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Jefferson County Cause No. 16-2-00082-6

IN THE COURT OF APPEALS, DIVISION II

FOR THE STATE OF WASHINGTON

ROBERT GARTEN and HAWN GARTEN
Appellants/Defendants

vs.

ERNEST EMMERT and THERESA EMMERT, husband and wife
Respondents/Plaintiffs

Appellants' Opening Brief

Shane Seaman
WSBA #35350

Cross Sound Law Group
18887 Hwy 305, Suite 1000
Poulsbo, WA 98370
360-598-2350
Shane@crosssoundlaw.com

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A. INTRODUCTION

The Trial Court, in a pre-trial ruling, ordered Appellants/Defendants Robert Garten and Hawn Garten to not cross onto Respondents/Plaintiffs Ernest Emmert and Theresa Emmert's property at a "meander line." Appellants were found in contempt for parking on a strip they own. The central issue in the case was a boundary dispute between uplands and tidelands based upon the location of a meander line that was derived from a pre-1889 federal patent and a claim of adverse possession. Respondents were initially granted a preliminary injunction and then obtained a partial CR 56 summary judgment order. In both, Appellants were directed to not cross onto Respondents' real property across the disputed meander line. The Trial Court's orders were vague and the Trial Court made numerous errors and conflicting rulings that made it difficult for Appellants to clearly understand what they were ordered not to do. The east/west dividing line between the two properties was in dispute through trial until final judgment quieting title. On the same day that the Trial Court found Appellants in contempt, the Trial Court signed a final judgement settling the east/west line, and the record demonstrates where Appellants parked is Appellant Robert Garten's property, thus no "plain violation" of previous orders. Appellants seek relief in the Court of Appeals to reverse the contempt order as well as reverse the attorney fees they were ordered to pay Respondents

and for remand directing that the injunction bond should be paid to them. The record will show (1) Appellants never intentionally violated the Trial Court's pre-trial orders because they parked on property owned by Appellant Robert Garten and (2) Appellants never willfully and intentionally disobeyed the Trial Court because the Trial Court's conflicting and often times confused rulings made where they were prohibited from going unclear.

B. ASSIGNMENT OF ERRORS

1. Did the Trial Court err by finding Appellants in contempt?
2. Did the Trial Court err by entering a contempt order with no specific findings?
3. Did the Trial Court err by not giving Appellants an opportunity to purge the contempt?
4. Did the Trial Court errors in the case create undue confusion for Appellants, and therefore they never willfully violated the Trial Court's orders?
5. Did the Trial Court err by issuing a "punitive" contempt order.
6. Did the Trial Court err by ordering Appellants pay attorney fees for the contempt?
7. Did the Trial Court err by not ordering the injunction bond should be paid to Appellants for the wrongfully issued preliminary

injunction precluding Appellants from entering that portion of real property that Robert Garten had fee simple title to?

C. ISSUES PERTAINING TO ASSIGNMENT OF ERRORS

1. For a party to be in contempt they must intentionally and willfully disobey a lawful judgment, decree, order, or process of the court RCW 7.21.010. Can a litigant be in contempt of the court's order that is unclear and that they are legitimately confused about?
2. A court is required to enter findings showing an intentional and willful action that is a "plain violation" of the court's order. If the court fails to enter findings, should the contempt be reversed?
3. A judge is required to give a party an opportunity to purge a civil contempt and remove that contempt finding. If the court does not give the party an opportunity to purge, should the contempt be reversed?
4. Should a court "punish" a party for past conduct of parking on property that the Court ultimately decides belongs to the litigant?
5. Can a party be in contempt of a court order precluding them from entering the adjacent property, they then park on an area where a "deed overlap" exists, and the court ultimately finds that party is the fee simple owner of the property where the parking occurred? Can a party be in contempt for parking on the party's property when the

extent of the Trial Court's two pre-trial orders was to stay off the opposing parties' property?

6. Should a Trial Court pay as damages some amount from the injunction bond for Respondents obtaining a preliminary injunction order precluding Appellants from entering property owned by Robert Garten. Does the failure to do so demand in equity and under the law that Appellants should be awarded some attorney fees for correcting the numerous pre-trial errors?
7. Should a Court award attorney fees to the party who successfully removes a wrongfully obtained contempt order?

D. STATEMENT OF CASE

1. Property Background.

There are two properties in this case. Appellant Robert Garten owns the tidelands by virtue of a Quit Claim Deed from Wesley D. Gustafson and Lynne F.R. Gustafson ("Gustafson") dated May 15, 2013 (CP 31-37, 156). Robert Garten traces his title back to an original grant from the State of Washington in 1913 (CP 156).

Respondents Ernest and Theresa Emmert own the uplands to the north, and their real property was originally part of a tract owned by Walter Simkus and Linda Simkus ("Simkus"), parts of Government Lots 1 and 2, Section 33, Township 28 North, Range 1 East (CP 47, 63-69).

Simkus took title from the State of Washington. The State obtained their title from escheat proceedings, Cause No. 2069, Jefferson County Superior Court (CP 66, 75-76). Thus, the State conveyed only the interest it could to Simkus in the quit claim deed, the uplands as allowed by law, which at that time, the State could not convey tidelands as a matter of law¹. The call in the deed is “thence South to the meander line” and the question in the case was where to set that particular line separating north/south.

- a) Meander line is Respondents’ southern boundary, but erroneous survey creates boundary dispute.

The issues in this case arose because Simkus had a surveyor, Arnold Wood (“Wood” or “Wood Survey”) perform a survey that extended the meander line (southern water side boundary) well out into the tideland (CP 73). Wood also adjusted the Westerly boundary line of Simkus’ property (Respondents’ property) (CP 73-79). Both of these adjustments had bearing on the contempt order. The northern uplands (in opposite of the southern tidelands), for which Respondents’ trace their title, were first sold on

¹ “(2) Notwithstanding any other provision of law, from and after August 9, 1971, all state-owned tidelands and shorelands enumerated in subsection (1) of this section shall not be sold except to public entities as may be authorized by law and they shall not be given away.” RCW 79.125.200

“(18) “Second-class tidelands” means the shores of navigable tidal waters belonging to the state, lying outside of and more than two miles from the corporate limits of any city, and between the line of ordinary high tide and the line of extreme low tide.” RCW 79.105.060

February 24, 1872 (CP 66). This area was surveyed in 1859, where the Lots 1, 2, 3, and 4 in Section 33 were noted on the map with approximate acreage for each lot. The “meander line” (line depicting the water boundary) was drawn showing the approximate boundary of the shoreline (CP 180). Tracing title back to a conveyance in 1872, depicting a lot created in a survey in 1859, is the only possible reason that the upland/tideland division is not the ordinary high-water mark as legally defined in RCW 79.105.060. Ordinary high water is where Appellant Robert Garten thought he owned up to on the northern side, partly because he has been paying taxes on “tidelands,” (CP 159-175) and the State couldn’t sell tidelands to Simkus.

Ultimately by the close of trial², the Trial Court determined Wood’s located meander line on the Wood Survey was erroneous, thus Respondent Emmert’s pled south waterside boundary line per his deed was incorrect. The pled line had an impact on the confusion with the contempt.

The correct “meander line” was determined by Jim Wengler (“Wengler” or “Wengler Survey”) in 2002, per the Record of Survey for a Portion of Gov’t Lot 2, Section 33 (CP 52-53, 59). In his survey notes Wengler documented numerous conflicts of surveys in the area and further

² The Court’s interlocutory ruling on this location was actually determined in the summary judgment hearing after several motions for reconsideration. There were many disputed facts surrounding the location, so depending on the evidence it could still be changed at trial.

noting that all other surveys incorrectly calculated the location of the Northwest Corner of Lot 2 (Respondents' parcel is in Lot 2.)(CP 60). Thus the record is clear several professional land surveyors have had differences of opinion concerning the location of the boundaries in the area. These factual issues were raised in the summary judgment motion and they have bearing on this appeal because they show the confusion as to where the boundaries are exactly.³

- b) No clear demarcation showing southern boundary is anything other than ordinary high water, and east/west boundary unclear.

When Appellant Robert Garten inspected the property upon first purchasing, there was absolutely no evidence that Respondent Emmert was claiming any interest in the tidelands and no evidence of adverse possession. The dividing line up at the top of the bank by Shine Road was not clearly marked and nothing on the bank showed the east/west line. Garten looked at the online county parcel map and found that what was depicted as Respondents' southern boundary was consistent with what he understood at the time the tideland/upland boundary was the ordinary high-water mark (CP 156-158). At that time the location of the east/west boundary line was

³ Surveyor Rob Johnston testified in the CR 56 motion about the conflicts in locating the meander line between Surveyors Carman and Wood setting it at one location, and Wengler and then Wood setting it at another (CP 186-187).

not known to be in dispute. After purchasing, Appellants started using the property up to where they believed the boundaries existed.

2. Procedural Background that led to the contempt order.

On November 2, 2018, Appellants Robert Garten and Hawn Garten were found to be in contempt for violation of previous orders directing them not to cross the meander line onto Respondent Emmerts' parcel. At the same time, the Court was ruling on disputed proposed findings between the parties that had been drafted after the Trial Court's oral ruling at the close of trial.⁴ Garten also asked the Trial Court to enter judgment quieting title to his property as shown by the Rob Johnston's survey ("Johnston" or "Johnston Survey"), attached and made an exhibit to the Judgment (CP 303-304).

⁴ There was a delay in entering the findings and final judgment at the close of trial. Ernest Emmert first asked to prepare a transcript copy of the Court's oral ruling post trial before entry of findings. That was a reasonable request. That took time. Appellants' counsel at close of trial indicated to the Trial Court, on the record, maybe the parties could work something out. It didn't happen. In the intervening time Respondents moved for contempt because Garten and/or their guest parked on an area they thought the Trial Court awarded them. There was conflict in the attorney's schedule for the contempt hearing, setting it out. When the parties then set it for a day they could be available, the trial judge was not available, and it got set out again. This appeared to frustrate the Trial Court.

- c) Trial Court entered two written orders precluding Appellants from entering Respondents property, but no explicit findings. The Trial Court also entered contradictory and confusing orders.

The relevant previous orders were first a preliminary injunction on July 22, 2016 (CP 38). Appellants believed at that time ordinary high water was the tideland/upland boundary because of RCW 79.105.060. Respondents prepared the order adopted by the Trial Court. It did not have any specific findings. The relevant portion of the order states:

Defendants, their agents and invitees shall cease and desist crossing the boundary line established by the 1995 survey and maintained by Emmerts. No contact except through counsel (CP 38).

The second relevant order came about when Respondents moved under CR 56 for relief, asking the Court to set their boundary as pled in their complaint (which is Wood's erroneous line), per the legal description in their deed. By this time Respondents had obtained another preliminary survey, the "Cassou Survey", which appeared to agree with location of the meander line as determined by the Wengler survey (CP 47-49). The Trial Court, Honorable Judge Harper, initially denied the CR 56 motion at the hearing on January 27, 2017 because Appellants correctly pointed out that Respondents pled meander line per their deed based upon the Wood erroneous line and Wood's survey factually and legally disagreed with the location of the Wengler meander line as confirmed by the Cassou Survey (CP 206-212). Upon losing, Respondents moved for reconsideration per CR 59(a)(9), that "substantial justice was not done," but was seeking new relief,

an order declaring the Wengler Survey line showing the “corrected meander” line was the extent of their waterside boundary. This was based upon Respondents’ Cassou Survey (CP 206-212). However, in asking for reconsideration, Respondents argued to leave the claim up to Wood’s erroneous line for trial, claiming adverse possession (CP 193-198). Wengler’s meander line was not the issue in the original summary judgment motion as Respondents argued for Wood’s line, which is what was pled (CP 2, 6-7).

The Trial Court issued a memorandum opinion on summary judgment on April 19, 2017 granting Respondents’ motion for reconsideration (CP 219-220). The Trial Court ruled that the southern boundary for the Plaintiffs’ real property is the “corrected” meander line based upon the Wengler line, noting Appellants had not provided another conflicting survey (CP 220). In granting reconsideration, the Trial Court made the preliminary injunction permanent, ordering the following:

It is also hereby ordered adjudged and decreed, that the defendants are permanently ordered to cease and desist crossing the boundary line at the balanced government meander line confirmed by the Cassou Survey. The issue of the area below the balanced government meander line is reserved for trial (CP 217).⁵

This paragraph in conjunction with the preliminary injunction of July 22, 2016 is the apparent basis for the contempt, although the Court’s oral ruling finding contempt suggest it may be the March 29, 2018 oral decision at the

⁵ On the Cassou Survey this area is shown by a “hashed area” on the map.

close of trial (RP 104). Frankly, its confusing as to the basis as will be seen in this brief.

However, Appellants found it necessary to request the April 19, 2017 order be revised (thus filing their own CR 59 motion) because the language of the order (CP 217) conflicted with the Court's memorandum opinion (CP 220). The April 19, 2017 order set the boundary as pled per the complaint, which was back to the Wood's erroneous meander line (CP 217), but the Appellants were directed to cease crossing the meander line shown on the Cassou Survey, which showed both the Wengler "corrected meander" line and the Woods "erroneous meander" line. The Trial Court granted partial relief to Appellants' motion for reconsideration on June 19, 2017 (CP 221-227, 229-230). In that memorandum opinion, the Court indicated it would consider a revised order to carry out the April 19, 2017 memorandum opinion (CP 230). The Trial Court had not signed Appellants' proposed order, and Respondents never presented a new order to clarify the issue between the erroneous meander line and the corrected line.

- d) Appellants' surveyor Johnston performs another survey and confirms a "deed overlap" on the east/west line exists.

After the Trial Court set the meander line in the CR 56 ruling at the Wengler "corrected meander" line, Appellants chose not attack that issue factually at trial, but noted their objections to preserve the record. However, because the Trial Court appeared to base its decision setting the meander line because Appellants had not obtained their own survey contradicting

Respondents' claims (CP 220), Appellants decided to incur the costs, hiring Johnston (this is the same surveyor who testified in the CR 56 motion), who recorded a survey on February 21, 2018, (Johnston Survey, Jefferson County AFN # 614431- attached to Final Judgment (CP 303-304). The Johnston Survey determined that the east/west boundary line between the parties' parcels was conflicting with Wood's original survey and thus the legal description Appellants pled was correct (contradicting Respondents' claims). This is relevant to the issues on appeal, because the Johnston Survey shows that the area referred to as the "deed overlap," (indicated by "hashed" lines) that Appellants parked on. This east/west line remained in dispute.

3. The "deed overlap" was properly raised and was at issue.

At close of trial, the Trial Court wasn't very clear in the oral ruling if it granted Appellants' relief concerning the "deed overlap" (being shown by a senior line on the survey) but did note in the oral ruling at the close of trial that Court decision on the Respondents' CR 56 motion established the "correct" meander line, at the very least, was the southern boundary of Respondents' property (RP 62). The summary judgment motion did not deal with the "deed overlap" or the east/west line, and thus the permanent injunction that was made part of the CR 56 order fails to address this issue.

- e) “Deed overlap” identified by Respondents’ surveyor, and repeatedly raised by Appellants after the CR 56 motion.

The “deed overlap” was raised in the pleadings because Appellants pleadings met the requirements under CR 8, pleading title pursuant to the legal descriptions in Appellant Robert Garten’s deed. Respondents’ CR 56 summary judgment motion dealt with only the meander line (CP 20-23). Yet, Respondents surveyor Cassou had identified the “deed overlap” in her declaration (CP 41). She testified “For the benefit of the Court I have placed slash marks through the area on the survey where the Garten Quit Claim Deed overlaps with the Emmert Statutory Warranty Deed” (CP 41), and included Exhibit F in her declaration, showing a hashed area with the notation “Garten Deed Overlap” (CP 154-155).

Due to the “deed overlap” not being resolved in the CR 56 motion, Appellants specifically inquired about it in an email to opposing counsel on February 15, 2018 (CP 305). The “deed overlap” was raised in Appellants’ trial brief (CP 231). “However, the evidence will show a deed overlap that rebuts the trespass and frivolous defense claims.” (CP 231- page 1, 4th sentence). It was on the first page. Later in the trial brief, Appellants specifically brought to the parties’ attention issues intended to raise in trial, including the “deed overlap” (CP 238). In the body of the trial brief, Appellants informed the Court they intended to argue the deed overlap based upon Johnston’s Survey (CP 245).

2. Deed Overlap. The evidence will also show that there is a deed overlap on the very same area that the Emmerts accuse

Garten for trespassing upon when they built a makeshift driftwood shelter. A boundary line adjustment was executed but failed to include the tideland owners. This information was before the Court, shown on the Parametrix survey [Cassou Survey], but was never called to the Court's attention or ruled upon. Garten will introduce evidence through his surveyor Rob Johnston that the overlap exists, and he has superior title to that area.

Garten Trial Brief, page 15 (CP 245).

The deed overlap was raised in opening. It was argued in closing with Appellants addressing the problems with the Wood Boundary Line Adjustment, giving reasons why Johnston's "senior line" was correct.

f) "Deed overlap" addressed in closing to rebut trespass and to set the east/west line.

In closing argument on March 29, 2018, Appellants' counsel didn't ask the Court to change the corrected meander line, as the Johnston, Cassou, and Wengler surveys all match, thus the summary judgment order setting the meander line did not change (RP 43, 51, 54). Appellants did ask the Court to rule as a matter of law the operative effect of the 1992 deed to Simkus from the State of Washington, after the escheat of the subject property to the State of Washington. Title to the tidelands could not be conveyed as a matter of law, setting the tideland/upland boundary at ordinary high water (RP 37, 41, 48, 52-53). The Trial Court inquired if Appellants were asking to change the southern boundary (RP 50-51).

Appellants argued the 1992 deed could effectively change the tideland/upland boundary, but wouldn't change the meander line (RP 40-42). The legal impact of the escheat proceedings was something the Trial Court never considered in the summary judgment motion. This is relevant to the issues on appeal because if Appellants are correct, part of the area they were precluded from crossing in the injunction could in fact belong to Appellants, and thus they again cannot be in contempt for going on property Robert Garten owns.

In the March 29, 2018 closing, the Trial Court asked the following question of Appellants' counsel: "And then the 'deed overlap' issue, how does that have anything to do with—does that have anything to do with adverse possession of the disputed strip, the hashed area?" (RP 53). The Trial Court was asking Appellants if it impacted Respondents' adverse possession claim, after the Court acknowledged that Appellants explained how the deed overlap was done, and the boundary line adjustment problems with the Wood Survey (RP 53-54).

In the March 29, 2018 closing the Trial Court asked Appellants: "Does the deed overlap issue-- I mean, I'm just curious. In your mind does that effect the summary judgment decision that the correct meander line was the southern boundary." (RP 54). Appellants answered that it did not change the Court ruling in summary judgment, locating the meander line, but the problem was, as Appellants' counsel kept repeatedly pointing out, is that it wasn't brought to the Court's attention in Respondents' motion for summary judgment (even though on the Cassou Exhibit F) (CP 155), and therefore, the east/west line still needed to be determined (RP 54 -55).

Respondents responded in the rebuttal argument concerning the deed overlap, briefly mentioning that Cassou testified a 1962 deed conveyed tidelands and some uplands, but never really explaining to the Court why the Johnston east/west line isn't the "senior line" (RP 59-60).

The Trial Court noted on March 29, 2018 pertaining to trespass "there's not sufficient evidence of trespass by Gartens. I mean, they didn't wrongfully use this property. They felt that when they did use it, they were thinking it was theirs." (RP 67). This was after the Trial Court ruled that Respondents had not prevailed on adverse possession within the "hashed area" shown on the maps (RP 64-66).

Finally the Trial Court orally ruled that the injunction was dissolved within the "hashed area" (RP70-71).

4. Trial Court ruled Garten owned the "deed overlap" shown by a "hashed area" on Johnston Survey.

On November 2, 2018, the Honorable Judge Harper made very specific revisions to the proposed Findings of Fact and Conclusions of Law (RP 100-103). The Trial Court made specific revisions to the Appellants' proposed judgment, rejecting Respondents' proposed judgment (RP 103). The Trial Court quieted title, setting the boundaries, the east/west line where the deed overlap was and the meander line location as described by the Johnston Survey, setting it at the corrected meander line found by Wengler.⁶

⁶ Although not relevant to the issues on appeal, Respondents moved for reconsideration of the final judgment, but the Trial Court denied. The Trial Court had the opportunity to correct and or change the "deed overlap" but did not. Thus the boundaries determined by the Johnston Survey are final, which includes Garten title to the deed overlap.

The result of this ruling should have had Appellants as the substantially prevailing party in the litigation. Respondents received one favorable ruling that was contrary to Appellants' position, where the tideland/upland boundary was located at the corrected meander line rather than ordinary high water. However, all other issues before the Court, adverse possession, trespass, and Appellants acting frivolously in their defense, Appellants entirely prevailed on. No attorney fees were awarded to Appellants per the Court's oral ruling (RP 103).

5. The Trial Court then found Garten in contempt for parking on area where "deed overlap" existed.

On November 2, 2018, the Trial Court found Robert Garten and his son Hawn Garten in contempt for going onto the Respondents' property "above the line" (per the oral ruling) after it made its decision to adopt the Johnston survey as part of the final judgment (RP 104), and per the written ruling "defendants Robert Garten and Hawn Garten are of court for violating the Court's Orders dated April 19, 2018 and March 29, 2018 01 at least five (5) occasions." [error in syntax in original] (CP 288-289).

g) Appellants testified that they thought court awarded them "deed overlap" area, and they didn't mean to violate court orders.

Robert Garten and Hawn Garten offered testimony by declaration that they believed the area they parked on was their property after the close of trial and therefore they didn't willfully or intentionally violate the CR 56 motion order instructing them not to cross onto Respondents' property "at

the meander line” (CP 270-272, 273-274). The record shows that Robert

Garten testified to the following:

“Ernie states we parked in front of the Cotton Wood Tree. My understanding is that was the area that Rob Johnston marked as the deed overlap, and thus the line went out to easterly line set forth on his survey. I looked at the photos provide by Ernie, and I think this is about the same area he claims we parked...If the Court looks carefully at Exhibit B of Ernie’s Declaration, the Court will see the vehicle in the photograph is parked right next to the stairs. That is the area we thought Rob Johnston informed us we had senior title to. I did not intentionally go east of that area, and I have asked my family not to park too far past the stairs. As soon as I learned of the contempt, I have been trying to make sure people don’t park to far east of the stairs. I apologize to the Court, because I did not intentionally mean to violate the order.” (CP 273-274).

Hawn Garten testified to the following:

“Just like my father, Ernie Emmert never spoke to me personally about where we were parking, so I was not aware that he claimed we were crossing the line.

On the bank, above the beach, Shine Road ends approximately at the pavement. There is very limited access and parking along that area.

Ernie states I parked in front of the Cotton Wood Tree on June 30, 2018 for about an hour, July 3, 2018 for a few hours and July 5, 2018 for about an hour. Each time I was parking I believe I was on the area that Rob Johnston marked as the deed overlap, and I thought the evidence determined we has senior title to. I looked at the photos provided by Ernie showing the cottonwood tree, and I think this is about the same area he claims we parked...I did not intentionally go east of the area where the senior line is shown, and I have asked my family not to park too far past the stairs. As soon as I learned of the contempt, I have not parked past the area. I apologize to the Court, because I did not intentionally mean to violate the order.” (CP 270-272).

Appellants did not intentionally cross at the meander line, down on the beach⁷, they only parked on the edge of Shine Road, on the top of the bank next to Appellants' access stairs, where they thought they owned per the deed overlap (RP 83, 86, CP 41, 155). Respondents' claim was that Appellants parked in front of the cottonwood tree (CP 557-559), but the exact location per Emmerts' declaration was unclear and presumptively well within the "deed overlap" area. Respondents also argued that Appellants were warned in an email, but if this Court looks at Appellants counsel response, again, only discussing not crossing at the meander line down at the beach (CP 603). Respondent demanded \$2,000 for each day of a violation for a total of \$10,000.00 plus attorney fees (CP 556).

h) At November 2, 2018 hearing on contempt, the Trial Court incorrectly determined no party raised the "deed overlap" at trial and then found Appellants in contempt.

The Trial Court didn't appear to agree with Appellants that there was confusion about where the east/west line was set. The judge stated on the record at the November 2, 2018 hearing that no one brought the Court's attention the issue of the "deed overlap," and Respondents made an argument that Appellants never raised this issue in the pleadings (RP 86).

The Trial Court made two statements on November 2, 2018 that directly impacted this contempt order. First the Trial Court stated, "Not once did anyone stand up and say 'O, by the way, Your Honor, another issue

⁷ Respondents argue a boat tied up down on the beach was also a violation. (A) it was in the area of the deed overlap (B) likely floated up with the tide and (C) there is no evidence, only conjecture in the record that anyone intentionally crossed the meander line.

is this deed overlap area.’ So am I a little bit frustrated? Yea, a tad.” (RP 86). And then later the Trial Court stated, “nobody ever raised another argument about this deed overlap, whatever the heck that’s supposed to mean.” (RP 104). Appellants were surprised because they had absolutely raised the issue as clearly detailed above and the Trial Court asked about the deed overlap issue at the close of trial. Appellants counsel assured the trial court it has been brought up (RP 88).

Because the Trial Court seemed not to recall what occurred, Appellants asked at the November 2, 2018 hearing for an opportunity to clear up the record, provide additional briefing and testimony regarding the “deed overlap” (RP 91). Exercising its discretion, the request was ignored, as the Trial Court wanted to finalize the case that day (RP 90-91) and the Trial Court found Appellants in contempt for parking upon the disputed deed overlap area, and then awarded Respondents attorney fees (RP 104). The Trial Court orally stated it was clear Appellants continued to go on Respondents’ property above the meander line, which was resolved in the CR 56 motion (RP 104). Again, the Trial Court has contradicted itself, as the final judgment holds that the “hashed area” on the Johnston Survey belongs to Robert Garten per his deed.

The Trial Court had made confusing rulings on the summary judgment conflicting itself, granted relief that was not properly requested, insisted that Appellants never raised the “deed overlap” and refused to award Appellants attorney fees, even though Appellants had prevailed on every single issue at the trial. The Trial Court stated there was no confusion about where not to park and Appellants knew they were parking on

Respondents' property after ruling at the close of trial the injunction within the "hashed area was dissolved," but then contradicted itself in signing the final judgment giving Appellants' title to where they parked within the "hashed area" of the "deed overlap." Appellants were devastated. They lost faith in the Trial Court to issue a competent ruling and therefore appeal the contempt finding, because that is what the Trial Court stated to do.⁸

E. ARGUMENT

6. Standard of Review.

The appropriate standard of review for a contempt order determined solely upon written declarations is whether the Trial Court's findings of fact are supported by substantial evidence. In re Marriage of Rideout, 150 Wn.2d 337, 352, 77 P.3d 1174, 1181 (2003), as corrected (Oct. 27, 2003) and the contempt rulings are determined for an abuse of direction. State, Dep't of Ecology v. Tiger Oil Corp., 166 Wn. App. 720, 768, 271 P.3d 331, 353 (2012). A civil contempt sanction will stand as long as it serves coercive, not punitive, purposes. In re Marriage of Didier, 134 Wn. App. 490, 501, 140 P.3d 607, 612 (2006) The Trial Court abused its discretion and there are no explicit findings, only a vaguely stated ruling, "defendants Robert Garten and Hawn Garten are of court for violating the Court's

⁸ TRIAL COURT: If there's something that's left open because of this deed overlap, that's fine. You can bring it back. You can all appeal. It doesn't matter to me (RP 104).

Orders dated April 19, 2018 and March 29, 2018 01 at least five (5) occasions.” [error in syntax in original] (CP 288-289). There is nothing specifically stated in the written order indicating exactly what Appellants did, when it occurred, how it was a violation of the court’s written order or more importantly that Appellants had knowledge and willfully violated a court order.

The November 2, 2018 oral ruling doesn’t add any clarity as it makes no specific findings, and the final written judgment contradicts what the Trial Court stated on the record. There is no substantial evidence in the record showing Appellants are in contempt for parking within the “deed overlap.”

7. Issue 1, 2 3, 4 & 5: The Trial Court erred holding Appellants in contempt for parking on their own property within the “deed overlap.” There was no “plain violation” of a previous order.

Appellants Robert Garten and Hawn Garten did not intentionally or willfully disobey the Court’s written order. Contempt of court is an intentional disobedience of a lawful judgment, decree, order, or process of the court. RCW 7.21.010 (1)(b). To be contemptuous the act itself must be performed with the specific intent to disobey or violate an order of the court. Holiday v. City of Moses Lake, 157 Wash.App. 347, 355, 236 P.3d 981,

(2010), Citing, In re Estates of Smaldino, 151 Wash.App. 356, 364-64, 212 P.3d 579 (2009).

To find contempt of a lawful judgment or order, the court must construe the order or judgment strictly in favor of the alleged contemnor. Tiger Oil Corp., 166 Wash.App. at 768. Further, any facts found must constitute a plain violation of the order. Johnston v. Beneficial Mgmt. Corp. of America, 96 Wn.2d 708, 713, 638 P.2d 1201, (1982). There are no facts or findings supporting contempt.

- i) The Court orally modified the order(s) on March 29, 2018 no longer restraining Appellants from entering the “hashed area.”

The Court’s oral ruling at the close of trial dissolved the injunction that kept Appellants off all the disputed property, with only a small portion left. The colloquy on the record reflect this:

MR. SEAMAN: So, Your Honor, with your ruling then, does that mean the injunctions that’s still in place prohibiting Mr. Garten and his family from going to the hashed area is now dissolved?

THE COURT: Yeah.

MR. SEAMAN: I have nothing else.

MR. NICHOLS: Is the injunction still in place above the hashed area?

THE COURT: Is it necessary? I mean, I don’t know. Is it necessary?

MR. NICHOLS: I believe it’s necessary, yes.

THE COURT: Well, what’s your position, Mr. Seaman?

MR. SEAMAN: You Honor, I would like to talk to my client about that. It may be something we could work something

out without having to come back to any further discussion of the Court. So I am not going to ask the Court to dissolve that right now.

THE COURT: Okay, I'll just leave that as it is, but you guys can talk. And if there has to be an argument about it we can deal with it later. But I'll leave that as it stands (RP 70-71).

Because the Trial Court modified the order precluding Appellants from crossing at the meander line orally, and then invited the parties to come back to Court to address any issue concerning whether the injunction remained or not outside the "hashed area," it was an abuse of discretion to then find Appellants in contempt on November 2, 2018, when Appellants clearly did not understand the Court meant they could not park on the area they believed they owned.

Also the colloquy at the close of trial refers to the "hashed area" shown on the survey which the trial judge dissolved any injunction thereon. The problem is the "hashed area" is on more than one map introduced at trial and in the CR 56 motion, and what is pertinent is that on the Johnston Survey the "deed overlap" area is a "hashed area" specifically discussed at the close of trial (RP 45, 53-54)⁹. For the Trial Court to hold on November 2, 2018 that there should be no confusion about where not to park,

⁹ In full candor to the Tribunal, this counsel recalls the "hashed area" being discussed at that moment was below the meander line as shown on the Cassou survey, but because the Johnston survey and Cassou Exhibit F also shows the hashed area of the deed overlap, and were exhibits being shown in closing, both Hawn Garten's and Robert Garten's personal understanding was different (see CP 271 and 274).

contradicts the plain statement by the Court at the close of trial on March 29, 2018 allowing entry upon the “hashed area.” The Trial Court abused its discretion by not allowing Appellants the opportunity to give more information, when its clear the Trial Court itself was confused on November 2, 2018, thinking the deed overlap had not been raised previously when it clearly was.

j) The “March 29, 2018 01” order Appellants violated doesn’t exist.

On its face the contempt order is erroneous. There isn’t any order in the record dated “March 29, 2018 01.” All that occurred on that date was the Trial Court orally ruling the injunction was dissolved within the “hashed area.” The only two written orders precluding Appellants from crossing at the meander line are dated July 22, 2016 (CP 38) and April 19, 2018 (CP 217). The finding Appellants violated a “March 29, 2018 01” order is not supported by substantial evidence or by the record.

k) The Trial Court’s oral finding on March 29, 2018 stated no evidence of trespass. The evidence does not support an intentional violation of the previous orders(s).

The records show that Appellants were arguing about the deed overlap at the close of trial, and the Trial Court stated there was no evidence of trespass (RP 67). The “deed overlap” was raised in the trial brief to rebut

trespass (CP 245). It's no stretch to see the Appellants interpretation of the Trial Court's statement meant "you didn't trespass because you have title to the senior line (within the deed overlap shown by the hashed area)." The Trial Court rejected the *jus publicum* argument as an alternative defense to trespass, really leaving this "overlap" as the most logical legal rational why trespass didn't occur. However, even if that wasn't the Trial Court's rational in the written findings, the Trial Court didn't make a finding there was an intentional violation by Appellants, and given the very confusing decisions throughout the case, it would be impossible with this record to fine one. To cap the confusion, the Trial Court's ultimate final judgment was Appellant Robert Garten DID have title to the "deed overlap," the "hashed area" on Johnston's Survey. As this Court noted the unpublished decision in JZK, Inc. v. Coverdale, 192 Wn. App. 1022 (2016)¹⁰ and its previous decision in Tiger Oil Corp., 166 Wn. App. at 768 (2012) "Implicit in [the definition of contempt] is the requirement that the contemnor have knowledge of the existence and substantive effect of the court's order or judgment." Citing to In re Estates of Smaldino, 151 Wash.App. 356, 365, 212 P.3d 579 (2009). Since the Trial Court orally stated "no" evidence of trespass existed, when at least the facts show initially Appellants entered

¹⁰ This case is cited to as persuasive authority only per GR 14.1

into the disputed property, then logically afterwards, after trial, Appellants believed Robert Garten owned the “deed overlap” area (CP270- 274). How then, if the Trial Court determines in the final judgment Appellant Robert Garten actually owns the property they parked on, can Appellants be in contempt for using it? That is not a “plain violation” of the Court’s previous order and there is not substantial evidence showing an intentional action to violate.

The rational in Tiger Oil Corp applies here, where there were ambiguities in the Trial Court’s previous orders, and this Court noted that although it was not deciding the ambiguities on appeal, this Court recognized the existence of the ambiguities, and made a determination that the record did not show a “plain violation.” Tiger Oil Corp., 166 Wn. App. at 772. Only where there were clear instructions that the contemnor had violated was the Trial Court upheld on its finding of contempt. Id.¹¹

¹¹ For example this Court noted that the New Tiger consent decree required New Tiger to use Best Available Control Technology and the evidence showed an undisputed failure to use Best Available Control Technology, thus that was an intentional disobedience. Tiger Oil Corp., 166 Wn. App. at 772.

- 1) There was no finding Appellants acted willfully to disobey the Court, and the evidence doesn't support that they did. The Trial Court's confusing pre-trial ruling should not be a basis for contempt.

Absent in our record are any actual findings about the contempt and the record taken as a whole cannot support a finding of a willful intent to disobey the order(s) precluding Appellants from entering Respondents' property across the meander line. In contempt proceedings, an order will not be expanded by implication beyond the meaning of its terms when read in light of the issues and the purposes for which the suit was brought. Johnston, 96 Wn.2d at 712–13. Since the results are severe, strict construction is required. Id.

Appellants spent time in this brief showing the record and the pre-trial procedures because it demonstrates why the Trial Court erred. It was a complicated case involving the location of the meander line. There were conflicting opinions of surveyors. Boundary lines were not clearly marked. The Trial Court was unclear as shown above, and this created confusion. The Trial Court initially granted a preliminary injunction ordering Appellants to stay off Respondents' property per a meander line established in 1995. But when Respondents asked to quiet title to that line, the Court then denied their CR 56 summary judgment the tideland/upland boundary at the Wood "erroneous meander" line, but then granted Respondents request for reconsideration, holding in a memo opinion the tideland/upland boundary should be a different line, the Wengler "corrected meander" line. The Trial Court then signed Respondents proposed order putting the

tideland/upland boundary back to the Wood “erroneous meander” line contradicting its memo opinion, then reversing itself, ruled it would set the boundary back to the Wengler “corrected meander” line, but then never signed another revised order. If the permanent injunction still in place, exactly where was unclear because the southern boundary has been set at multiple locations by the Trial Court (which is why the Trial Court was correct in denying the CR 56 in the first place). But none of the pre-trial orders addressed the east/west line.

The final revised summary judgment order is an interlocutory order, subject to review and revision by entry of the final judgment. Washburn v. Beatt Equip. Co., 120 Wn.2d 246, 300, 840 P.2d 860, 890 (1992). It’s unjust to find Appellants in contempt for parking on property they thought Robert Garten owned at the end of trial. If the Trial Court followed the law on November 2, 2018, considered the language in the two previous orders dated July 22, 2016 (CP 38) and April 19, 2017 (CP 217), considered it’s oral rulings on March 29, 2018, it could not have found any basis for a willful disobedience. The fact there are no findings whatsoever in the contempt order on this point alone is grounds for reversal.

m) Appellants were not given an opportunity to “purge” the contempt.

An order of remedial civil contempt must contain a purge clause under which a contemnor has the ability to avoid a finding of contempt and/or incarceration for noncompliance. In re Marriage of Didier, 134 Wn. App. at 501. None exist in this case. A “punitive sanction” is a sanction imposed

to punish a past contempt of court for the purpose of upholding the authority of the court RCW 7.21.010. This contempt is punitive, not coercive, because the Court is punishing Appellants by finding them in contempt, ordering them to pay attorney fees for apparently violating the Trial Court's subjective intent.¹² The Trial Court did not follow procedures in RCW 7.21.040 or RCW 7.21.050.

8. Issue 6: Attorney Fees should not have been awarded.

Due to the error by the Trial Court finding Appellants in contempt, the attorney fees awarded of \$2,012.50 should be reversed.

9. Issue 7: The Trial Court should have awarded the injunction bond.

As an additional issue on Appeal which is tied into this contempt proceeding, is that Robert Garten prevailed in removing the injunction that was on the "hashed area" shown on the Cassou and Johnston Survey. A bond in the amount of \$10,000.00 had been posted. The bond "shall be fixed by the court.... conditioned to pay all damages and costs which may accrue by reason of the injunction or restraining order." RCW 7.40.080. It should be set in an amount to cover damages and costs which may be

¹² TRIAL COURT: I don't think there was any confusion about the decision and I don't think there was any confusion about the remaining injunction. I looked at the oral decision, so that's that, so I'm going to find the Defendants in contempt of violating that (RP 104).

incurred by the adverse party. Jensen v. Torr, 44 Wn. App. 207, 211, 721 P.2d 992, 994 (1986). The Trial Court erred by releasing the bond, and then finding Appellants in contempt.

10. Appellants request attorney fees on Appeal, RAP 18.1.

Pursuant to RAP 18.1 (a) and (b), Appellants request attorney fees and costs on appeal. Because the Trial Court awarded attorney fees under contempt and should be reversed, Appellants request attorney fees per RCW 7.21.030(3).

Procedural bad faith is also grounds for attorney fees. Rogerson Hiller Corp. v. Port of Port Angeles, 96 Wn. App. 918, 928, 982 P.2d 131, 136 (1999). Respondents confounding the issues, making improper motions for reconsideration, arguing that the “deed overlap” was not raised, are all reasons why this contempt order was put into place. In the end, the “hashed area,” showing the “deed overlap” on the Johnston Survey, is Robert Gartens.

F. CONCLUSION

Appellants appealed because the Trial Court found them in contempt, gave them no opportunity to “purge” the contempt, and because the Trial Court made several confused rulings, Appellants fear the next time Respondents make claims about the “deed overlap” area, the Trial Court

might very well find them in contempt again, even though the Trial Court signed the final judgment awarding Garten Title to the “deed overlap.” The Trial Court erred, there was no “plain violation” of the previous orders July 22, 2016 (CP 38) and April 19, 2018 (CP 217). There was no violation of an oral ruling on March 29, 2018 after the Trial Court ruled no evidence of trespass, and dissolved the injunction after the “deed overlap” was raised at trial and argued in closing. The Trial Court erred by not giving Appellants an opportunity to show that the “deed overlap” was raised previously. The Trial Court erred by not making findings and making the contempt punitive. Appellants respectfully request the Trial Court reversed and attorney fees awarded.

Dated this __25_ day of April 2019.

CROSS SOUND LAW GROUP



Shane Seaman, WSBA #35350
18887 St. Hwy 305 NE, Suite 1000
Poulsbo, WA 98370
(360)598-2350
shane@crosssoundlaw.com
Attorney for Appellants

CERTIFICATE OF SERVICE

I certify that I directed Appellants' Opening Brief to be served by
U.S. Mail, postage prepaid, on _____, 2019, to the following:

Attorney for Respondents Ernest and Theresa Emmert

Law Office of Peter J. Nichols, P.S.
Attn: Peter Nichols
2611 NE 113th Street, Suite 300
Seattle, WA 98125

Dated this _____ day of _____, 2019, at Poulsbo, Washington.

Melissa S. Colletto
Legal Secretary

CROSS SOUND LAW GROUP

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