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Division II
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NO. 52766-9-II

COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON

ROBERT GARTEN and HAWN GARTEN

Appellants,

vs.

ERNEST EMMERT and THERESA EMMERT, husband and wife
Respondents.

RESPONDENTS OPENING BRIEF
AND CERTIFICATE OF SERVICE

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I. INTRODUCTION

This case is a boundary dispute between Respondent Emmerts, who purchased their waterfront property in 1995 via Statutory Warranty Deed and Appellants Garten, who purchased their tidelands via Quitclaim Deed in 2013. The dispute arose in July of 2015, when appellant Hawn Garten confronted Respondent Ernie Emmert on the property and verbally threatened him. CP 22:2-3 & Ex 5, CP 138:5.

Emmert filed suit and obtained a preliminary injunction which prohibited the Gartens from crossing the boundary line as established by a 1995 survey by Arnold Wood and maintained by Emmert. CP 24.

On April 19, 2017 the Court awarded Emmerts summary judgment establishing title to the southern boundary of the Emmert property as the meander line established by Emmert's surveyor Kathleen Cassou, in a 2017 survey. The issue reserved for trial was title by adverse possession to the property between the Cassou meander line and the Wood meander line which was south of the Cassou line. CP 62.

At trial the Court ruled that adverse possession was not established for the area between the Cassou meander line and the Wood meander line.

The trial court found that the boundaries to the Emmert property were as established by the Cassou survey and pursuant to RCW 7.28.010, and the Emmert Statutory Warranty Deed, their title to the area is superior. CP 138:6-7. At the

conclusion of the trial the Court Ordered the injunction be left in place above the Cassou "correct meander line".

After trial the Gartens failed to comply with the injunction. Counsel for Garten, who was warned via email of trespasses, represented that Gartens understood that they were not to go above the Cassou meander line.

From: peter nichols <PeterNichols@msn.com>
Sent: Tuesday, June 19, 2018 9:58:03 AM
To: Shane Seaman
Subject: Emmert v. Garten

Shane:

I hope you have had time to review the Judges decision. I was hoping that since we do not have findings and conclusions entered that you could remind your client that there is still a restraining order on the beach for the property above the correct meander line. My client tells me that your client is parking on his property and walking on it as well. With the 4th of July coming up we want to make sure that there are no problems.

Please speak with your client and let me know.

Sincerely,

**Peter J. Nichols
Law Office of Peter J. Nichols, P.S.
2611 NE 113th Street, Suite 300
Seattle, WA 98125
206-440-0879
206-440-0636 Facsimile**

From: Shane Seaman <Shane@crosssoundlaw.com>
Sent: Wednesday, June 20, 2018 1:23 PM
To: peter nichols
Subject: Re: Emmert v. Garten

Peter,

I have had an opportunity to review and will have some draft findings for you to look over. If we can get an agreement, maybe we can avoid another hearing.

I spoke with Robert about the boundaries before you emailed me. He told me that Rob Johnston had marked the area below the corrected meander line and that he understood that he wasn't suppose to go above that. I will remind him again.

Shane

CP 103:28-Ex. D.

The trespasses continued and the Court found that Gartens violated the injunction on at least five (5) occasions in July, 2018 and found them to be in Contempt of Court. CP 137: 1-2. The contempt order contains typographical errors, (The original order was entered July 22, 2016. CP 24, left in place by the Court on April 19, 2017, memorandum opinion CP 62 and made permanent in the oral ruling after trial on March 29, 2018.) However, there is no question that the Gartens knew and understood the extent of the restraining order dating back to July of 2016.

Appellants only appeal the Order on Contempt dated November 21, 2018.

II. STATEMENT OF THE ISSUES

A. STANDARD OF REVIEW- ABUSE OF DISCRETION.

- B. THE TRIAL COURT PROPERLY USED ITS DISCRETION AND HELD GARTENS IN CONTEMPT WHEN THEY WERE GIVEN WRITTEN WARNINGS AND CONTINUED TO VIOLATE THE COURT ORDER.

- C. THIS COURT SHOULD AFFIRM THE TRIAL'S COURT'S ORDER BECAUSE THE FINDINGS OF FACT AND CONCLUSIONS OF LAW STATE THE CORRECT BOUNDARIES BETWEEN THE PROPERTY ARE IN THE CASSOU SURVEY AND THE EMMERT WARRANTY DEED.

- D. THE COURT SHOULD AFFIRM THE AWARD OF ATTORNEYS FEES FOR HAVING TO BRING THE CONTEMPT MOTION AND FOR RESPONDING TO THIS APPEAL.

III. STATEMENT OF THE CASE

On July 22, 2016 the trial court signed an Order for a preliminary injunction against Appellants. The injunction ordered Appellants to cease and desist from crossing the boundary line established by the 1995 survey and maintained by Emmerts and that the parties have no contact except through counsel. CP 24.

On June 19, 2017, in a memorandum opinion the trial court granted Emmerts partial summary judgment. CP 62. The Court found that the Cassou Survey established the "correct meander line". The Court stated:

This "Correct Meander Line" defines, at the least the Southern border of the Emmert property. It also defines, at most, the northern boundary of the Garten tidelands; this line takes precedence over the Line of Ordinary High Tide, which is further north of the "Correct Meander Line".

Defendant has not produced any competent evidence to contradict the foregoing or to create a material issue of fact concerning the same. CP 62: 2

The trial court left for trial the issue of ownership of the property below the correct meander line for trial. CP 62, 68.

The case went to trial on the issues of adverse possession, of the area between the correct meander line and the meander line established by the 1995 survey; trespass; and frivolous defenses. CP 138:2

At trial the court found that adverse possession had not been established. CP 138:5. The Court gave Garten title to the “hatched area”, which was the area of land below the correct meander line on the Cassou Survey. 138:7

The court found the correct boundary lines between the subject properties are what is shown on the Cassou survey. CP 138: 7

The trial court found that Hawn Garten was inappropriate, threatening and intimidating. Robert Garten was not credible in part insofar as his credibility determined some of the issues. CP 138:3. Garten had signed an excise tax affidavit stating the tidelands were a gift, when he actually paid \$5,000.00 to the seller. CP 138:3.

The Court found that the actions of plaintiffs Ernest Emmert and Theresa Emmert in this matter were in absolute good faith. CP 138:3

The violations of the trial court's order started in June of 2018. CP 101. Prior to making the motion for contempt Appellants were warned through counsel that they were violating the trial court's order. CP 103:28-30. Appellant's counsel represented that Garten knew he was not supposed to go above the corrected meander line. CP 103:28.

Appellants violated the order on at least five (5) occasions. CP 102, 127, 137.

III. ARGUMENT

A.) THE STANDARD OF REVIEW IS ABUSE OF DISCRETION.

1.) Standard of Review.

Contempt rulings are reviewed for an abuse of discretion. *Dep't of Ecology v. Tiger Oil Corp.*, 166 Wn.App. 720, 768, 271 P.3d 331 (2012). "Whether contempt is warranted in a particular case is a matter within the sound discretion of the trial court; unless that discretion is abused, it should not be disturbed on appeal." *Moreman v. Butcher*, 126 Wn.2d 36, 40, 891 P.2d 725 (1995) (quoting *In re Pers. Restraint of King*, 110 Wn.2d 793, 798, 756 P.2d 1303 (1988)). A trial court abuses its discretion if its contempt decision was manifestly unreasonable or based on untenable grounds. *Holiday v. City of Moses Lake*, 157 Wn.App. 347, 355, 236 P.3d 981 (2010).

When applicable, the trial court's finding of contempt also must be supported by substantial evidence. *In re Rapid Settlements, Ltd.*, 189

Wn.App. 584, 601, 359 P.3d 823 (2015), review denied, 185 Wn.2d 1020 (2016). Substantial evidence is evidence that is sufficient to persuade a rational, fair-minded person of the finding's truth. *Blackburn v. Dep't of Soc. & Health Servs.*, 186 Wn.2d 250, 256, 375 P.3d 1076 (2016).

B. THE TRIAL COURT PROPERLY USED ITS DISCRETION AND HELD GARTENS IN CONTEMPT WHEN THEY WERE GIVEN WRITTEN WARNINGS AND CONTINUED TO VIOLATE THE COURT ORDER.

Under RCW 7.21.030(2), a court may find a person in contempt of court and impose a remedial sanction "[i]f the court finds that the person has failed or refused to perform an act that is yet within the person's power to perform." The court may impose one or more of several listed sanctions, including "[a]n order designed to ensure compliance with a prior order of the court." RCW 7.21.030(2)(c).

The July 2016 preliminary injunction was straight forward. Gartens were not to cross the boundary line established by the 1995 survey and no contact with Emmert except through Counsel. CP 24.

The Order granting Summary Judgment on April 19, 2017 quieted title of the property above the correct meander line to Emmerts based on the "correct meander line" as established by the Cassou survey. CP 61, 62. The Order left the injunction in place.

In its oral decision after trial, the Court affirmed its earlier decision

establishing the correct meander line as the southern boundary of the Emmert's property. CP 62.

Despite the straight forward directives of the Order and assurances of compliance by appellants counsel that Gartens understood the Order, **Gartens violated it on at least five (5) occasions.** CP 102, CP 137.

The contempt statutes provide three requirements for imposing remedial contempt sanctions. First, the contemnor must have "failed or refused to perform an act," RCW 7.21.030(2) which under RCW 7.21.010(1)(b) includes the disobedience of a lawful order. Second, the failure to perform an act must have been intentional. RCW 7.21.010(1). Third, the act must have been within the contemnor's power to perform. RCW 7.21.030(2).

1. Disobedience of Lawful Order.

There is substantial evidence that it was within Gartens ability to not cross the boundary line above the correct meander line. By crossing the border line on at least five (5) occasions they violated a lawful order of the trial court. CP 102, 137.

2. Intentional Act.

Chapter 7.21 RCW does not define "intentional" and no contempt case has discussed this requirement in depth. One clear rule is that for a contemnor to act intentionally, he or she must have actual or constructive

knowledge of the "existence and substantive effect of the court's order or judgment." Estate of Smaldino, 151 Wn.App. 356, at 365 2009. In addition, the court's order must be clear enough that the contemnor understands what is necessary for compliance. See Tiger Oil, 166 Wn.App. at 769-71.

It is undisputed that Gartens had actual and constructive notice of the Court's Order. It was set in place July 22, 2016 and continued on April 19, 2017. Gartens received reminders from their Counsel in 2018. CP 103.

3. Within Contemnor's Power to Perform.

The email of June 20, 2018, points out that Garten knew he was not supposed to go above the meander corrected meander line. The trial court was within its discretion to find the Gartens in contempt on that basis.

The Court could have awarded remedial sanctions under RCW 7.21.030(2), however it chose not to do so. Instead, it limited the payment of documented losses by Emmert under RCW 7.21.030(3). The Court ordered that Garten pay attorney's fees incurred by Emmert to bring the motion for contempt. CP 137.

C. THIS COURT SHOULD AFFIRM THE TRIAL'S COURT'S ORDER BECAUSE THE FINDINGS OF FACT AND CONCLUSIONS OF LAW STATE THE CORRECT BOUNDARIES BETWEEN THE PROPERTY ARE IN THE CASSOU SURVEY AND THE EMMERT WARRANTY DEED.

Garten goes to great lengths in his brief regarding his "deed overlap" theory to justify his violation of the Court Order. There was nothing in

Gartens answer or counterclaims regarding the deed overlap. In fact, prior to Garten obtaining his survey in February of 2018, the Court had already quieted title in Emmerts the area in their Warranty Deed above the correct meander line. CP 62, CP 138:2

The “deed overlap” was an attempt by Garten to transfer some of the shine cemetery land to himself. The deed was not signed by a cemetery official. CP 32: 2. Garten asserts that, despite not amending his pleadings that he presented some sort of deed overlap claim that gives him some of the Emmert property above the correct meander line.

The trial court had the benefit of Cassou’s survey and listened to all of Garten’s evidence at trial and expressly made Conclusion of Law 1:

Plaintiff Emmert title is quieted in their favor in their parcel up to the “corrected” balanced government meander line based upon their deed as set forth in the court’s summary judgment ruling, and no evidence presented at trial warrants changing the courts previous ruling. Pursuant to RCW 7.28.010, and Statutory Warranty Deed Plaintiff’s title to this area is superior. CP 138:6.

The trial court heard evidence regarding the cemetery deed at trial. The trial court found that Robert Garten was not always credible. CP 138:3. The court had substantial evidence to determine whether the Emmert Statutory Warranty Deed was superior to the Garten Quit claim Deed and found in favor of the Emmerts.

Garten assertions that he confused the “deed overlap” with the

hatched area was clearly without merit. The hatched area was referred to throughout trial as the area below the correct meander line. CP 138:7

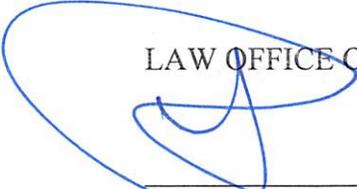
D. THE COURT SHOULD AFFIRM THE AWARD OF ATTORNEYS FEES FOR HAVING TO BRING THE CONTEMPT MOTION AND FOR RESPONDING TO THIS APPEAL.

The trial Court imposed a very minimal sanction on the contempt order. It limited the sanctions to the attorney's fees incurred by Emmerts to bring the contempt motion after five violations. This Court should affirm that award and award Emmerts their fees incurred on appeal pursuant to RAP 18.1.

IV. CONCLUSION

This Court should affirm the trial court's contempt order, dismiss the appeal and award Emmert's their attorneys' fees and costs on appeal.

Dated this 25 day of JUNE, 2019.


LAW OFFICE OF PETER J. NICHOLS, P.S.

Peter J. Nichols, WSBA # 16633
Attorney for Respondents

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

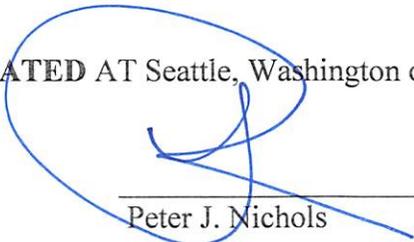
That on June 25, 2019 via first class mail and electronic delivery, an envelope containing a true and correct copy of the Respondent's

Opening Brief addressed to:

Shane Seaman
Cross Sound Law Group
18887 Hwy 305, Suite 1000
Poulsbo, WA 98370
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DATED AT Seattle, Washington on this 25 day of

June, 2019.



Peter J. Nichols

THE LAW OFFICE OF PETER J. NICHOLS

June 25, 2019 - 2:08 PM

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