the boundary line between the Twu and Cooke properties was clearly marked.</i>	29
D. The Superior Court should have entered an injunction allowing the Cookes to enforce the view easement.	34
E. Cookes concede that Ms. Twu is entitled to an award of attorney fees pursuant to RCW 4.84.270 for defeating the Cookes’ claim for damages.	36
F. Ms. Twu is not entitled to an award of attorney fees pursuant to RCW 4.84.250, et seq. based on her timber trespass damages award. .	37

G. Request for attorney fees on appeal.....	40
VI. CONCLUSION	40

TABLE OF AUTHORITIES

	<u>Page</u>
Cases	
<i>Birchler v. Costella Land Co.</i> , 133 Wn.2d 106, 110 (1997)	30
<i>Fed. Way Family Physicians, Inc. v. Tacoma Stands up for Life</i> , 106 Wn.2d 261, 721 P.2d 946 (1986)	23
<i>McKillop v. Pers. Representative of Estate of Carpine</i> , 192 Wn. App. 541, 369 P.3d 161 (2016)	40
<i>Miles v. Miles</i> , 128 Wn. App. 64, 114 P.3d 671 (2005)	22, 23, 29
<i>MJD Pops., LLC v. Haley</i> , 189 Wn. App. 963, 358 P.3d 476 (2015)	23
<i>Snyder v. Haynes</i> , 152 Wn. App. 774, 217 P.3d 787 (2009)	36
<i>State v. Chenoweth</i> , 160 Wn.2d 454 (2007)	30, 31
<i>Trotzer v. Vig</i> , 149 Wn. App. 594, 203 P.3d 1056, <i>rev. den.</i> , 166 Wn.2d 1023 (2009) 34	
<i>Woodruff v. Spence</i> , 88 Wn. App. 565, 945 P.2d 745 (1997)	40
 Statutes	
RCW 4.84.250	passim
RCW 4.84.270	37
RCW 64.12.030	3, 4, 29, 30
RCW 64.12.040	passim

I. INTRODUCTION

Can a trial court grant relief that neither side requested and that is based on findings of fact not supported by any plausible evidence?

The dispute here was over the interpretation of a view easement. The parties live on adjoining residential properties on the side of a hill with magnificent views of the Columbia River gorge. The respondents/cross-appellants' (David and Kelley Cooke) home sits uphill from appellant-cross-respondent's (Chu-Yun Twu) home. The Cookes enjoy a view easement across Twu's property that protects their views.

The view easement works by prohibiting Twu from having trees, or other vegetation, grow higher than 30 feet from the foundation of her home. The parties disagreed on whether the 30-foot height restriction should be measured from the lower front foundation or the higher rear foundation of Twu's home.

After a two-day bench trial, the trial ruled in the Cookes' favor because it found that measuring the 30 feet from the higher foundation would defeat the purpose of the easement by blocking the Cookes' view. Neither party appeals that aspect of the trial court's judgment.

However, the court also decided an issue not raised by either side. This led to the judge granting relief not requested by either side, which

then led to the court granting such relief on a finding of fact wholly unsupported by the evidence.

Specifically, the court ruled that two flowering trees – growing smack-dab in the middle of the view corridor (hence blocking the very view the easement was intended to protect) – were excluded from the easement because they were planted before the easement was created.

Neither side raised the issue in their pleading nor asked the court to grant any relief related to those trees. To the contrary, both sides assumed that the view easement applied to these two trees; Ms. Twu specifically alleged as much. Consequently, little evidence was presented on the issue. And the trace of evidence that was presented actually demonstrated the trees were planted after the easement was created, and therefore subject to the height restriction. To determine otherwise would have defeated the original parties' intent in creating the easement.

The trial court therefore erred by deciding a claim (whether the two flowering trees were exempt from the view easement) not requested by the parties. It compounded this error by then deciding this un-plead claim on a record devoid of any supporting evidence. Indeed, the evidence compelled the opposite finding—that the two trees were planted after 1999.

Besides the dispute over the height restriction, Twu claims the Cookes wrongfully and willfully cut a fruit tree from her property. The Cookes cut the tree. And after a surveyor staked the boundary line that showed the tree was truly on Twu's side of the line, the Cookes conceded liability for wrongfully cutting the tree. But because they had good reason – when they cut the trees – to believe the trees were on their side of the boundary line, they denied having acted “willfully”, with malice or that they acted without probable cause.

Despite overwhelming (if not undisputed) evidence to the contrary (i.e. there were never any survey markers placed on the ground to mark the boundary and the Cookes had previously, as part of a boundary line adjustment agreement with Twu, instructed the surveyor to place the line south of the tree), the trial court wrongfully found the Cookes had acted “willfully” and without “probable cause.” So instead of single damages under RCW 64.12.040, the Superior Court awarded treble damages under RCW 64.12.030, which led to Twu being declared the prevailing party under RCW 4.84.250, et seq. (regarding attorney fees in claims under \$10,000). Ms. Twu was only entitled to single damages, and not treble damages, under RCW 64.12.030.

Thus, the issue on appeal regarding the timber trespass claim is whether there is substantial evidence to show the Cookes acted willfully or

without probable cause when they cut-down a tree they believed was on their side of the boundary line.

Finally, the trial court refused to grant any injunctive relief, even though it was requested by both sides. Instead, the court's ruling has the effect of requiring the parties to file new lawsuits every time there is an alleged violation of the view easement. In other words, every time that Ms. Twu refuses to maintain her vegetation in compliance with the 30-foot height restriction, under the Superior Court's ruling, the Cookes must file a new lawsuit to vindicate their express rights under the view easement. Did the court abuse its discretion in not granting equitable relief when it was requested by both parties?

II. ASSIGNMENTS OF ERROR

- A.** The trial court erred in deciding issues not raised by the parties' pleadings and in its denial of reconsideration of this issue.
- B.** The trial court erred in granting relief not raised by the pleadings or requested by the parties and in its denial of reconsideration of this issue.
- C.** The trial court erred in concluding that the two flowering trees were exempt from the view easement and in its denial of reconsideration of this issue.
- D.** The trial court erred when it concluded the Cookes acted willfully and without probable cause when they cut the cherry tree from Twu's side of the boundary line and in its denial of reconsideration of this issue.
- E.** The trial court erred in awarding treble damages to Twu and in its denial of reconsideration of this issue.
- F.** The trial court erred in concluding that the Cookes were not the prevailing party under RCW 4.84.250, et seq., because

Twu should not have been found to have recovered more than the Cookes' pre-trial offer.

- G. The trial court erred in not awarding the Cookes their legal fees and costs under 4.84.250, et seq.
- H. The trial court erred in not granting injunctive relief to the parties in its denial of reconsideration of this issue.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- A. Should the trial court decide issues not raised by the parties?
- B. Should the trial court grant relief not raised by the pleadings nor requested by the parties?
- C. Was there substantial evidence to support the court's finding of fact that the two flowering tree were exempt from the view easement?
- D. Was there substantial evidence to support the court's finding of fact that the Cookes acted willfully and without probable cause when they cut the cherry tree from Twu's side of the boundary line?
- E. Should the court have issued a final injunction that would have protected the Cookes' rights under the easement?

IV. STATEMENT OF THE CASE

A. **The parties' properties.**

The Cooke property is located at 2018 NW Sierra Lane in Camas, Washington.¹ It sits uphill from and behind the Twu property located at 2020 NW Sierra Lane.² The view from the Cooke property includes sweeping views to the east of the Columbia River Gorge and Mt. Hood, views to the south of Portland, and views to the west of the Columbia River.

¹ The Cooke property is referred to either as the "Cooke property" or as the "2018 property."

² The Twu property is referred to either as the "Twu property" or as the "2020 property."

What is now the Cookes' house was constructed by then-owner Mark Martel.³ At the time he built the house on the 2018 property, Mr. Martel also owned the 2020 property.⁴ Mr. Martel constructed the house on the 2020 property.⁵ Mr. Martel owned the 2018/Cooke property until 2002, when he sold it to the Cookes.⁶

B. Mark Martel's 1999 Landscape and View Easement.

In 1999, while he still owned the 2018 property, Mr. Martel sold the 2020 property to Annette DeVey.⁷ When he sold the 2020 property to Ms. DeVey, Mr. Martel also entered into both a landscape and a view Easement with Ms. DeVey.⁸ The operative language of the Martel/DeVey view easement provided that:

“The scope of this easement shall be limited to the right of Martel to require that the view from the Martel Property over and across the DeVey Property be free from any structure or vegetation in excess of thirty (30) feet measured from the foundation of the existing home on the DeVey Property that would obscure or impair such view.”⁹

³ RP 1:152.

⁴ RP 1:150:22-151:3.

⁵ RP 1:151:2-7.

⁶ RP 1:152:12-14.

⁷ Ms. DeVey is now known as Annette King.

⁸ CP 10.

⁹ CP 10.

To this, DeVey added in hand writing: “Not pertaining to any existing structure or vegetation.” (Emphasis in original).¹⁰

C. Neither Martel nor Devey testified that the two flowering trees were planted before 1999.

Neither Mark Martel nor Annette DeVey testified that the two trees singled out in the Superior Court’s ruling were planted before 1999. For example, Mr. Martel testified that the reference to existing vegetation in the 1999 view easement was a reference to the large fir trees: “this document was written and [s]he had a concern about the house, so that’s why we put that structure in there, and I think the vegetation was referring to this fir tree here that was already there. And I said fine that doesn’t affect the view I’m trying to preserve which is here to here, [indicating] so – and that was all that was there at the time.”¹¹

Mr. Martel testified further:

Q: Did you plant those cherry trees or were they planted after you sold the property to Ms. DeVey?

A: I don’t remember those cherry trees being there.¹²

Q: [Y]ou don’t remember planting those trees before you sold the property in 1999?

A: I’m trying to remember me planting those or having someone plant those. I just can’t remember that I did and I can’t remember why I would have.¹³

¹⁰ CP 10.

¹¹ RP 1:161.

¹² RP 1:167.

¹³ RP 1:168.

Although Mr. Martel had no memory of planting cherry trees on the hill, he did remember planting other vegetation. Specifically, Mr. Martel testified that “I do remember planting or having this planted, the vine or the ivy. I distinctly remember that. I distinctly remember planting these rhododendrons and planting this out in the front and there’s some rhododendrons over here that we planted.”¹⁴

For her part, Ms. DeVey admitted planting cherry trees on the 2020 property *after* she purchased the property in 1999¹⁵, but could not testify unequivocally that the two trees singled out in the Superior Court’s ruling had been planted on the 2020 property *before* 1999: “There was no discussion of not planting anything up there – or excuse me – taking out anything that was there. There were trees already on that slope, and my understanding was that vegetation could be planted. I planted several decorative trees, Japanese maples, cherry trees....[T]here were trees there when I moved in.”¹⁶ Ms. DeVey, however, could not testify that the two trees at issue were in place when she moved in:

“Q: So there were some cherry tree on the property when you moved in?

A: There were trees. I don’t recall what type of trees on that slope.”¹⁷

¹⁴ RP 1:166:25-167:5.

¹⁵ RP 3:498:1-6.

¹⁶ RP 3:481:20-482:4.

¹⁷ RP 3:482:5-8.

Again, on cross examination, Ms. DeVey confirmed that she planted cherry trees on the 2020 property,¹⁸ but could not testify unequivocally that there were any trees planted on the hillside above her house—in the area subject to the view easement—when she bought the property:

Q. Are you testifying that there were existing ornamental trees on that slope?

A. I believe there were. Like I said in the beginning, I couldn't tell you what they were or where they were, but there was definitely *vegetation* on that slope.

Q. Okay. Well, vegetation, I mean, there was ivy; right?

A. Yes. There were –

Q. Some shrubs?

A. – shrubs and/or trees on that slope.

Q. Okay. But, sitting here today – I understand we're going back 20 years ago.

Are you kind of doubting in your mind whether or not there was actually trees? I understand there was vegetation, but are you certain or do you have some doubt in your mind whether there was actually trees there when you bought the property from Mr. Martel? Let me ask it a different way.

If Mr. Martel had said when he testified, I made sure there was ivy there and I planted some trees in the front of the house, but I did not plant any trees before I sold it to Ms. King, I didn't plant any ornamental trees on that hillside.

¹⁸ RP 3:498:1-6; 3:499:6-8.

Would he be right?

A. You might be right in thinking or suggesting that I would have doubt about either of those statements. I can't be certain. My recollection is there were already trees on that slope.

Q. But you can't remember what they were, how big they were, anything. It's just you remember shrubs, there might have been trees there.

You just can't remember the details?

A. That's correct.¹⁹

D. Cookes purchase 2018 Property from Martel in 2002.

In 2002, the Cookes purchased 2018 NW Sierra Lane from Mr. Martel. During the pendency of their sale transaction, Mr. Martel and Mrs. Cooke walked the property together.²⁰ Mr. Martel pointed out landscaping on the hillside and told Mrs. Cooke that "everything that had been planted on the east side had been planted by DeVey, the landscaping when she did the patio, the rock work, and landscaping work."²¹ Even the flyer used by Mr. Martel to market the 2018 property does not show these cherry trees, indicating that they were planted close in time to the marketing of the 2018 property in 2002.²²

¹⁹ RP 3:499:9-500:19.

²⁰ RP 2:333.

²¹ RP 2:334.

²² Exhibit 2.

E. Ms. Twu needed a boundary line adjustment to purchase the 2020 NW Sierra Lane.

In 2009, Ms. Twu made an offer to purchase the property at 2020 NW Sierra Lane.²³ Ms. Twu purchased the home for her elderly parents; she did not intend to live there.²⁴ Due to errors in the original subdivision of the Cooke and Ms. Twu properties, the Cookes' property line ran through the middle of the home on the 2020 property. This problem needed to be resolved for Ms. Twu to complete her purchase.²⁵

The Cookes proposed a boundary line adjustment that resulted in Ms. Twu's house being entirely on the Twu property and also transferred to the Cookes the area included within the Martel/DeVey landscape easement.²⁶ To continue to protect the view that they had enjoyed pursuant to the Martel/DeVey view easement, the Cookes also proposed to Twu a nearly identical view easement that covered all the Cooke property following the boundary line adjustment.²⁷ Mrs. Cooke and Ms. Twu negotiated the language of both agreements which were then recorded in connection with Ms. Twu's purchase of 2020 NW Sierra Lane.

///

///

²³ RP 4:589:1.

²⁴ CP 205.

²⁵ RP 4:623:9-12.

²⁶ RP 1:95:17-24; 1:96:9-13.

²⁷ RP 4:592-593.

F. The 2009 view easement created three categories of vegetation on the Twu property.

Like the 1999 view easement, the 2009 view easement provides that “[t]he scope of this easement shall be limited to the right of Cooke to require that the view from the Lot 1 Property over and across the Lot 2 Property 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.”²⁸

The 2009 view easement addressed maintenance of vegetation within the view corridor. To do this, the view easement created three categories of vegetation for the purpose of designating which party is responsible for maintaining the vegetation. First, the view easement expressly does not apply to “vegetation that is older than 10 years prior to the signing of this agreement” in May 2009.²⁹

Second, the 2009 view easement provides that “[m]aintenance of any existing vegetation due to an obstruction of the view across Lot 2 [Twu] Property will be Cooke’s responsibility.”³⁰ And third, “[m]aintenance of any new vegetation due to an obstruction of the view across Lot 2 [Twu] Property will be Twu’s responsibility. Existing

²⁸ CP 19.

²⁹ CP 19.

³⁰ CP 19.

vegetation is defined as any vegetation in place prior to the signing of this agreement.”³¹

Thus, the first category of vegetation, vegetation that was in existence before 1999, is not subject to the view easement’s 30-foot height restriction. The second category of vegetation, vegetation that was put in place between 1999 and 2009, is subject to the height restriction and is to be maintained by the Cookes. The third category of vegetation, vegetation that was put in place after 2009, is subject to the height restriction and is to be maintained by Twu.

G. The parties’ negotiations of the 2009 view easement show their mutual intent that the two trees are subject to the view easement’s 30-foot height restriction.

The parties’ correspondence during their negotiation of the 2009 view easement plainly demonstrates that they agreed that the two flowering trees are subject to the height restriction. For example, Mrs. Cooke told Ms. Twu in a May 22, 2009 email that “[m]y husband and I will agree to the maintenance of the trees on the East side of the property going forward but I do want to note that those were not existing at the time the original easement agreement was put in place. Annette planted those when she put in the patio, rock work and other improvements to the

³¹ CP 19.

home.”³² This email followed up on an earlier discussion between Ms. Twu and Mrs. Cooke on the same subject.³³ In the course of the parties’ negotiations, Ms. Twu never challenged the Cookes’ classification of the trees for purposes of the view easement.

H. Ms. Twu’s pleadings in this case demonstrate her understanding that the two trees are not exempt from the view easement’s 30-foot height restriction.

Ms. Twu did not allege that the two trees singled out in the Superior Court’s ruling were planted before 1999. In fact, in her counterclaim against the Cookes, she alleged the opposite:

- “Since 2013, Plaintiffs have required Twu to cut her two (2) other blossoming cherry trees *to a height below the elevation that is authorized under the 2009 View Easement.*”³⁴
- “Plaintiffs threaten to enter Twu’s property to cut Twu’s trees and other vegetation *to a height below that authorized in the 2009 View Easement.*”³⁵
- “Plaintiffs harass Twu and threaten to enter Twu’s property to cut down her cherry trees and other vegetation *to heights below that authorized in the 2009 View Easement.*”³⁶
- “Twu seeks injunctive relief prohibiting Plaintiffs from entering her property or otherwise harassing Twu by requiring her to cut her trees *to a height below that authorized by the 2009 View Easement.*”³⁷

³² Exhibit 19, page 4; Exhibit 93.

³³ Exhibit 19, page 3.

³⁴ CP 25 (emphasis added).

³⁵ CP 25 (emphasis added).

³⁶ CP 27 (emphasis added).

³⁷ CP 27 (emphasis added).

In her prayer for relief, Ms. Twu sought “an injunction prohibiting Plaintiffs from entering Twu’s property or harassing Twu by requiring her to cut her blossoming cherry trees *below an elevation that is thirty (30) feet above the north side of Twu’s house....*”³⁸

Thus, Ms. Twu’s claims for relief in this case consistently discuss the application of the 30-foot height restriction to the two trees singled out in the Superior Court’s judgment. Ms. Twu clearly understood and consistently took the position that the 2009 view easement applies to these two trees.

Consistently with these allegations, Ms. Twu did not argue in her trial brief or her closing argument brief that the three cherry trees were planted before 1999. To the contrary, Ms. Twu consistently referenced the cherry trees in the context of her argument that the 30-foot height restriction was to be measured from the higher back foundation of the Twu house. For example, in her opening brief, Ms. Twu noted that “2014 is the first time that the plaintiffs either trim or ask defendant to trim the existing (remaining) cherry trees. The trimming elevations requested by the plaintiffs were well below the view easement requirements.”³⁹

³⁸ CP 28 (emphasis added).

³⁹ CP 185.

And in her closing argument, Ms. Twu similarly used the two trees to argue only about the proper point of beginning for measuring the 30-foot height restriction. Ms. Twu argued that the Cookes routinely permitted vegetation on the Twu property to exceed the 30-foot height restriction measure from the front foundation. In so arguing, she noted that “[t]here were also two cherry trees at the top of the slope. Both grew well above the top of the fence....”⁴⁰ Similarly, Ms. Twu noted “she has trimmed trees lower than the view restriction....”⁴¹

All of Ms. Twu’s pleadings and briefs filed before and immediately after the trial in this case consistently—and correctly—demonstrate her understanding that that the two trees at issue are subject to the 30-foot height restriction.

I. Ms. Twu’s trial testimony shows her understanding that the two trees were planted after 1999.

At trial, Ms. Twu testified consistently with her pleadings. On direct examination, speaking of the flowering cherry trees, Ms. Twu testified “I was just thinking, maybe they are tired of trimming the tree so because as you know that cherry tree can grow between twenty to thirty feet and I am only allowed to grow up to twelve, thirteen feet.”⁴² Ms. Twu similarly testified that the tree removed by Mr. Cooke was subject to the

⁴⁰ CP 267.

⁴¹ CP 274.

⁴² RP 4:610:9-611:11.

height restriction: “For that cherry tree location, yes. If you go toward the east side, the soil is slightly higher. It’s about a foot higher. So the one tree that was cut down to the stump, that limitation was 12 feet.”⁴³

On cross examination, Ms. Twu again affirmed her understanding that the Cookes had a right to maintain the cherry tree: “[T]he cherry tree can grow between 20 to 30 feet and the limitation I have is 13 feet for that location so I understand the Cookes may not want to continue to maintain it every year and that was fine so if I just get some replacement to grow up to the limit that was fine.”⁴⁴

“Q.And we’ve seen the e-mails. I don’t have to put them back up again. We saw those e-mails where at least Mrs. Cooke was telling you my understanding is that these flowering trees that are east of your house were planted after 1999.

Do you remember that?

A. Yes.

Q. So you didn’t – and you didn’t have any reason to dispute what she was saying at the time?

A. No.”⁴⁵

///

///

///

⁴³ RP 4:612:25-613:9.

⁴⁴ RP 4:648:2-24.

⁴⁵ RP 4:625:20-626:11.

J. Ms. Twu’s expert arborist did not know when the two trees were planted.

Even Ms. Twu’s expert arborist Morgan Holen could not testify that the two trees were planted before 1999. Ms. Holen testified that all three cherry trees—the one removed by Mr. Cooke and the two remaining—were likely planted at the same time, but when asked if she could “say the tree was planted on the property before 1999” she replied “I could not say that.”⁴⁶ In fact, Ms. Holen testified that the cherry tree that Mr. Cooke cut down had likely been in the nursery for anywhere from one to six years.⁴⁷

K. David Cooke removes the cherry tree in May 2013.

In May 2013, David Cooke cut down a cherry tree that, he later learned, was on Ms. Twu’s property.⁴⁸ The Cookes had been maintaining that tree prior to removing it in 2013.⁴⁹ The Cookes believed that the tree had become part of their property following the 2009 boundary line adjustment.⁵⁰ When the boundary line adjustment was completed in 2009, the surveyor did not place survey stakes on the ground to delineate the new boundary line between the Cooke and Twu properties.⁵¹ Mrs. Cooke

⁴⁶ RP 4:551:13.

⁴⁷ RP 4:549:4-550:14.

⁴⁸ RP 1:104:24-105:1.

⁴⁹ RP 1:100:14-16.

⁵⁰ RP 1:100:23-101:2.

⁵¹ RP 1:101:9-12.

had instructed her surveyor to move the adjusted boundary line to be at the top of Ms. Twu's hill and outside of the Cookes' fence that ran along the top of that hill.⁵² The Cookes relied on their surveyor's advice that their adjusted boundary line was "several feet past the fence line."⁵³

The Cookes had been limbing the cherry tree for a number of years before they finally removed the tree: "we would continue to limb the side of the tree that impacted the easterly view. And so we decided it had finally gotten to the point that it looked ridiculous, that we should just go ahead and take the tree out."⁵⁴ The Cookes did so because they believed the tree was theirs.⁵⁵

When Ms. Twu's surveyor placed markers in 2014, the Cookes learned—after the removal of the cherry tree—that the actual boundary line placed both the cherry tree and portions of the Cookes' existing fence on Ms. Twu's side of the property line.⁵⁶

L. The trial court's ruling.

The parties tried this case to the court. The court heard testimony for two days and the parties submitted written closing arguments. The

⁵² RP 2:331:8-332:3.

⁵³ RP 1:101:25-102:1.

⁵⁴ RP 1:104:12-16.

⁵⁵ RP 1:104:19-20.

⁵⁶ Exhibit 37 ("we never would have agreed to property boundaries that fall within our preexisting fence line").

court thereafter issued its “Judgment and Order following trial findings of fact and decision on civil claim.”⁵⁷

In its written ruling, the court stated that

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...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.⁵⁸

Regarding the timber trespass claim, the trial court found that “[t]he parties...entered into 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.”⁵⁹ The court rejected Morgan Holen’s estimate for the value of the tree and adopted the replacement value of \$1,788.00 offered by the Cookes’ expert Scott Clifton of Treewise.⁶⁰

⁵⁷ CP 30.

⁵⁸ CP 32.

⁵⁹ CP 32.

⁶⁰ CP 32.

On the issue of whether Ms. Twu is entitled to treble damages, the trial court stated that “[s]ubstantial evidence was presented that Cooke was keenly aware of boundary lines between the 2020 NW Sierra Lane and 2018 NW Sierra Lane. Primarily, there was significant surveying of the properties and the ultimate reconveyance...between the parties to eliminate the encroachment of the 2020 house onto the 2018 property and to provide 2018 property up to the hillside from 2002.”⁶¹

Both parties sought recovery of attorney fees pursuant to RCW 4.84.250. The trial court denied both parties’ requests for attorney fees, concluding that “neither party is the prevailing party...”⁶²

Both parties asked for injunctive relief with respect to the view easement.⁶³ The Superior Court denied this relief, stating that “[b]y 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.”⁶⁴

Both parties filed motions for reconsideration. Ms. Twu sought reconsideration on her entitlement to attorney fees pursuant to RCW

⁶¹ CP 34.

⁶² CP 35.

⁶³ CP 4; CP 27-28.

⁶⁴ CP 33.

4.84.250, et seq. The Cookes sought reconsideration of the trial court's ruling that exempted the two trees from the 30-foot height restriction and the award of treble damages to Ms. Twu. The Cookes also filed a motion for award of attorney fees pursuant to RCW 4.84.250, et seq. The trial court denied all post-trial motions.⁶⁵ Ms. Twu timely appealed.⁶⁶ The Cookes timely cross appealed.⁶⁷

V. ARGUMENTS

A. Standards of Review.

1. Findings of fact are reviewed for substantial evidence.

An appellate court reviews a trial court's findings of fact for substantial evidence.⁶⁸ Substantial evidence is evidence sufficient to persuade a fair minded, rational person of the finding's truth.⁶⁹ Findings of fact must support the trial court's conclusions of law.⁷⁰

2. Denial of injunctive relief is reviewed for abuse of discretion.

The grant or denial of an injunction is within the discretion of the trial court, to be exercised according to the facts of each case.⁷¹ An

⁶⁵ CP 64.

⁶⁶ CP 66.

⁶⁷ CP 322.

⁶⁸ *Miles v. Miles*, 128 Wn. App. 64, 69-70, 114 P.3d 671 (2005).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Fed. Way Family Physicians, Inc. v. Tacoma Stands up for Life*, 106 Wn.2d 261, 264, 721 P.2d 946 (1986).

appellate court must determine whether the trial court's decision is manifestly unreasonable, arbitrary, or based on untenable grounds.⁷²

3. A trial court ruling regarding a party's right to attorney fees is reviewed for legal error.

The question of whether a party is entitled to an award of attorney fees is reviewed for legal error.⁷³

B. Substantial evidence does not support the trial court's finding that the two trees were planted before 1999.

As noted, the Superior Court singled out two flowering trees on the Twu property and concluded that they were exempt from the 2009 view easement's 30-foot height restriction.⁷⁴ Neither party asked the court to decide this issue. The court's conclusion on this issue necessarily includes a finding that the trees were planted before 1999, because the category of vegetation that is exempt from the height restriction is "existing vegetation that is older than 10 years prior to the signing of this agreement."⁷⁵

However, the evidence before the Superior Court compels the opposite finding—that the two trees were planted after Annette DeVey acquired the 2020 property in 1999. This evidence includes the testimony of Annette DeVey and Mark Martel who owned the parties' properties in 1999, Ms. Twu's allegations in her pleadings and other filings in this case,

⁷² *Id.*

⁷³ *MJD Pops., LLC v. Haley*, 189 Wn. App. 963, 976, 358 P.3d 476 (2015).

⁷⁴ CP 32.

⁷⁵ CP 19.

Ms. Twu’s expert’s testimony, and Ms. Twu’s own testimony. All of this evidence compels a finding that the two trees singled out in the trial court’s judgment were planted after 1999. The trial court’s contrary finding is not supported by substantial evidence.

1. Martel and DeVey Testimony.

Mark Martel and Annette DeVey are the two witnesses with personal knowledge of the condition of the 2018 and 2020 properties in and around 1999. Neither one of them testified that the two trees singled out by the Superior Court were planted before 1999. Mr. Martel testified that he “just can’t remember” planting the trees before he sold the 2020 property to Ms. DeVey and that he “can’t remember why I would have.”⁷⁶ It would not have made any sense for Mr. Martel to plant the two trees before selling the property to Ms. DeVey and then thereafter enter into a view easement providing that the height restriction—the very mechanism for protecting Mr. Martel’s view—did “[n]ot pertain[] to any existing structure or vegetation.”⁷⁷

Although Ms. DeVey testified that she recalled that “there were already trees on that slope,” she “couldn’t tell you what they were or where they were, but there was definitely *vegetation* on that slope.”⁷⁸

⁷⁶ RP 1:168.

⁷⁷ CP 10 (emphasis in original).

⁷⁸ RP 3:499:11-14.

Although her “recollection is there were already trees on that slope,” she “can’t be certain” and “can’t remember the details.”⁷⁹ This testimony is the high water mark for evidence that the two trees were planted before 1999.⁸⁰

In contrast, Ms. DeVey unequivocally stated “I planted several decorative trees, Japanese maples, cherry trees....”⁸¹ Similarly, Mr. Martel testified that he planted ivy and rhododendrons, but had no recollection of planting any flowering trees on the slope.

In summary, Mr. Martel offered uncontroverted testimony that he only planted ivy and rhododendron before 1999 and Ms. DeVey offered uncontroverted testimony, solicited by Ms. Twu’s attorney, that she planted cherry trees—the very trees singled out by in the Superior Court’s ruling—after 1999. Thus, neither Mr. Martel nor Ms. DeVey offered any testimony to support a finding that the two trees were planted before 1999. Instead, their testimony supports the opposite conclusion.

2. Ms. Twu’s pleadings and other filings in this case demonstrated the same.

One of the most telling portions of the record relating to the issue of the two trees are Ms. Twu’s own allegations and briefs. Throughout her

⁷⁹ RP 3:500:12-19.

⁸⁰ The Judgment and Order did not make specific reference to Ms. DeVey’s testimony in its discussion of the two trees.

⁸¹ RP 3:481:24-25.

pleadings and other filings with this court, both before and after trial, Ms. Twu consistently asserts her right to grow these two trees up to the limit of the thirty-foot height restriction.

As noted above, Ms. Twu argued throughout her counterclaim about the Cookes allegedly forcing her to trim the two trees “*to a height below that authorized by the 2009 View Easement.*”⁸² Ms. Twu made consistent arguments in her trial brief and in her written closing argument.

Thus, Ms. Twu’s claims for relief in this case are all grounded in her correct understanding that the 2009 view easement applies to the two trees singled out in the Superior Court’s ruling.

3. *Ms. Twu’s trial testimony shows that she believes the two trees were subject to the 2009 view easement.*

Even Ms. Twu’s trial testimony compels a finding that the trees were planted after 1999 and subject to the 30-foot height restriction. In response to her own attorney’s questioning, Ms. Twu stated that “that cherry tree can grow between twenty to thirty feet and I am only allowed to grow up to twelve, thirteen feet.”⁸³ And on cross examination, Ms. Twu again testified that “[T]he cherry tree can grow between 20 to 30 feet and the limitation I have is 13 feet....”⁸⁴

⁸² CP 27 (emphasis added).

⁸³ RP 4:611:2-7.

⁸⁴ RP 4:648:2-24.

If Ms. Twu believed that these two trees were not subject to the height restriction, she would have rejected the Cookes' request to maintain them for that reason. There would have been no reason to resort to her argument that the height restriction is measured from her north foundations stem wall and that the two trees can grow to a height that his 30 feet measured from that part of the foundation. Yet, with one exception,⁸⁵ Ms. Twu never made the argument that the two flowering trees were exempt and could grow into the Cookes' view corridor without limit. Even after Mr. Cooke cut down the cherry tree, Ms. Twu asked Mrs. Cooke "if the tree had grown too large."⁸⁶

4. *Morgan Holen's testimony supports a finding that the trees were planted in 1999 or later.*

Finally, even Ms. Twu's expert arborist Morgan Holen could not tell the court that the two trees were planted before 1999. Ms. Holen was actually engaged to offer an opinion on the replacement value for the cherry tree removed by Mr. Cooke.⁸⁷ As part of that scope of work, Ms. Holen offered an opinion that the cherry tree removed by Mr. Cooke was

⁸⁵ The one exception is Ms. Twu's June 4, 2014 email to Kelly Cooke where Ms. Twu asserts, without any evidence, her belief that the remaining flowering trees were planted before 1999. Exhibit 36, page 1. When challenged on that assertion, Ms. Twu immediately backed off. Exhibit 37.

⁸⁶ RP 2:361:13-23.

⁸⁷ The trial court rejected Ms. Holen's value opinion and accepted the value opinion offered by the Cookes' expert Scott Clifton. CP 34.

17 years old at the time it was cut, based on the number of visible rings on the stump.⁸⁸

Although she offered an opinion about the age of the tree, she admitted that she could not testify as to when the tree was planted, other than to acknowledge that such trees are never planted immediately but are typically planted only after they measure a “three inch caliper” which would take “three or four years in the nursery...or longer depending on the species.”⁸⁹ Thus, Ms. Holen’s testimony does not support a finding that the two trees were planted before 1999 but instead compels a finding that the two trees were planted in 1999 or later. This analysis is consistent with Ms. DeVey’s testimony that she “planted several decorative trees, Japanese maples, cherry trees....”⁹⁰

Thus, all of the evidence before the trial court supports a finding that the two trees were planted in or after 1999. Taken together, the trial evidence on this issue would not “persuade a fair-minded, rational person”⁹¹ that the two trees were planted before 1999 for one simple reason—no party offered any such evidence. For the reasons discussed herein, substantial evidence does not support a finding that the two trees were planted before 1999 and the trial court erred in so finding. As such,

⁸⁸ RP 4:536:12-16.

⁸⁹ RP 4:548:15-18.

⁹⁰ RP 3:481:20-482:4.

⁹¹ *Miles*, 128 Wn. App. at 69-70.

the trial court's legal conclusion that the two trees are exempt from the 30-foot height restriction is also error and should be reversed.

C. The trial court erred in awarding Ms. Twu treble damages.

1. Substantial evidence does not support the trial court's finding that the boundary line between the Twu and Cooke properties was clearly marked.

As noted, the Cookes never disputed that they removed the cherry tree from Ms. Twu's property. The only issues at trial were (1) the amount of Ms. Twu's damages; and (2) whether Ms. Twu is entitled to treble damages under RCW 64.12.030 or single damages under RCW 64.12.040.

RCW 64.12.030 provides for an award of treble damages in action for timber trespass. However, "[i]f upon trial of such action it shall appear that the trespass was casual or involuntary, or that the defendant had probable cause to believe that the land on which such trespass was committed was his or her own...judgment shall only be given for single damages."⁹² Treble damages are "available when the trespass is 'willful,' because if the trespass is...based on a mistaken belief of ownership of the land, treble damages are not available."⁹³

Probable cause, the standard for imposing single damages, "requires not certainty but only sufficient facts and circumstances to

⁹² RCW 64.12.040.

⁹³ *Birchler v. Costella Land Co.*, 133 Wn.2d 106, 110 (1997).

justify a reasonable belief....”⁹⁴ In analyzing probable cause in the context of an application for a search warrant, the Washington Supreme Court noted that “the focus is on what was known at the time the warrant was issued, not what was learned afterward.”⁹⁵ “The fact that the affiant’s information later turns out to be inaccurate or even false is of no consequence if the affiant had reason to believe those facts were true. Probable cause requires more than suspicion or conjecture, but it does not require certainty.”⁹⁶

Thus, the inquiry focuses on what was known at the time, not what was learned later. The unchallenged testimony at trial was that the Cookes believed that the cherry tree they removed was on their property.⁹⁷ Their belief was based on information given to them by the surveyor who documented the 2009 boundary line adjustment and his statement that the new boundary ran along the top of the bank.⁹⁸ There were no survey stakes in the ground in 2013 to alert the Cookes to the location of the boundary line.⁹⁹ It was not until Ms. Twu commissioned a survey in 2014 that survey stakes were placed on the boundary between the Cooke and Twu properties. Based on this information, the Cookes had been limbing

⁹⁴ *State v. Chenoweth*, 160 Wn.2d 454, 475 (2007).

⁹⁵ *Id.* at 476.

⁹⁶ *Id.*

⁹⁷ RP 1:103:2.

⁹⁸ RP 2:219:9-16.

⁹⁹ RP 1:101:9-12.

the subject cherry tree at the top of the bank for a number of years without objection from Ms. Twu or her predecessors.¹⁰⁰ Although the Cookes had a surveyor prepare a sketch in connection with the 2009 boundary line adjustment, that surveyor never actually marked the new boundary on the ground.¹⁰¹ This evidence that there were no survey markers placed before 2014 is uncontroverted.

The proximity of the stump to the iron fence and the fact that the Cooke's actively maintained the property on both sides of the fence corroborates the Cookes' probable cause to believe that the cherry tree was on their property after the 2009 boundary line adjustment.¹⁰² The Cookes' belief about the cherry tree is corroborated by the evidence showing that their fence was also on Ms. Twu's side of the boundary line. The Cookes had instructed their surveyor to place the boundary line near the top of the bank, which would have meant that their entire fence and the cherry tree were both on the Cooke property. Following Ms. Twu's 2014 survey, the Cookes learned that the cherry tree and a portion of their fence was on Ms. Twu's property. Fn: Exhibit 37.

The trial court nevertheless found that “[a]s of May 2009 there could be no dispute between the parties regarding the established property

¹⁰⁰ RP 1:68:4-7; 1:104:12-18.

¹⁰¹ RP 1:101:9-12.

¹⁰² Mrs. Cooke testified that, before the 2009 boundary line adjustment, the Cookes maintained the cherry tree pursuant to the 1999 landscape easement. RP 1:100:23-101:2.

boundary”¹⁰³ and that “Cooke was keenly aware of boundary lines between 2020 NW Sierra Lane and 2018 NW Sierra Lane.”¹⁰⁴

The question, however, is whether the Cookes had probable cause to believe that the cherry tree was on their property. RCW 64.12.040. Again, probable cause “requires not certainty but only sufficient facts and circumstances to justify a reasonable belief...” *Chenoweth*, 160 Wn.2d at 475. The trial evidence certainly showed that the Cookes’ surveyor identified, in a sketch, where the boundary line was. But the evidence also showed that the boundary line was never marked on the ground, that the Cookes relied on their surveyor’s statement that the line was “several feet past the fence line,”¹⁰⁵ and that the Cookes had consistently maintained the cherry tree, believing it was theirs, without any objection from Ms. Twu or her predecessors.

This uncontroverted evidence also implicates the Superior Court’s analysis that “[w]here 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.”¹⁰⁶ There is simply no evidence of a boundary dispute in this area. To the contrary, the Cookes

¹⁰³ CP 32.

¹⁰⁴ CP 34.

¹⁰⁵ RP 1:101:25-102:1.

¹⁰⁶ CP 34.

believed they owned the property “several feet past the fence line,”¹⁰⁷ including the location of the cherry tree and, consistently with this belief, had been limbing this cherry tree for several years before they finally removed it.

Again, the Cookes’ belief that their boundary was “several feet past the fence line,”¹⁰⁸ was based on guidance from their surveyor. On similar facts, the court in *Trotzer v. Vig*¹⁰⁹ held that the claimant was only entitled to single damages pursuant to RCW 64.12.040. In that case, Vig told Trotzer of his plans to extend a trail near the parties’ common boundary line. Trotzer advised Vig of his belief that the fence was the boundary line. In reliance on Trotzer’s statement, Vig cut trees up to the fence. The fence was not the boundary line and Vig removed several of Trotzer’s trees.

Because Vig relied on Trotzer’s representation regarding the location of the boundary line, the trial court found that Vig had probable cause to believe the trees were on Vig’s property and declined to award treble damages. The court of appeals affirmed, noting that Trotzer “presented no evidence of willfulness on the part of Vig.”¹¹⁰

¹⁰⁷ RP 1:101:25-102:1.

¹⁰⁸ RP 1:101:25-102:1.

¹⁰⁹ 149 Wn. App. 594, 203 P.3d 1056, *rev. den.*, 166 Wn.2d 1023 (2009).

¹¹⁰ *Id.* at 611.

Here, the Superior Court's finding of willfulness is premised on the fact that the Cookes completed a survey in connection with the boundary line adjustment. As noted, there were no markers in the ground to indicate the precise location of the boundary line. The Cookes reasonably relied on the information given to them by their surveyor. There was not a "mere subjective belief in the right to cut the trees" as suggested by the Superior Court's opinion.

The Cookes had probable cause to believe that the cherry tree was on their property. Ms. Twu did not offer any evidence to the contrary. The trial court's finding to the contrary is not supported by substantial evidence.

In light of this evidence, the trial court similarly erred in concluding that Ms. Twu was entitled to an award of treble damages. The Superior Court's decision on treble damages should be reversed and remanded for entry of judgment in favor of Ms. Twu for single damages only.

D. The Superior Court should have entered an injunction allowing the Cookes to enforce the view easement.

Both parties asked the Superior Court for declaratory and injunctive relief. The parties asked the court to fix the proper location from which to measure the 30-foot height restriction and to grant associated injunctive relief. The Cookes asked for "a mandatory injunction

requiring that Defendant remove all vegetation, on a continuing basis, planted after June 1, 2009, which grows above 30 feet as measured from the lowest portion of the foundation of Defendant’s existing house....”¹¹¹ The Superior Court agreed with the Cookes with respect to the proper point of beginning the 30-foot height restriction. The Cookes’ requested injunctive relief would have permitted the Cookes’ simple motion before the Superior Court if Ms. Twu failed to comply with the proposed injunction.

The Superior Court ruled that “[b]y establishing view easement height restrictions on the servient estate Cooke has adequate remedies under the law to enforce the restrictions.”¹¹² Absent injunctive relief, however, the Cookes will be forced to file a new lawsuit each time Ms. Twu refuses to comply with the view easement. This framework creates inefficiencies and potentially leads to inconsistent outcomes.

An injunction is an appropriate remedy in an easement dispute.¹¹³ Here, both parties asked for injunctive relief. Thus, there is no dispute that such relief was proper in this case. The Superior Court’s ruling on the parties’ claims for declaratory relief demonstrates the Cookes’ clear right to maintain their view. Ms. Twu’s conduct before and throughout this

¹¹¹ CP 4.

¹¹² CP 33.

¹¹³ See, e.g., *Snyder v. Haynes*, 152 Wn. App. 774, 217 P.3d 787 (2009).

litigation demonstrated her intent to invade this clear right.¹¹⁴ The Superior Court abused its discretion by refusing to grant the Cookes' requested injunctive relief.

E. Cookes concede that Ms. Twu is entitled to an award of attorney fees pursuant to RCW 4.84.270 for defeating the Cookes' claim for damages.

The Cookes asserted a claim for damages for less than \$10,000. The Superior Court rejected the Cookes' damages claim. The Superior Court declined to award Ms. Twu attorney fees pursuant to RCW 4.84.250, et seq., on the ground that "neither party is the prevailing party."¹¹⁵ RCW 4.84.270 provides that "[t]he defendant...shall be deemed the prevailing party within the meaning of RCW 4.84.250 if the plaintiff...recovers nothing...."

The Cookes concede that the trial court erred in concluding that Ms. Twu was not entitled to an award of attorney fees under RCW 4.84.250, et seq. for defeating the Cookes' damages claim. The amount of any such award will be determined on remand and will be limited to those fees incurred in connection with defending against the damages claim. The Cookes' concession in this regard is limited to Ms. Twu's entitlement to

¹¹⁴ Exhibit 48, page 2; Exhibit 51, page 3; Exhibit 52; Exhibits 55-57; Exhibit 61, page 3.

¹¹⁵ CP 35.

an award of attorney fees incurred in defending against the Cookes' claim for damages.¹¹⁶

F. Ms. Twu is not entitled to an award of attorney fees pursuant to RCW 4.84.250, et seq. based on her timber trespass damages award.

Ms. Twu seeks reversal of the Superior Court's ruling denying her request for attorney fees on the timber trespass claim. Ms. Twu seeks fees pursuant to RCW 4.84.250, et seq., based on her argument that she beat her pretrial settlement offer. She did not. Ms. Twu's pretrial offer included both an offer to settle for a specified dollar amount, which Ms. Twu did beat at trial, and a demand that the Cookes agree to Ms. Twu's interpretation of the height restriction. Ms. Twu lost that issue at trial. For this reason, she is not the prevailing party and is not entitled to an award of attorney fees incurred in prosecuting her timber trespass claim.

The relevant facts are undisputed:

On June 29, 2017, the Cookes offered Ms. Twu \$2,005 dollars on her timber trespass claim.¹¹⁷ This was more than Twu's estimate of

¹¹⁶ The Cookes also concede that Ms. Twu is entitled to attorney fees on appeal only with respect to the Cookes' claim for damages. The Cookes reserve the right to contest the amount of fees to which Ms. Twu is entitled based on the Cookes' concession on this issue, both in this brief and in correspondence with Ms. Twu's counsel.

¹¹⁷ CP 38.

damages (\$2,002.76),¹¹⁸ and more than the court's award of actual damages (\$1,788.00),¹¹⁹ before that amount was trebled.

On July 12, 2017, Ms. Twu rejected the Cookes' offer and offered to settle all claims in the case as follows:

Ms. Twu will accept payment in the amount of \$2,002.76 to resolve all claims, including claims related to the view easement and timber trespass. Thus, in exchange for the Cookes' (1) payment to Ms. Twu in the amount of \$2,002.76, (2) agreement to only enforce the view easement at or above the elevation of 335.32 feet above sea level, and (3) dismissal of their claims with prejudice, Ms. Twu will agree to dismiss her claims with prejudice."¹²⁰

In contrast, the Cookes' settlement offer addressed only the damages aspect of the case and did not attempt to resolve their claim for declaratory relief with regard to the height restriction. Ms. Twu's attorney wrote: "We do not believe that the Cookes can separate the timber trespass claim from all of the other claims for the purposes of RCW 4.84.250-300. Therefore, your offer is ineffective because it does not resolve the entire action."¹²¹

In other words, Ms. Twu would only settle if the Cookes also agreed to capitulate to Ms. Twu's interpretation of the view easement. The Based on Ms. Twu's offer, the Cookes could not resolve the damages

¹¹⁸ CP 82.

¹¹⁹ CP 34.

¹²⁰ CP 39 (emphasis in original).

¹²¹ CP 39.

claim without also giving up on the view easement claim. For this reason, the Cookes rejected Ms. Twu's offer.¹²²

The purpose of RCW 4.84.250 is to provide an incentive for litigants to resolve small matters, by awarding the prevailing party their legal fees. However, a claimant is only entitled to their fees if they have made a settlement offer before trial and obtain a verdict that exceeds that offer.¹²³ In making a prevailing party determination under RCW 4.84.260, the trial court must compare the pretrial offer with the final outcome of the case.¹²⁴ This "apples-to-apples" comparison plainly demonstrates that Ms. Twu cannot be the prevailing party under RCW 4.84.260, regardless of the amount of her recovery.

As trebled, Ms. Twu received a higher damages award than the pre-trial offers. However, she lost on the issues related to the view easement. So, by coupling her RCW 4.84.250-300 settlement offer with these other causes of action, Twu can't be deemed the prevailing party. Indeed, her improper attempt to tie the declaratory judgment and injunction claims with the damages claims made it legally and practically impossible for the Cookes to accept Ms. Twu's pretrial offer.

¹²² CP 54.

¹²³ *Woodruff v. Spence*, 88 Wn. App. 565, 571, 945 P.2d 745, 749 (1997).

¹²⁴ *McKillop v. Pers. Representative of Estate of Carpine*, 192 Wn. App. 541, 548, 369 P.3d 161 (2016) ("the trial court should compare the total amount of the offer of compromise with the jury award").

The Superior Court found in the Cookes' favor on the view easement. They are therefore the prevailing party on that issue. And since Twu coupled her claim for declaratory relief under the 2009 view easement with her offer to settle her timber trespass damages claim, Ms. Twu cannot be said to have improved on her pretrial offer and, as such, cannot be the prevailing party under RCW 4.84.260. The Superior Court properly denied Ms. Twu's request for attorney fees incurred in prosecuting her claim for timber trespass.

G. Request for attorney fees on appeal.

In the event that this court agrees that Ms. Twu is entitled to only single damages pursuant to RCW 64.120.40, the Cookes will be the prevailing party based on their pretrial offer. As such, the Cookes request an award of attorney fees pursuant to RAP 18.1 and RCW 4.84.250-290.

VI. CONCLUSION

The Superior Court went out on a limb to conclude that the two trees on Ms. Twu's property are exempt from the view easement. Neither party asked the court to decide that issue. All of Ms. Twu's pleadings and other filings show that she, like the Cookes, understood that the two trees were subject to the view easement's thirty-foot height restriction. Substantial evidence does not support the Superior Court's findings to the contrary. This court should reverse and remand for entry of judgment

providing that the two trees are, in fact, subject to the view easement's height restriction.

Similarly, substantial evidence does not support the Superior Court's findings that the Cookes' acted willfully in removing the cherry tree. Rather, the evidence that the Cookes believed the tree to be on their property is uncontroverted. This court should reverse the Superior Court's judgment for treble damages and remand with instructions to enter judgment in favor of Ms. Twu for single damages on her timber trespass claim, and an award of attorney fees under RCW 4.84.250, et seq.

The Cookes demonstrated a clear right to their requested injunctive relief. This court should reverse and remand to the Superior Court for entry of injunctive relief as requested by the Cookes.

The Cookes concede that a remand is appropriate on Ms. Twu's claim for attorney fees incurred for defending against the Cookes' damages claim. However, the Superior Court's properly declined to award attorney fees to Ms. Twu on her claim for timber trespass.

///

///

///

///

///

Finally, the Cookes request attorney's fees on appeal.

DATED this 27th day of August, 2018.

Respectfully Submitted,

LANDERHOLM, P.S.



BRADLEY W. ANDERSEN, WSBA No. 20640
JEFF LINDBERG, WSBA No. 32444
Attorneys for Respondents/Cross Appellants
David Cooke and Kelly Ratzman-Cooke

CERTIFICATE OF SERVICE

The undersigned hereby certifies as follows:

1. My name is Heather A. Dumont. I am a citizen of the United States, over the age of eighteen (18) years, a resident of the State of Washington, and am not a party of this action.

2. On the 27th day of August, 2018, a copy of the foregoing **RESPONDENTS/CROSS APPELLANTS' OPENING BRIEF** was delivered via first class United States Mail, postage prepaid, to the following person:

Paige B. Spratt, WSBA # 44428
Schwabe, Williamson & Wyatt
700 Washington Street, Suite 701
Vancouver, WA 98660
E-mail: pspratt@schwabe.com

Counsel for Defendant /
Appellant and Cross-
Respondent Twu Yun-Chun

Averil Rothrock, WSBA #24248
Schwabe, Williamson & Wyatt
1420 5th Avenue, Suite 3400
Seattle, WA 98101
Email: arothrock@schwabe.com

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

DATED: August 27, 2018

At: Vancouver, Washington


HEATHER A. DUMONT

LANDERHOLM, P.S.

August 27, 2018 - 4:37 PM

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

The following documents have been uploaded:

- 512947_Briefs_20180827163613D2798771_4781.pdf
This File Contains:
Briefs - Respondents/Cross Appellants
The Original File Name was Opening Brief.pdf

A copy of the uploaded files will be sent to:

- KeeleyAnn.Martin@landerholm.com
- arothrock@schwabe.com
- brad.andersen@landerholm.com
- fretonio@schwabe.com
- heather.dumont@landerholm.com
- pspratt@schwabe.com

Comments:

Sender Name: Heather Dumont - Email: heather.dumont@landerholm.com

Filing on Behalf of: Jeffrey Thomas Lindberg - Email: jeff.lindberg@landerholm.com (Alternate Email: jacqueline.renny@landerholm.com)

Address:
805 Broadway Street, Suite 1000
Vancouver, WA, 98660
Phone: (360) 696-3312

Note: The Filing Id is 20180827163613D2798771