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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' REPLY BRIEF

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I. INTRODUCTION

In this case, the Cookes asked the Superior Court to decide the following three issues: 1) whether the 30-foot height restriction in the parties' view easement was to be measured from the front or the rear of Ms. Twu's foundation; 2) whether the Cookes were entitled to damages because Ms. Twu's vegetation exceeded the 30-foot height limitation and interfered with the Cookes' protected view; and 3) whether the Cookes were entitled to an injunction to prevent Ms. Twu from further interfering with their protected view. The Cookes did not ask for a determination as to whether the two cherry trees singled out in the Superior Court's decision were planted before or after 1999.

Neither did Ms. Twu. To the contrary, in her Answer and Counterclaim, Ms. Twu effectively conceded that the two cherry trees were planted after 1999 and, as such, were subject to the view easement. This was her position in her counterclaim, at summary judgment, in her opening brief, in her trial testimony, and in her written closing argument. Thus, throughout the entire life of this case, Ms. Twu has consistently and correctly taken the position that the two cherry trees are subject to the view easement.

In its written decision, the Superior Court nevertheless thrust this undisputed issue into the case, and decided that the Cookes had the burden of proof to establish the age of the two cherry trees and failed to carry that burden. Despite her multiple admissions that the two trees were subject to the view easement, Ms. Twu now embraces the Superior Court's ruling on

this issue, argues that the Cookes had the burden of proof, and that the absence of evidence on this issue must be visited upon the Cookes. In so arguing, Ms. Twu concedes the absence of evidence in the record. Tellingly, in responding to this issue, Ms. Twu fails to acknowledge or address her consistent pattern of admissions on this issue throughout this case. The Cookes are entitled to relief on this issue.

Regarding Ms. Twu's timber trespass claim, Ms. Twu is entitled to single damages only, not treble damages as awarded by the Superior Court. Kelly Cooke was the only witness to testify on the issue of whether the Cookes had probable cause to believe that the cherry tree that they removed was on the Cookes' property. Her testimony is unchallenged. Moreover, Mrs. Cookes' testimony is corroborated by other evidence introduced and received without objection. For the reasons discussed herein, substantial evidence does not support the trial court's finding that the Cookes acted willfully. This aspect of the Superior Court's ruling should also be reversed and remanded for entry of judgment for single damages only.

Finally, Ms. Twu's entitlement to attorney fees on appeal is limited to those fees incurred with respect to her successful defense of the Cookes' damages claim. The Cookes conceded Ms. Twu's entitlement to this narrow category of fees. Ms. Twu has not otherwise demonstrated a basis for an award of attorney fees.

II. REPLY IN SUPPORT OF COOKES' CROSS APPEAL

A. The Superior Court's ruling regarding the two cherry trees must be reversed.

1. The Cookes properly assigned error.

Ms. Twu incorrectly asserts that the Cookes did not properly assign error to the Superior Court's findings of fact. The Cookes assigned error as follows:

- 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 or 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.¹

The related statement of Issues Pertaining to Assignments of Error confirm that the Cookes are challenging the Superior Court's findings and conclusions relating to this issue: "Was there substantial evidence to support the court's finding of fact that the two flowering tree [sic] were exempt from the view easement?"²

¹ Cookes' Opening Brief at 4.

² Cookes' Opening Brief at 5.

The Superior Court's decision did not address the two cherry trees in its findings of fact, but instead addressed this issue in the portion of its written ruling setting for the court's conclusions of law. Further, there were no numbered findings of fact as contemplated by RAP 10.3(g) to which the Cookes could specifically assign error.

In addition to their assignments of error and related statement of issues, the body of their brief plainly states that "[s]ubstantial evidence does not support the trial court's finding that the two cherry trees were planted before 1999."³ The Cookes properly assigned error to this aspect of the Superior Court's ruling.

Even if the Cookes' assignments of error suffered from a technical failure to comply with RAP 10.3(g), such does not preclude appellate review.⁴ A failure to properly assign error is not prejudicial to appellate review where the manner in which the claimed errors are set forth and described in headings throughout the brief is adequate to inform the appellate court of what actions were asserted as error.⁵ This aspect of the Superior Court's ruling is properly before this court for review.

³ Cookes' Opening Brief at 23.

⁴ *State v. Clark*, 53 Wn. App. 120 (1988), *rev. den.*, 112 Wn.2d 1018 (1989), *superseded by statute on other grounds as recognized in State v. C.M.B.*, 130 Wn. App. 841, 845-46 (2005).

⁵ *Id.* ("While the rules on appeal have not been strictly followed here insofar as assignments of error are concerned, nevertheless, the manner in which the claimed errors are set forth and described in headings throughout the brief is adequate to tell us what actions are asserted as error."); *see also Heaverlo v. Keico Indus.*, 80 Wn. App. 724, 728 (1996) (RAP 10.3 does not prevent an appellate court from considering a party's argument, despite a failure to properly assign error, if the brief clearly discloses the error sought to be reviewed and the opposing party has had the opportunity to adequately respond to the allegation of error).

2. Ms. Twu is bound by her admissions regarding the two cherry trees.

As noted, Ms. Twu repeatedly argues that the Cookes had the burden of proving the age of the cherry trees and, conceding the lack of record evidence on this issue, argues that the Cookes failed to carry this burden. However, there is one very telling omission from Ms. Twu's response brief. Not once does she address the Cookes' argument⁶ regarding Ms. Twu's multiple admissions that the two cherry trees are subject to the view easement.

Ms. Twu effectively conceded this point in her answer and counterclaim,⁷ her summary judgment declarations,⁸ her trial brief,⁹ her trial testimony,¹⁰ and her closing statement.¹¹ Before, during, and after trial—until the Superior Court's written ruling—there was simply no dispute between the parties that the two cherry trees were subject to the view easement.

Examples of these admissions are set forth in the portions of Cookes' opening brief at pages 14-16. There are others throughout the record on appeal. One example of Ms. Twu's consistency with regard to this issue is her declaration filed in opposition to the Cookes' Motion for Partial Summary Judgment.¹² In discussing the drafting of the parties'

⁶ Cookes' Opening Brief, 14-16, 25-26.

⁷ CP 25-28.

⁸ CP 81, 82, 145 and 146.

⁹ CP 185, 186.

¹⁰ RP 4:610:9-611:11; 4:612:25-613:9; 4:648:2-24; 4:625:20-626:11.

¹¹ CP 262, 267, 268, 274.

¹² CP 145-148.

2009 view easement, Ms. Twu stated that “I obviously wanted to exclude my home and my existing fir trees from the height restriction.”¹³ She goes on to state that “in 2009, I didn’t know whether the roof of my home violated the height restriction and, out of an abundance of caution, I wanted to ensure that existing structures, like my home, and *fir trees* were excluded from the easement agreement.”¹⁴

Ms. Twu goes on to challenge the Cookes’ interpretation of the view easement—that it should be measured from the front of Ms. Twu’s foundation, not from the back—and argues that, if the Cookes are correct, “I would have to level most of my plants or shrubs that were in my yard. In fact, the cherry trees at the top of my property would have had to have been cut down.”¹⁵ If, as she now claims, the cherry trees were not subject to the view easement because they were planted before 1999, Ms. Twu would have no reason to make these statements in her declaration. The height of the cherry trees would have been a non-issue in any discussion of the view easement.

Yet Ms. Twu repeatedly referenced these cherry trees when she articulated her interpretation of the view easement. When discussing items that were excluded from the view easement, Ms. Twu only references her home and the fir trees. In contrast, Ms. Twu addresses the cherry trees that were singled out in the Superior Court’s decision when she is arguing

¹³ CP 145 (¶ 2).

¹⁴ CP 146 (¶ 3) (emphasis added).

¹⁵ CP 146 (¶ 4).

about the 30-foot height restriction and, in doing so, she clearly admits that the height restriction applies to the cherry trees.

In light of Ms. Twu's admissions, and regardless of who had the burden of proof, it was not, as Ms. Twu now argues, incumbent upon the Cookes to adduce evidence at trial and convince the Superior Court that the trees were planted after 1999.¹⁶ To so argue is entirely inconsistent with Ms. Twu's own allegations in her counterclaim and her testimony and arguments both before and after trial. Such judicial admissions in a parties' pleadings "have been defined as stipulations by a party or its counsel that have the effect of withdrawing a fact from issue and *dispensing wholly with the need for proof of the fact.*"¹⁷

In summary, even assuming that the Cookes were required to adduce trial evidence on the age of the two cherry trees to show that the cherry trees are subject to the view easement, Ms. Twu, in her Answer and Counterclaim, summary judgment declaration, trial brief, and closing statement admitted that the trees are subject to the view easement. Her multiple consistent admissions on this point "dispens[ed] wholly with the need for proof of the fact."¹⁸

¹⁶ *Mukilteo Ret. Apts. v. Investors*, 176 Wn. App. 244, 256-57 (2013).

¹⁷ *Id.* at 256, n. 8 (emphasis in original; internal quotation marks omitted).

¹⁸ *Mukilteo Ret. Apts.*, 176 Wn. App at 256, n.8.

3. If anyone had the burden of proof on the age of the trees, it was Ms. Twu.

In defense of the Superior Court's ruling, Ms. Twu argues that the Cookes' claims for damages and injunctive relief made the age of the two trees an issue on which the Cookes had the burden of proof at trial. As noted, this argument ignores Ms. Twu's multiple admissions to the contrary. In any event, if the Cookes' claims put the age of the two trees at issue, so did Ms. Twu's counterclaim for timber trespass.

The Cookes were only liable for timber trespass damages if the cherry tree that was removed was not subject to the view easement. Otherwise, the Cookes had the legal right to remove that portion of the cherry tree that extended above the 30-foot height restriction. To prove that the Cookes were liable for trespass because they removed the cherry tree "without lawful authority"¹⁹ Ms. Twu necessarily had to establish the age of the tree. In fact, the colloquy between Mr. Andersen and the court quoted on page 16 of Ms. Twu's response brief is actually in the context of the examination of Mrs. Cooke about the cherry tree that the Cookes removed.²⁰ Thus, if any party had the burden of proof on the age of the cherry tree, it was Ms. Twu.

¹⁹ RCW 64.12.030.

²⁰ RP 1:104-105.

B. The Superior Court's ruling regarding treble damages must be reversed.

1. The Cookes properly assigned error.

The Cookes incorporate the arguments and authorities set forth in section II.A.1 above. The Cookes' assignments of error II.D and E plainly assign error to the Superior Court's ruling imposing treble damages. Their statement of issues pertaining to these assignments ask whether substantial evidence supports "the court's finding of fact that the Cookes acted willfully and without probable cause when they cut the cherry tree...."²¹ Similarly, the section heading on page 29 states that "[s]ubstantial evidence does not support the trial court's finding that the boundary line between the Twu and Cooke properties was clearly marked."²² This aspect of the Superior Court's ruling is properly before this court for review.

2. Mrs. Cooke's testimony is unchallenged and corroborated by other evidence.

Although the Cookes never denied that they removed the cherry tree, they resisted Ms. Twu's claim for treble damages on the ground that they "had probable to believe that the land on which such trespass was committed was [their] own."²³ The testimony and other corroborating evidence supporting the Cookes' defense is discussed in the Cookes' opening brief.²⁴

²¹ Cooke Opening Brief at 4-5.

²² Cooke Opening Brief at 29.

²³ RCW 64.12.040.

²⁴ Cooke Opening Brief at 18-19, 30-34.

Ms. Twu does not and cannot challenge the testimony from Mrs. Cooke that no survey markers were placed in the ground before 2014. Thus, regardless of the availability of survey sketches generally depicting the location of the boundary line between the Cooke and Twu properties, the uncontroverted evidence in the record is that there were no physical markings on the ground before 2014. The cherry tree was within two to three feet of the actual boundary line.²⁵ Also uncontroverted is the evidence that the Cookes relied on statements from their surveyor regarding the location of the boundary line between the Cooke and Twu properties. This information on which the Cookes relied placed the cherry tree, they believed, on the Cooke property. Given this understanding and belief, the unchallenged evidence at trial shows that the Cookes had probable cause to believe that the cherry tree was on their property.

To support the Superior Court's award of treble damages, Ms. Twu relies heavily on remarks made by the trial judge at the hearing on the motion for reconsideration that he "ha[d] no doubt" that the Cookes knew that the cherry tree was on Ms. Twu' property. The trial judge's comments at the motion for reconsideration are not evidence. Also, contrary to Ms. Twu's assertion in her response brief, the Superior Court, in its written decision did not make a credibility determination with respect to Mrs. Cooke's testimony. And Mrs. Cookes' testimony was the only testimony regarding the Cookes' understanding of whether the cherry tree was on

²⁵ RP 2:302:9-11.

their property. Any findings on this issue must be based on substantial record evidence. Here, the only evidence on the issue of willfulness or the Cookes' belief was Ms. Cookes' testimony about the Cookes' understanding of the location of the property line, their reliance on the surveyor, their ongoing pruning of the very same cherry tree with no objection from Ms. Twu, and the absence of survey markers on the ground.

The other portions of the record on which Ms. Twu relies to defend the Superior Court ruling do not undermine the Cookes' position. The Superior Court's statement that, "[a]s of May 2009, there could be no dispute between the parties regarding the established property boundary" or that the Cookes were "keenly aware of boundary lines" are unremarkable as far as they go and are consistent with the fact that the parties had a survey sketch prepared in connection with their boundary line adjustment. But these statements are also consistent with the undisputed evidence that there were no actual property markers in the ground before 2014.

Thus, while the parties may have had a survey sketch, the actual physical boundary line was not marked when the cherry tree was removed in 2013. Instead, the Cookes relied on the statements from their surveyor as to the location of the boundary line, which, to their understanding, placed the cherry tree on their property.²⁶ This evidence of the Cookes'

²⁶ RP 1:101:25-102:1.

reliance on their surveyor’s advice—evidence that was not controverted at trial—shows that the Cookes had probable cause to believe that the cherry tree was on their property.

For this reason, the analysis in *Trotzer v. Vig*²⁷ compels a finding of probable cause here. Ms. Twu’s attempt to distinguish *Trotzer* fails. As in this case, *Trotzer*, the party seeking treble damages, “presented no evidence of willfulness on the part of Vig.”²⁸ Although Vig removed trees from Trotzer’s property, he did so based on the mistaken belief that a portion of Trotzer’s property actually belonged to Vig. This mistaken belief was due, in part, to the fact that Trotzer advised Vig where he believed the property line and this advice was mistaken. Significantly, as here, only Mr. Vig testified about whether the trespass was willful.²⁹ The court’s decision in *Vig* and the uncontroverted evidence offered by the Cookes supports the same outcome in this case. The Cookes had probable cause to believe the cherry tree was on their property. Mrs. Cooke testified to this without contradiction. For her part, Ms. Twu ““presented no evidence of willfulness....”³⁰

For the reasons discussed herein, the Superior Court’s award of treble damages should be reversed and the case remanded for entry of judgment for single damages only.

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

²⁸ *Id.* at 611.

²⁹ *Id.* at 610.

³⁰ *Id.* at 611.

C. **Ms. Twu’s attorney fees on appeal should be limited to those incurred in connection with the Cookes’ damages claim.**

I. **The Cookes’ concession is limited to attorney fees incurred in connection with the Cookes’ damages claim.**

In her opening brief, Ms. Twu argued that she is entitled to fees on appeal “for successfully defending the Cookes’ interference claim...” and “for successfully prosecuting her timber trespass claim.”³¹ Ms. Twu now seeks to expand her claim for attorney fees on appeal for responding to the Cookes’ cross appeal by arguing that “[t]hese grounds apply equally to a successful defense of the Cookes’ cross appeal, which pertains to the small damages claim.”³² The Cookes, however, did not appeal the Superior Court’s ruling on their damages claim, so Ms. Twu has not incurred any attorney fees defending this aspect of the Superior Court’s ruling. Ms. Twu nevertheless makes the strained argument, without citation to any authority, that her defense of other portions of the Superior Court’s ruling “relate[] directly to her defeat of the claim for money damages for interference.”³³

Ms. Twu’s argument fails. She is not entitled to an award of attorney fees for defending aspects of the trial court’s ruling relating to claims that are not attorney fee generating claims. The Cookes’ concession in their opening brief is limited to Ms. Twu’s defense of the Cookes’

³¹ Twu Opening Brief at 21.

³² Twu Reply Brief at 33.

³³ *Id.*

damages claim. The Cookes did not appeal the trial court ruling on their damages claim.

Tellingly, Ms. Twu did not seek recovery or attorney fees in the trial court on the issue of the two cherry trees being subject to the view easement: “There were only two claims at trial that provided for an award of attorneys’ fees (interference and timber trespass) and Ms. Twu prevailed on both.”³⁴ Ms. Twu was correct—there are no other attorney fee generating claims. She may not shoehorn her appellate fees from these non-fee generating claims into the Cookes’ narrow concession.

2. Ms. Twu is not entitled to attorney fees for responding to the Cookes’ appeal of the treble damages award.

Ms. Twu asks this court for attorney fees incurred in responding to the Cookes’ challenges to the Superior Court’s treble damages award. This request should be denied. Ms. Twu’s only basis for an award of attorney fees on her timber trespass claim is RCW 4.84.250, *et seq.* To be entitled to an award of attorney fees under this section, including on appeal, Ms. Twu is required to have recovered as much or more than her pretrial offer. Ms. Twu’s pretrial offer included three components: “(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 [Cookes’] claims with prejudice.”³⁵

³⁴ CP 41.

³⁵ CP 53.

In other words, Ms. Twu’s pretrial offer required the Cookes to capitulate on the central issue in this case—the starting point for measuring the 30-foot height restriction. The Cookes won that issue at trial; Ms. Twu lost. Because she conditioned the settlement of her damages claim on the Cookes’ capitulation on their claim for declaratory relief with respect to the height restriction, Ms. Twu had to win *both* issues at trial in order to beat her pretrial offer. She did not.

*Hanson v. Estell*³⁶ and *McKillop v. Pers. Rep. of Carpine*³⁷ do not assist Ms. Twu. *Hanson* simply stands for the proposition that a party may seek attorney fees under RCW 4.84.250, et seq., in a case where that party is also seeking relief other than damages. In *Hanson*, Estell argued that, because Hanson also sought injunctive relief, the provisions of RCW 4.84.250 do not apply.³⁸ The court rejected that argument, concluding that “[n]othing in [RCW 4.84.250] prohibits parties from seeking other relief besides damages....”³⁹ Significantly, Hanson’s pretrial offer was limited to the damages claim: “The Hansons offered \$200 as full settlement of any damages....”⁴⁰ There is no indication that Hanson included its claim for injunctive relief in its pretrial settlement offer as Ms. Twu did here with her claim for declaratory relief. *Hanson* does not assist Ms. Twu.

McKillop simply stands for the unremarkable proposition that a trial court must make an apples to apples comparison of the pretrial offer

³⁶ 100 Wn. App. 281, 997 P.2d 426 (2000).

³⁷ 192 Wn. App. 541, 369 P.3d 161 (2016).

³⁸ 100 Wn. App. at 289-90.

³⁹ *Id.* at 290.

⁴⁰ *Id.* at 289.

and the trial result: “The trial court had no basis for reducing” the amount of McKillop’s pretrial offer “before comparing it to the jury award.”⁴¹ In other words, the party seeking attorney fees under RCW 4.84.250 is stuck with its pretrial offer.

When this apples-to-apples comparison is done here, it is clear that Ms. Twu is not entitled to recover attorney fees under RCW 4.84.250, *et seq.* Her pretrial offer included three components, including her claim for declaratory relief. To settle Ms. Twu’s damages claim, the Cookes would have been forced to capitulate to Ms. Twu’s claim for declaratory relief regarding the interpretation of the height restriction. Ms. Twu lost that claim at trial. Thus, in comparing Ms. Twu’s pretrial offer with the outcome at trial, it is clear that she did not improve her position. She may not recover attorney fees. As such, those fees incurred in responding to the Cookes’ challenge to the treble damages ruling are not recoverable on appeal.

III. CONCLUSION

Throughout the life of this case before the trial court, Ms. Twu repeatedly conceded that the two cherry trees singled out by the Superior Court were subject to the parties’ view easement. She never argued otherwise. Instead, she consistently argued about the height to which those two trees can grow pursuant to her now discredited interpretation of the view easement. Given these multiple concessions, the Cookes did not have

⁴¹ 192 Wn. App. at 549.

the burden to prove the age of the two cherry trees at trial. If anyone did, it was Ms. Twu who had to prove that the Cookes removed the other cherry tree “without lawful authority.” The Cookes are entitled to relief from this aspect of the Superior Court’s judgment.

The Cookes are similarly entitled to relief from the Superior Court’s treble damages award. Substantial evidence does not support the court’s finding of willfulness. Instead, the uncontroverted evidence compels a finding that the Cookes had probable cause to believe that the cherry tree they removed was on their property.

Finally, Ms. Twu is not entitled to attorney fees beyond those incurred in connection with the Cookes’ claim for damages. The Cookes conceded as much, but no more. Ms. Twu may not shoehorn the rest of her appellate fees into this narrow concession, nor has she made the affirmative case for these fees.

DATED this 2nd day of November, 2018.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies as follows:

1. My name is Jacqueline Renny. 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 2nd day of November, 2018, a copy of the foregoing **RESPONDENTS/CROSS APPELLANTS' REPLY BRIEF** was delivered via first class United States Mail, postage prepaid, to the following person:

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

DATED: November 2, 2018

At: Vancouver, Washington



JACQUELINE RENNY

LANDERHOLM, P.S.

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