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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' Reply Brief

Shane Seaman
WSBA #35350

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

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A. REPLY TO RESPONDENTS' STATEMENT OF THE CASE

Respondents base their argument on a June 19-20, 2018 email exchange between counsel as proof Appellants knew they were not permitted to enter into the “deed overlap”. See *Respondents Opening Brief and Certificate of Service*, page 6. Appellants claimed Respondents were walking and parking on their property near the cottonwood tree, and in response, Respondents’ counsel referred to Rob Johnston’s survey with a reply that Appellants were not to go above the meander line. Appellants did not intentionally cross at the meander line, down on the beach, they parked on the edge of Shine Road at the top of the bank where they thought they owned per the deed overlap (RP 83, 86, CP 41, 155).

All the evidence points to Appellants entering at the “deed overlap” area, which is technically above the meander line (as all upland properties are), but the “deed overlap” area is Garten’s per the final judgment. Respondents have not appealed the Court’s final judgment.

The boundaries to Respondent Emmert’s property are not what is on Emmert’s deed, or what are established by the Cassou Survey. Respondents are incorrect on this point. See *Respondents Opening Brief and Certificate of Service*, page 4. Respondent Emmert’s pled south waterside boundary, at the meander line set forth in their deed, was incorrect. The Cassou Survey showed the “correct” meander line, and in reconsideration of the CR 56{

TA \l "CR 56" \s "CR 56" \c 4 } motion, the Trial Court set Respondents southern boundary at that location. The Johnston survey agreed with the Cassou survey regarding the meander line location.

Respondents' property boundaries are what are set forth in the final judgment which states:

“That title is quieted in Plaintiff Ernest Emmert and Theresa Emmert upon their subject real property, south to the “corrected meander” line, with their parcel No 821334015 southern waterside boundary being the line identified as the balanced government meander line”, as shown on the Johnston Survey, AFN # 614431, Vol 37, page 453, dated 02/21/2018.

That title is quieted in Defendant Robert Garten to the real property shown on the Johnston Survey, AFN # 614431, Vol 37, page 453, dated 02/21/2018.

A copy of the survey is attached to the judgment.

CP 301.

The Final Judgment is straightforward. It incorporated the survey, where on Note 5 Johnston explained the senior line is the west line, the boundaries being the dark solid line noted as “Garten Boundary.” Respondent Emmert's parcel was adjusted to the “corrected” meander line,

changing the southern boundary AND Garten's parcel was quieted in him per the boundaries set forth on Johnston's survey. CP 304. The Court did not quiet title for Respondent Emmert's according to his deed per the Cassous Survey, because the Cassou Survey originally showed both the "corrected" and the "erroneous" meander line. Respondents focus heavily on Conclusion of Law 1, (CP 297) and Conclusion of Law 5, (CP 298) as somehow changing the Court's ruling that the east/west boundary is what is on Garten's deed, but the argument is misplaced. Conclusion of Law 1 only pertains to the southern boundary, which was the subject of the summary judgment motion. The east/west boundary was not raised until trial, when the "deed overlap" was addressed. Conclusion of Law 5 holds the boundaries are what are shown on the Cassou Survey (CP 298), but that is ambiguous and/or at the least an error of law for which review is de novo.

If we look back at the record, Respondents supported their motion for summary judgment establishing the meander line with Cassou's survey showing the deed overlap (CP 155), and in the narrative Ms. Cassou stated the following:

The legal description for tideland parcel "I" overlaps the description for parcel "G" on the east by approximately 33 feet (2 Rods). This survey does not address or resolve the overlap. (CP 54). In her declaration, Ms. Cassou states she placed slash marks where the "deed overlap" existed (CP 41) however the deed overlap was not called

to the attention of the trial court in the CR 56 motion. Referring back to the Cassou Survey did not resolve the “deed overlap.” The record also shows that Respondents’ counsel was made aware in a February 15, 2018 email that the deed overlap identified by the Cassou Survey would need to be resolved (CP 305). It is for this reason that Appellants obtained their own survey by Rob Johnston, because a lack of a survey seemed to be the reason why the Court granted Respondents’ motion for reconsideration of the initially denied CR 56{ TA \s "CR 56" } motion. The Cassou Survey didn’t resolve the overlap, that is undisputed. So if the Trial Court’s conclusions 1 and 5 are based upon Cassou Survey, those conclusions did not settled the deed overlap, when the surveyor specifically stated she was not resolving the issue.

The Johnston testimony and survey did resolve the deed overlap, and this is what the Trial Court adopted in the final judgment (CP 301). The colloquy on the record at the November 2, 2018 hearing shows the Trial Court was made aware of the difference between the Cassou and Johnston surveys, and the end result is the Judge adopted the Johnston Survey. First, in the Trial Court’s questions, it’s plain the Judge understood Appellants were asking for the Johnston Survey to be adopted.

JUDGE HARPER: And what about the Defendants’ proposed judgment? They basically just define what

property the Emmerts got and why it was refers to quieting title up to the corrected meander line and identified boundaries [INAUDIBLE] blah-blah-blah-blah; and after the title was quieted, then the Defendants took the piece shown on the Johnston survey and a copy of that survey is attached.

(RP 94). Then in answering a question Appellants counsel states the following:

MR. SEAMAN: Your Honor, the Cassou Survey and the Johnston Survey don't disagree with what you ruled on in the summary judgment motion, which was the corrected meander line. There's no dispute there.

MR. NICHOLS: But there are some other differences in the Johnston Survey that was done two months before trial.

MR. SEAMAN: At trial. At trial. That's the difference. The Johnston Survey shows the deed overlap. Other than that, I think the lines are the same. I don't think he's disagreeing that the line, the meander line, is different. Nobody has changed that from your ruling.

(RP 95-96). Appellants' counsel also states to the Trial Court:

MR. SEAMAN: Again, according of the Trial Court, [sic] the only difference is that hashed area, which apparently is still in dispute, is this hashed area here, but the line we're talking about is exactly the same as Cassou's line that you ruled on. It doesn't change anything the Court ruled as the southern boundary and I'm not proposing anything different.

(RP 97). Then after all the colloquy on the record, with Respondent having ample time to raise issue, the Trial Court orally ruled that Appellants “Final Order and Judgement” would be used.

JUDGE HARPER:....So the final order and judgment will be -- unless Mr. Nichols finds some error in the designation of what I ruled here about the boundary line and the adverse-possession claim, we’ll use Mr. Seaman’s “Final Order and Judgment” and the change is going to be on page 1....

(RP 103).

The Trial Court orally directed changes to be made, but did not change anything in the proposed judgment concerning using the Johnston Survey showing Appellant Robert Garten’s east/west boundary. The Trial Court then later signed the revised judgment presented by the parties. Respondents moved for reconsideration and Appellants’ counsel declaration dated December 7, 2018 filed in response clearly shows the history of the deed overlap as it progressed through trial (CP 305-309) and the Trial Court did not grant Respondents’ motion for reconsideration, thus leaving the Johnston Survey as part of the final judgment.

This is why the Trial Court’s contempt order is particularly distressing to Appellants. The Trial Court appeared to comment Appellants violated the order by crossing on Respondents’ property, yet, when all was said and done, the Trial Court ruled the encroached upon area was Appellant Robert

Garten. Respondents think they still own the deed overlap area, which is very clear by their briefing. But its Garten's property that was actually entered onto by Appellants. Appellants could not have factually violated the Courts vaguely worded preliminary injunction orders.

B. APPELLANTS REPLY ARGUMENT

The Trial Court ruling that the “deed overlap” is Appellant Robert Garten's property contradicts the ruling that Appellants violated the court's preliminary injunction orders. Appellants have been forced to defend themselves from a series of confusing rulings that stem from Arnold Woods erroneous 1995 survey and Emmert's erroneous legal description. Appellant Robert Garten reasonably believed he owned what the County maps showed and the Court found his investigations were reasonable. (CP 297, Finding 29). Yes, the issues started due to a verbal altercation, for which the Trial Court put most of the blame onto Hawn Garten, however, but for Respondent Emmert obtaining a preliminary injunction per the July 22, 2016 order (CP 38), the Trial Court would never have found contempt. It was respondents proposed language adopted by the Trial Court, keeping Garten off the property shown by the 1995 survey, which was incorrect. That was a “wrongful” action by Respondents, excluding Appellants from property owned by Appellant Robert Garten. The impact of Respondent

Emmert's confused CR 56 motion further contributed. Respondent convinced the Trial Judge to reverse the initial denial, where the Trial Court originally correctly realized there were issues of fact in conflicting surveys with three possible boundary locations.¹ Finding "substantial justice was not done" reversing itself and setting the Respondents southern boundary at the "corrected" meander line, but signing the order putting it back to the Woods erroneous line required Appellants to correct the order. The Trial Court ordering Appellants not to cross at the meander line per the Cassou Survey in the April 19, 2017 order (CP 217), set up the contempt, but Appellants never crossed "at the meander line."² But for Respondents forcing Appellants to defend themselves at trial, which Appellants wholly prevailed on all remaining trial issues, and then claiming the "deed overlap" wasn't properly raised, Appellants would not have been found in contempt. Other than ordinary high water isn't the boundary, and the County maps apparently were wrong, Appellants haven't been wrong about the borders. Justice is not served by them being found in contempt and ordered to pay attorney fees for parking on their own property.

¹ The issue of fact was created by Respondent, because they wanted Wood's erroneous boundary per the deed as set forth in the CR 56 motion, but they supported the motion with the Cassou survey, which showed a different location, the "correct" meander line.

² "*defendants are permanently ordered to cease and desist crossing the boundary line at the balanced government meander line confirmed by the Cassou Survey.*"

If Appellants don't appeal, they run the danger of being found in contempt again, because Respondents believe the deed overlap is theirs. But for Respondents way of prosecuting this case is why this appeal exists.

1. There are no facts supporting 5 violations of a clear and plain order.

Utterly lacking in Respondents briefing is a citation to any specific facts in the record showing that Appellants had knowledge that parking within the "deed overlap" was a plain violation of the Court's order not to cross the meander line onto Respondents' property. Respondents did not point to a specific intent to disobey or violate an order of the court other than point to the post trial email. Holiday v. City of Moses Lake, 157 Wash.App. 347, 355, 236 P.3d 981, (2010){ TA \l "Holiday v. City of Moses Lake, 157 Wash.App. 347, 355, 236 P.3d 981, (2010)" \s "Holiday v. City of Moses Lake, 157 Wash.App. 347, 355, 236 P.3d 981, (2010)" \c 1 } No facts exist, because the area the Appellants entered was the "deed overlap," the Court orally dissolved the order precluding them from entering the "hashed area," and Appellants thought the Court awarded Appellant Robert Garten title to where they entered. There are no written findings in the contempt order. (CP 288-289)

Respondents argue the July 2016 preliminary injunction order was straightforward. Appellants contend it was vague, but even if this Court does not agree the Trial Court's orders were unclear, Respondents fail to adequately rebut Appellants argument that at the close of trial, the oral ruling appeared to revise the court's previous written orders. It's after this occurred that the alleged five violations happened. The email that Respondents rely so heavily on in their briefing is referring to Rob Johnston boundaries, again demonstrating Respondents thought the Court ruled in their favor at the close of trial. See *Respondent's Brief*, page 6.

2. There are no facts showing an intentional disobedience.

The Trial Court indicated that there was a disobedience by Appellants Garten because they were notified promptly they were going onto Respondent's property and then kept going onto it. (RP 103-104). Any facts found must constitute a plain violation of the order and must be supported by evidence. Johnston v. Beneficial Mgmt. Corp. of America, 96 Wn.2d 708, 713, 638 P.2d 1201, (1982){ TA \l "Johnston v. Beneficial Mgmt. Corp. of America, 96 Wn.2d 708, 713, 638 P.2d 1201, (1982)" \s "Johnston v. Beneficial Mgmt. Corp. of America, 96 Wn.2d 708, 713, 638 P.2d 1201, (1982)" \c 1 }. Exactly where is Respondent's property in relation to the "deed overlap" at the time the Court was indicating the disobedience in the

oral ruling? Based upon the Trial Court's statements at the close of trial, Appellants thought they entered Robert Garten's property. Both Appellants Robert Garten and Hawn Garten offered testimony by way of declaration explaining their confusion. (CP 270-274) The trial court never held this testimony was not credible, rather it seems the Trial Court own confusion about the "deed overlap" led to its oral comments that Appellants should not have been confused by the two previous orders dated July 22, 2016 (CP 38) and April 19, 2017 (CP 217). Appellants set forth in their opening brief the confusing progression of this case in front of the Judge, leaving them very frustrated. In a series of pre-trial rulings they lost initially, but then won at trial fully removing the order keeping Appellants off the "hashed area." No attorney fees were awarded to Appellants. Respondents contending that the "deed overlap" was never raised in trial, which is factually untrue, apparently confused the Trial Judge. It, with the Trial Court's error, due to either forgetting the "deed overlap" issue or misapplying the result, promulgated by the poor drafting of Appellants' orders that created this problem. The Trial Court chose to reject the *jus publicum* argument and the impact of the escheat proceedings from the State, all good defenses, but then found no evidence of trespass. Despite the oral comments, the Trial Court never reduced to writing any findings

regarding an intentional disobedience. Appellants could not have factually disobeyed the order, which is why the Trial Court erred.

3. Respondent Emmert does not own the “deed overlap.”

A judgment is the final determination of the rights of the parties in the action. CR 54. As Professor Tegland put it:

“The court’s final determination is memorialized in the form of a judgment, which declares the rights of the parties in the action ...

“An oral decision is not a judgment. An oral decision is not binding and is subject to change until it is reduced to writing and entered as a judgment

“Likewise, a memorandum opinion is not a judgment”

—Tegland

See Tegland, 4 Washington Practice: Rules Practice, CR 54 (6th ed.){
TA \l "Tegland, 4 Washington Practice: Rules Practice, CR 54 (6th ed.)" \s
"Tegland, 4 Washington Practice: Rules Practice, CR 54 (6th ed.)" \c 5 }
The Trial Court went through the entire findings and conclusions and made the changes it wanted. The Trial Court had a thorough colloquy on the record concerning the Appellants proposed judgment, and the difference between the Cassou and Johnston surveys (RP 95-96). The parties submitted a revised judgment after the November 2, 2018 hearing. That is

the judgment the Trial Court signed, showing Garten's property lines goes to the "senior line" and thus he owns the "deed overlap." It was not appealed.

4. Attorney fees should be awarded to Garten.

The property belongs to Appellant Robert Garten. There was no logical or legal reason to find Appellants in contempt, yet Respondents pushed it forwarding, still arguing the "deed overlap" is theirs. Appellants request attorney fees per RCW 7.21.030(3).{ TA \l "RCW 7.21.030(3)." \s "RCW 7.21.030(3)." \c 2 }

5. Appellant ask for reversal of the contempt.

Appellants request the Trial Court be reversed, and the contempt order overturned. The Trial Court was wrong in releasing the injunction bond back to Respondents and finding that the injunction wasn't "wrongful" (RP 103). The Court reasoned Appellants weren't "harmed" by reason of the injunction.

The most obvious harm is that Appellants were found in contempt due to the poorly worded orders of July 22, 2016 (CP 38) and April 19, 2017 (CP 217) and the ongoing confusion given the procedural history of this case could result in more appeals. A preliminary injunction is issued wrongfully when it would not have been ordered had court been presented with all of

the facts. Fisher v. Parkview Properties, Inc., 71 Wn. App. 468, 859 P.2d 77 (1993){ TA \l "Fisher v. Parkview Properties, Inc., 71 Wn. App. 468, 859 P.2d 77 (1993)" \s "Fisher v. Parkview Properties, Inc., 71 Wn. App. 468, 859 P.2d 77 (1993)" \c 1 }, as amended on denial of reconsideration (Nov. 22, 1993). The test of wrongfulness is not based upon “damages”—that comes after the Court makes a determination of wrongfulness. The wrongfulness stemmed from Respondent obtaining the initial preliminary injunction based upon the erroneous 1995 Wood survey. The Trial Court erred on this legal issue, erred by reversing the summary judgment, and then erred by finding Appellants in contempt. Rather than continue to argue these issues to the Trial Judge, if the contempt is reversed, Appellants don’t run the danger of being found in contempt again if they park on their property at the “deed overlap.” Appellants simply ask that the Trial Court be reversed, affirm Appellant Robert Garten owns per the Johnston Survey as set forth in the final judgment. The only issue on remand is what amount of the injunction bond should be paid to them. Finally Appellants ask that attorney fees may be awarded to Appellants and Appellants will submit an Affidavit of Fees per RAP 18.1(d){ TA \l "RAP 18.1(d)" \s "RAP 18.1(d)" \c 4 }.

C. CONCLUSION

Appellants respectfully request that the contempt order be reversed and that the Court award them reasonable attorney fees.

Dated this July 22, 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' Reply Brief to be served by U.S.

Mail, postage prepaid, on July 22, 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 22nd day of July 2019, at Poulsbo, Washington.



Melissa S. Colletto
Legal Assistant

CROSS SOUND LAW GROUP

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