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Nº. 52891-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

RONALD PEABODY,
Appellant,

v.

JON TUNISON et. al.,
Respondents.

OPENING BRIEF OF APPELLANT

Appeal from the Superior Court of Kitsap County,
Cause No. 17-2-00712-1
The Honorable William Houser, Presiding Judge

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in granting Defendants' summary judgment motion.
2. The trial court erred in awarding attorney's fees and costs to Defendants.
3. The trial court erred in entering a final judgment in favor of Defendants.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Should Defendants' motion for summary judgment have been granted where Defendants failed to establish that they were entitled to summary judgment as a matter of law? (Assignments of Error Nos. 1 & 3)
2. Should the trial court have awarded Defendants' attorney's fees and costs where the Defendants were not the successful party in the litigation? (Assignment of Error No. 2)

C. STATEMENT OF THE CASE

Factual and Procedural Background

In April of 2013, Plaintiff Ronald Peabody purchased the subject property from Wells Fargo.¹ Prior to Mr. Peabody purchasing the property, Wells Fargo entered into a Drainfield Easement Agreement with the predecessor in interest to Defendant Tunison's property, Jerome Willock.² The drainfield easement granted Wells Fargo a nonexclusive utility easement permitting Wells Fargo to utilize a portion of Willock's

¹ CP 5.

² CP 6, 29-37.

property as a drainfield.³ In return, Wells Fargo was to bear the cost of the monitoring, maintenance, and repair of the drainage facilities.⁴ Emphasis added. The easement ran with the land of both properties.⁵ Paragraph 7 of the easement provides, “In the event that any action is filed in relation to this Agreement...the unsuccessful party in the action shall pay to the successful party...all costs of enforcement and reasonable attorney fees and costs.”⁶

In August of 2013, Mr. Peabody had a survey of his property done for purposes of determining the exact location of his septic system.⁷ Mr. Peabody had heard rumors from his neighbors that there was a manufactured home on the drainfield easement and the survey confirmed that there was a manufactured home as well as a shed on the easement.⁸

Mr. Peabody told Mr. Willock that Mr. Willock needed to remove the structure.⁹ Mr. Willock died before he removed the structures on the easement.¹⁰

Mr. Willock’s property was inherited by Carla Seaton and

³ CP 31-33.

⁴ CP 31-33.

⁵ CP 31-33.

⁶ CP 33.

⁷ CP 583-585.

⁸ CP 583-586.

⁹ CP 586-589.

¹⁰ CP 589.

Kimberly Smith.¹¹ Mr. Peabody learned that Ms. Seaton and Ms. Smith had the property “under contract” to be sold, so Mr. Peabody had his attorney draft a letter to Ms. Seaton and Ms. Smith requesting they remove the mobile home and the shed from the drainfield easement area.¹²

In February of 2017, Ms. Seaton and Ms. Smith sold the property to the defendants, Jon and Roxanne Tunison without removing the shed or the mobile home.¹³

On March 9, 2017, counsel for Plaintiff sent a letter to the director of the Kitsap County Health District reminding him that it was his duty to discover encroachments on drainfields, pointing out that such encroachments existed on Mr. Peabody’s drainfield easement, and ending with a demand that the Kitsap Public Health District remove “all encroachments from drainfield easement area.”¹⁴

On March 16, 2017, counsel for Plaintiff sent a letter to counsel for Defendants asking that the structures be removed from the drainage easement immediately.¹⁵ Neither the mobile home or the shed had permanent or fixed foundations and the shed was of little value.¹⁶ The manufactured home was decommissioned, the electric meter removed, the

¹¹ CP 589.

¹² CP 390; 590.

¹³ CP 392-393.

¹⁴ CP 398-399.

¹⁵ CP 401-402.

¹⁶ CP 226.

water line disconnected, the appliances removed, and the kitchen was decommissioned.¹⁷ In fact, Defendants' lender required Defendants to "decommission" the mobile home as a condition of financing Defendants' purchase of the property.¹⁸ Despite this, it still took Defendants thirteen months to remove the shed and the mobile home from the property.¹⁹

On March 21, 2017, the Kitsap Public Health District responded to Plaintiff's March 9, 2017 letter with a letter informing Mr. Peabody that the Health District "complied with the requirements of Kitsap County Board of Health Ordinance 2008A-01" and that there were "no known violations of Ordinance 2008A-01 occurring at [that] time."²⁰

On April 11, 2017, Plaintiff's septic system was inspected and it was noted that "[a s]hed is sitting with in [sic] the envelope of the drain field easement area and a mobile home is sitting 14 feet in the identified reserve drain field easement envelope."²¹ This was classified by the inspection company as "[i]mproper encroachment (structures/impervious surfaces)."²²

On April 19, 2017, Mr. Peabody submitted a property conveyance application to the Kitsap Public Health District requesting a report on the

¹⁷ CP 226.

¹⁸ CP 226.

¹⁹ CP 226.

²⁰ CP 400.

²¹ CP 394.

²² CP 394.

condition of his septic system and notifying the Health District that the shed and mobile home on Defendants' property were encroaching on Mr. Peabody's drainfield.²³

On April 21, 2017, Mr. Peabody filed suit against the Tunisons asserting that the presence of the shed and mobile home in the easement area constituted a breach of the 2012 Drainfield Easement Agreement.²⁴

On April 26, 2017, the Health District issued a PCI report including a finding that:

There is a shed sitting within the boundary of the drainfield easement area. There is also a mobile home that is over part of the reserve drainfield area. This is considered a violation of Section 13.C.12.b) which states: The owner shall Protect the onsite sewage system, including the reserve, from use, activities, or situations that may have an adverse impact on the system, or dispersal component soils, including, but not limited to: vehicular traffic or domestic animal management activities.²⁵

Emphasis added.

However, on April 28, 2017, the Director of the Health District (John Kiess) issued a revised PCI report stating:

The property conveyance report issued on April 26, 2017, incorrectly noted an item of non-compliance based on an erroneous inspection report submitted by the septic maintenance provider. There are no items of non-compliance or known violations of Ordinance 2008A-01

²³ CP 374, 412-414.

²⁴ CP 3-9. Numerous other parties were named in the complaint, however, the claims against these parties either settled or were voluntarily dismissed and are not relevant to this appeal.

²⁵ CP 422-423.

occurring at this time. The identified reserve drainfield is intact based on the original approval of the area in 2003 and at the time the easement was established in 2012.²⁶

This report was based on Director Kiess' incorrect rejection of the Health District's April 26, 2017 PCI report and the report submitted by Peabody's septic maintenance company. Prior to issuing the April 28, 2017 revised report, Director Kiess directed the septic maintenance company to submit a proper report showing no deficiencies:

I then discovered A+ Onsite's April 11 report and Mr. Ader's property conveyance inspection report were incorrect. To fix this situation, I issued the following message to Mr. Peabody's septic inspector: "The approved reserve drainfield area is not being encroached on per the original approval and recorded easement. Remove this deficiency and comments and please relock the report." Mr. Peabody's septic inspector later resubmitted a full inspection report showing no deficiencies, and this revised report was accepted. I also issued a new property conveyance inspection report April 28 correcting the errors in Mr. Ader's prior report and stating, "there are no items of non-compliance or known violation of Ordinance 2008A-01 occurring at this time."²⁷

Director Kiess summarized the Health District's position on the shed and mobile home as follows:

[T]he existence of the above described encroachments do not constitute a violation of the Board of Health's regulation, and the Health District's records demonstrate such encroachments are not impacting the proper functioning of Mr. Peabody's [septic system].²⁸

²⁶ CP 424.

²⁷ CP 201-203.

²⁸ CP 203.

On June 8, 2017, the Tunisons filed their answer to Mr. Peabody's complaint in which they asserted counterclaims and a third-party complaint against Liberty Bay Bank.²⁹ Ultimately, all counterclaims and third-party claims were settled or dismissed.³⁰

On August 17, 2017 WestSound Engineering issued a survey map of the drainfield easement area, including the location of the mobile home and the shed in the drainfield easement area.³¹

On August 25, 2017 Director Kiess filed a second declaration stating that the encroachments of the shed and mobile home did not constitute a violation of the board of health regulations and the Health District's records demonstrated that the encroachments were not impacting the proper functioning of Mr. Peabody's septic system.³²

On November 15, 2017, Director Kiess filed a third declaration for purposes of correcting his first two declarations. In his third declaration Director Kiess stated that, after comparing the WestSound Engineering August 17, 2017 map of the drainfield easement to the Health District's "as-built" drawing of the septic system, he believed his first two declarations were in error and that the shed and mobile home may be

²⁹ CP 51-63.

³⁰ CP 467-4.

³¹ CP 426.

³² CP 201-203.

located in the area of the approved reserve drainfield and, therefore, might violate the health ordinance.³³ Director Kiess declared that

it appears that the north orientation of the original design drawing is incorrect and the primary septic drainfield was installed approximately ninety (90) degrees out of orientation to the approved septic design. If correct, the approved reserve drainfield area may be located in the area of the existing shed and mobile home.

6. If the approved reserve drainfield area is located in the area of the existing shed and mobile home, the requirements of Kitsap County Board of Health Ordinance 2008A-01 (Ordinance), Section 13.C.12. are being violated. As noted in the April 26, 2017, property conveyance inspection report this is considered an “Other Item of Non-Compliance” per Section 13.D.6. of the Ordinance.³⁴

On November 17, 2017, Defendants filed a Motion for Partial Summary Judgment in which they made three arguments: (1) the presence of the shed and mobile home did not constitute a per se violation of Peabody’s drainfield easement rights because the easement was not an exclusive easement and was only a utility service easement; (2) the shed and the mobile home had not interfered with Peabody’s use of the drainfield; and (3) that the shed and the mobile home were not preventing the Peabodys from applying to expand their drainfield.³⁵ This motion was never ruled on and was withdrawn.³⁶

³³ CP 207-208.

³⁴ CP 208.

³⁵ CP 97-118.

³⁶ CP 490.

Plaintiff filed a Response to Defendants' motion for partial summary judgment on December 5, 2017.³⁷ Plaintiff explained that Kitsap County Public Health Ordinances 2008A-01, Section 13.C.12 required Peabody to bring suit against the Tunisons to protect the septic system and the septic drainflow reserve area from the encroaching mobile home and shed.³⁸ Plaintiff also responded that Defendants' refusal to remove the mobile home and the shed from the drainfield required Mr. Peabody to bring suit because he wished to expand his home but Kitsap County would not grant Mr. Peabody a permit to expand his septic system until the shed and trailer were removed.³⁹

On February 15, 2018, Mr. Peabody submitted an application to Kitsap County to enlarge his septic system drainfield.⁴⁰

On March 1, 2018, this application was approved on condition that the shed and mobile home be moved from the easement no later than the time of installation.⁴¹

No later than March 27, 2018, the Tunisons had removed the shed and mobile home from the drainfield easement.⁴²

On April 18, 2018, Mr. Peabody began work on the drainfield

³⁷ CP 209-223.

³⁸ CP 216-219.

³⁹ CP 219-222.

⁴⁰ CP 458-459.

⁴¹ CP 459.

⁴² CP 455-457.

expansion.⁴³

On June 29, 2018, Defendants filed a motion for summary judgment.⁴⁴ By this point, all claims had been dismissed or settled except for Plaintiff's drainfield easement claim. In their motion for summary judgment, the Defendants argued: (1) presence of shed and mobile home was not a per se violation of Peabody's easement rights; (2) it was undisputed that shed and mobile home did not interfere with Peabody's use of his drainfield; and (3) the shed and mobile home did not prevent Peabody from enlarging his drainfield.⁴⁵ Defendants also asked for attorney's fees and costs for having to defend against Mr. Peabody's easement violation claim.⁴⁶

On July 16, 2018, Plaintiff filed a response to Defendants' motion for summary judgment.⁴⁷ Mr. Peabody argued: (1) he had to file suit to comply with the Kitsap County Public Health Ordinances requiring him to protect his onsite sewage system from Defendants' ongoing violation of the Public Health Ordinances; (2) that Kitsap County would not issue him a drainfield expansion permit until shed and mobile home were removed from the drainfield easement area; (3) that defendants' actions continued

⁴³ CP 430-432.

⁴⁴ CP 346-454.

⁴⁵ CP 433-454.

⁴⁶ CP 454.

⁴⁷ CP 489-507.

to violate the easement agreement and that he suffered damages due to Defendants' "breach of contract" by way of their over 13-month refusal to remove the structures from the easement; and (4) that Defendants were not entitled to attorney fees and costs.⁴⁸ Mr. Peabody argued that summary judgment was not appropriate because material issues of fact existed regarding KC Ordinance 2008A-01, section 13, its requirements, whether Defendants actions violated the ordinance and the drainfield easement, and the effect of the ordinance on the drainfield easement.⁴⁹

On July 25, 2018, Defendants filed a Reply to Plaintiff's Response to Defendants' motion for summary judgment.⁵⁰ Defendants argued: (1) that Mr. Peabody had abandoned the original claim that the shed and mobile home were a per se violation of the drainfield easement agreement; (2) that Mr. Peabody failed to present evidence of a violation of the health ordinance; (3) that Director Kiess' November 15, 2017 declaration provided only unverified possibility the structures were on the drainfield; (4) that a violation of the health ordinance did not give Mr. Peabody an independent cause of action against the Defendants; (5) that Mr. Peabody had failed to demonstrate that the Tunisons impaired his ability to expend his drainfield; and (6) that Mr. Peabody failed to provide factual or legal

⁴⁸ CP 489-507.

⁴⁹ CP 489-507.

⁵⁰ CP 651-666.

support for his claims that he suffered damages.⁵¹

On August 14, 2018, the trial court entered an order granting the Defendants' motion for summary judgment.⁵²

On August 23, 2018, the Tunisons moved for an award of attorney fees and final order of dismissal based on the attorney fee provision of drainfield easement.⁵³

On September 9, 2018, Mr. Peabody filed a motion for award of attorney fees and costs and response to Defendants' motion for fees and costs, arguing that Mr. Peabody, not the Tunisons, was the successful party because he had Tunisons' "encroachments removed from his drainfield/reserve area."⁵⁴

On September 12, 2018, the Tunisons filed a response to Mr. Peabody's motion for award of fees and costs.⁵⁵ The Tunisons argued that they were prevailing party since the court had granted their summary judgment motion.⁵⁶

On October 10, 2018, the trial court entered its ruling on attorney fees.⁵⁷ The trial court found that on August 14, 2018, the only remaining

⁵¹ CP 651-666.

⁵² CP 676-678.

⁵³ CP 681-682.

⁵⁴ CP 740-756.

⁵⁵ CP 798-804.

⁵⁶ CP 799-780.

⁵⁷ CP 809-813.

claim was Mr. Peabody's claim for damages suffered by the encroachment of the shed and mobile home because all other claims had been dismissed.⁵⁸ The court found it had granted summary judgment in favor of Tunisons on Peabody's request for damages, therefore the Tunisons were the prevailing party on that issue.⁵⁹ The court also found that the Tunisons moved the shed and the trailer for reasons not alleged in the complaint.⁶⁰ The court noted that Mr. Peabody had stated in his deposition that the structures were not interfering with his use of the easement, and concluded, therefore, that Mr. Peabody was not entitled to removal of the structures because the easement was a non-exclusive easement.⁶¹ The trial court concluded that final judgment was entered in favor of the Tunisons, therefore the Tunisons were the prevailing party and were entitled to fees and costs.⁶²

On October 29, 2018, the trial court entered the final judgment and order of dismissal.⁶³

Notice of Appeal was filed on November 13, 2018.⁶⁴

⁵⁸ CP 810.

⁵⁹ CP 810.

⁶⁰ CP 811.

⁶¹ CP 811.

⁶² CP 811-812.

⁶³ CP 814-816.

⁶⁴ CP 817-831.

D. ARGUMENT

Mr. Peabody seeks review of (1) the trial court's decision granting the Defendants' Motion for Summary Judgment dated August 14, 2018, (2) the trial court's Ruling on Attorney Fees dated October 10, 2018, and (3) the Final Judgment and Order of Dismissal.

1. The trial court erred in granting the Motion for Summary Judgment because Defendants failed to demonstrate they were entitled to summary judgment as a matter of law.

In their motion for summary judgment, the Defendants argued: (1) presence of shed and mobile home was not a per se violation of Peabody's easement rights; (2) it was undisputed that shed and mobile home did not interfere with Peabody's use of his drainfield; and (3) the shed and mobile home did not prevent Peabody from enlarging his drainfield.⁶⁵

A. Standard of review.

A trial court ruling on summary judgment is reviewed de novo.⁶⁶ A party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of

⁶⁵ CP 433-454.

⁶⁶ *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008).

law.”⁶⁷ “Summary judgment is proper only if reasonable persons could reach but one conclusion from the evidence presented.”⁶⁸ Summary judgment is inappropriate “if the record shows any reasonable hypothesis which entitles the nonmoving party to relief.”⁶⁹ When ruling on a motion for summary judgment, the court must consider the evidence and draw all reasonable inferences in the light most favorable to the nonmoving party.⁷⁰

B. Defendants misrepresented Plaintiff’s argument about the duty Defendants breached by failing to remove the mobile home and shed and failed to establish that they were entitled to summary judgment as a matter of law.

In their Brief in Support of Summary Judgment, Defendants asserted that, “Peabody’s easement violation claim against the Tunisons is based on Peabody’s mistaken presumption he is entitled to exclusive use of the entire drainfield easement area, even those portions he is not using.”⁷¹ But Mr. Peabody’s claim was *not* that he had a right to exclusive use of the drainfield easement area. As will be explained below, Mr. Peabody’s claim was that Defendants breached their duties under the drainfield easement and the health ordinance when they refused to comply

⁶⁷ CR 56(c).

⁶⁸ *Cano-Garcia v. King Cty.*, 168 Wn. App. 223, 230, 277 P.3d 34, review denied 168 Wash.App. 223 (2012).

⁶⁹ *Grimsrud v. State*, 63 Wn. App. 546, 552, 821 P.2d 513 (1991).

⁷⁰ *Key Tronic Corp. v. Aetna (CIGNA) Fire Underwriters Ins. Co.*, 124 Wash.2d 618, 623–24, 881 P.2d 201 (1994).

⁷¹ CP 444.

with Mr. Peabody's requests to remove the structures on the easement to maintain the drainfield easement area in compliance with the easement agreement and Kitsap County Health Ordinance 2008 A-01, Section 12(A)(1)(3), (B)(1), and (C)(12)(a).⁷²

- i. *Plaintiff had a contractual duty and a duty under the ordinance to keep the drainage easement area free from any encroachments.*

Paragraph 2 of the drainage area easement agreement contained a maintenance agreement.⁷³ Paragraph 2.1 of the maintenance agreement requires Mr. Peabody and his successors in interest to monitor and maintain the "drainage facilities" on the easement.⁷⁴ Plaintiff therefore had a contractual duty to maintain the drainfield easement area.

Kitsap County Board of Health Ordinance 2008A-01, Section 13 provides, in pertinent part,

A. Purpose and Applicability.

1. The purpose of the following requirements is to establish the minimum standards for the use, monitoring, and maintenance of onsite sewage systems.

⁷² CP 498-501. It is anticipated that Defendants will argue that this argument should not be considered because Plaintiff never amended his complaint. However, any such argument by Defendants fails because the issue was tried and litigated with the express or implied consent of the parties below. "When issues that are not raised by the pleadings are tried by express or implied consent of the parties, they will be treated in all respects as if they had been raised in the pleadings." *Dewey v. Tacoma Sch. Dist. No. 10*, 95 Wn. App. 18, 26, 974 P.2d 847 (1999), *citing* CR 15(b).

⁷³ CP 31-32.

⁷⁴ CP 31.

3. These regulations apply to all onsite sewage systems within the jurisdiction of the Health Officer.

B. General Requirements.

1. The owner shall be responsible for the use, monitoring, and maintenance of the onsite sewage system in conformance to these regulations. Occupants, tenants, employees, and other persons shall cooperate with the owner to conform to these regulations.

C. Owner Responsibilities and Requirements. The owner shall:

12. Protect the onsite sewage system, including the reserve area, from use, activities, or situations that may have an adverse impact on the system, or dispersal component soils, including, but not limited to:

a) Encroachment and/or covering the system with buildings, structures, materials, or vegetation that restricts, prevents access to, or inspection or proper functioning of the system;

Emphasis added.

Plaintiff therefore had a duty pursuant to the easement agreement and under the ordinance to maintain the entirety of the drainage easement, including the reserve area, and to protect it from encroachments such as buildings and structures that encroach or covered the system. Director Kiess concluded as much in his third declaration when he stated that: “the

approved reserve drainfield area may be located in the area of the existing shed and mobile home” and “If the approved reserve drainfield area is located in the area of the existing shed and mobile home, the requirements of Kitsap County Board of Health Ordinance 2008A-01 (Ordinance), Section 13.C.12. are being violated.”⁷⁵

- ii. *Defendants had a duty to not impair Mr. Peabody’s effort to maintain the drainfield easement in compliance with the easement agreement and in compliance with the Kitsap County Public Health ordinances.*

Kitsap County Board of Health Ordinance 2008A-01, Section 13(B)(1) mandates that “Occupants, tenants, employees, **and other persons** shall cooperate with the owner to conform to these regulations.” Emphasis added. Defendants therefore had a duty under the ordinance to cooperate with Mr. Peabody’s efforts to clear the encroaching shed and mobile home from the drainfield easement area.

- C. Defendants did not establish that they were entitled to judgment as a matter of law where it was undisputed that they breached their duty by refusing to remove the shed and the mobile home.

Mr. Peabody’s claim in the trial court was that Defendants breached their duty under the easement agreement that required Mr. Peabody to “monitor, maintain, and repair” the system and in failing to

⁷⁵ CP 208.

cooperate with Mr. Peabody's efforts to remove encroachments from the drainfield by refusing to remove the shed and mobile home for over 13 months despite repeated requests by Mr. Peabody to do so. Defendants failed to address this claim.

The evidence presented to the court included the third declaration of Kitsap County Health District Director Kiess that the shed and the mobile home were encroachments on the easement under Kitsap County Board of Health Ordinance 2008A-01, Section 13.⁷⁶ Defendants did not present any evidence to rebut this declaration.

When the evidence is viewed and all reasonable inferences are drawn in the light most favorable to Mr. Peabody, Defendants failed to establish that they were entitled to judgment as a matter of law. As stated above, summary judgment is inappropriate "if the record shows any reasonable hypothesis which entitles the nonmoving party to relief."⁷⁷ In this case, the only conclusion that can be reached when the evidence is viewed and all reasonable inferences are drawn in favor of Mr. Peabody is that the Defendants breached their duties under the easement agreement and in failing to cooperate with Mr. Peabody's efforts to maintain the drainfield easement.

Defendants' refusal to comply with Mr. Peabody's repeated

⁷⁶ CP 207-208.

⁷⁷ *Grimsrud v. State*, 63 Wn. App. 546, 552, 821 P.2d 513 (1991).

requests forced him to bring suit to comply with his duties to maintain the easement. The record before the trial court showed a very “reasonable hypothesis” entitling Mr. Peabody to relief. Summary judgment should not have been granted in favor of Defendants because Defendants failed to demonstrate that they were entitled to summary judgment as a matter of law.

2. The trial court erred in awarding Defendants reasonable attorney fees and costs.

In their motion for summary judgment, Defendants also asked for attorney’s fees and costs for having to defend against Mr. Peabody’s easement violation claim.⁷⁸ Defendants based this request on paragraph seven of the drainfield easement which states:

In the event that any action is filed in relation to this Agreement or is given to an attorney for enforcement, the unsuccessful party in the action shall pay to the successful party, in addition to all sums either party may be called upon to pay, all costs of enforcement and reasonable attorney fees and costs.⁷⁹

The trial court awarded Defendants attorney fees and costs based on the trial court’s finding that Defendants were the prevailing party under RCW 4.84.330.⁸⁰

A. The trial court erred in finding that Defendants were the “successful” party.

⁷⁸ CP 454.

⁷⁹ CP 33.

⁸⁰ CP 809-813.

As discussed above, the trial court erred in finding that Defendants were entitled to summary judgment. Accordingly, the trial court erred in finding that Defendants were the “successful” party and entitled to attorney’s fees and costs under the drainfield easement.

B. The trial court erred in finding Defendants were entitled to attorney’s fees and costs as the “prevailing party” under RCW 4.84.330.

In the event this court finds that summary judgment was properly granted in favor of Defendants, Plaintiff submits the following argument.

Paragraph seven of the easement required the trial court to determine which party was the “successful” party in the litigation and to award attorney’s fees and costs to that party. Defendants’ initial motion for award of attorney’s fees relied entirely on paragraph seven of the easement agreement as the basis for the award of attorney’s fees.⁸¹ Defendants asserted that they were entitled to attorney’s fees because the court granted summary judgment in their favor.

Mr. Peabody responded, asserting that he was the “successful” party to the litigation below because the goal of his litigation was to have the shed and mobile home removed from the drainage easement and the shed and mobile home were, in fact, removed from the drainage

⁸¹ CP 681-684.

easement.⁸² In contrast, by the time Defendants brought their motion for summary judgment, all of Defendants' counterclaims had been dismissed and Defendants had removed the shed and mobile home from the drainage easement.⁸³

Defendants responded to Mr. Peabody's argument by again arguing that *Defendants* were the prevailing party because the trial court granted their motion for summary judgment.⁸⁴ In Defendants' response to Mr. Peabody's motion for attorney's fees, Defendants argued for the first time that RCW 4.84.330 applied to this case.⁸⁵

i. RCW 4.84.330 does not apply in this case.

RCW 4.84.330 provides, in pertinent part,

In any action on a contract...entered into after September 21, 1977, where such contract...specifically provides that attorneys' fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he or she is the party specified in the contract or lease or not, shall be entitled to reasonable attorneys' fees in addition to costs and necessary disbursements.

As used in this section "prevailing party" means the party in whose favor final judgment is rendered.

Emphasis added.

⁸² CP 745-746.

⁸³ CP 745.

⁸⁴ CP 799-800.

⁸⁵ CP 799-800.

Undoubtedly, Defendants cited RCW 4.84.330 in their response to Mr. Peabody's motion for attorney's fees because the definition of "prevailing party" included in that statute is favorable to Defendants. But RCW 4.84.330 does not apply to this case: "By its plain language, the purpose of RCW 4.84.330 is to make unilateral contract provisions bilateral."⁸⁶ Paragraph seven of the easement agreement is a bilateral contract provision so RCW 4.84.330 does not apply to this case.

Both Mr. Peabody and Defendants based their claims for attorney's fees on paragraph seven of the easement agreement, *not* on RCW 4.84.330. This is a critical fact because paragraph seven says the "successful" party, not the "prevailing party," is entitled to attorney's fees and costs under the easement agreement.

The easement agreement does not define "successful party." When a term in a contract is undefined, the term is given its ordinary meaning, and the court may look to a dictionary for such meaning.⁸⁷ "Successful" is defined as "turning out to be as hoped for."⁸⁸

As discussed above, Mr. Peabody brought the suit to get the shed and mobile home removed from the drainfield easement and was "successful" in this effort. In contrast, Defendants both dismissed all of

⁸⁶ *Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481, 489, 200 P.3d 683 (2009) (emphasis added).

⁸⁷ *Boeing Co. v. Aetna Cas. & Sur. Co.*, 113 Wn.2d 869, 877, 784 P.2d 507 (1990).

⁸⁸ Webster's New College Dictionary (2005), page 1429.

their counterclaims and ended up removing the shed and mobile home. If any party could be said to have had the result of the litigation “turn out as hoped for,” it is Mr. Peabody, who obtained exactly what he hoped to obtain when he filed suit.

The language of “prevailing party” contained in RCW 4.84.330 is not part of paragraph seven of the easement agreement. It was error for the trial court to rely on the definition of “prevailing party” in RCW 4.84.330, which term does not appear in paragraph seven of the easement agreement.

ii. Defendants’ argument and the trial court’s conclusion that Defendants were the “prevailing party” was based on a misrepresentation of Mr. Peabody’s claim.

Defendants’ argument against Mr. Peabody’s request for attorney fees and costs was predicated on the same misrepresentation of Mr. Peabody’s claim discussed above, i.e., that Mr. Peabody’s claim was that Defendants had violated his exclusive easement rights by leaving the shed and mobile home on the drainage easement.⁸⁹

In granting Defendants’ motion for attorney’s fees and costs and denying Mr. Peabody’s motion for attorney’s fees and costs, the trial court adopted Defendants’ incorrect characterization of Mr. Peabody’s claim as

⁸⁹ CP 799-803.

one of breach of an exclusive easement.⁹⁰ As discussed above, this is a gross mischaracterization of Mr. Peabody's claim.

If the shed and mobile home were removed due to the litigation, then Mr. Peabody certainly was the "successful" party in the litigation. If the shed and mobile home were not moved as a direct result of the litigation, then, at most, neither party was "successful" and therefore each party was responsible for its own attorney's fees and costs. In either case, it was error for the trial court to award Defendant attorney's fees and costs under paragraph seven of the easement agreement.

3. The trial court erred in entering a final judgment and order of dismissal in favor of Defendants.

As discussed above, the trial court erred in granting Defendants' summary judgment motion and the trial court erred in awarding Defendants' attorney's fees and costs. For the same reasons as discussed above, the trial court erred in entering a final judgment and order of dismissal in favor of Defendants.

E. CONCLUSION

For the reasons stated above, this court should vacate the trial court's orders granting summary judgment for Defendants, awarding Defendants reasonable attorney's fees and costs, and the final order of

⁹⁰ CP 810-812.

dismissal and remand this case for further proceedings.

DATED this 20th day of March, 2019.

Respectfully submitted,



Steven W. Davies, WSBA #11566
Attorney for Plaintiff

CERTIFICATE OF SERVICE/MAILING

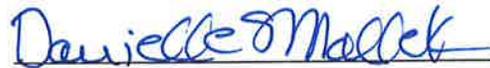
I certify that on the 20th day of March, 2019, I caused a true and correct copy of Opening Brief of Appellant to be served on the following in the manner indicated below:

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- Email: isaac@isaacandersonlaw.com

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.



Danielle S. Mallek

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