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Division II
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No. 52891-6-II

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

RONALD PEABODY,
Appellant,

vs.

JON TUNISON AND ROXANNE TUNISON,
Respondents.

APPEAL FROM THE SUPERIOR COURT
OF KITSAP COUNTY, WASHINGTON

THE HONORABLE WILLIAM C. HOUSER, JUDGE

BRIEF OF RESPONDENTS

ISAAC A. ANDERSON, WSBA #28186
of Law Office of Isaac A. Anderson, PS
Attorney for Respondents

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II. INTRODUCTION

Petitioner Ronald Peabody (“Peabody”) sued the respondents Jon Tunison and Roxanne Tunison (the “Tunisons”) for breach of a drainfield easement agreement after demanding the Tunisons move their mobile home and shed, which were located on the Tunisons’ property but within unused portions of Peabody’s drainfield easement area. Because these structures were not even close to Peabody’s drainfield and hence were not harming his septic system, the Tunisons brought a motion for summary judgment. The trial court properly granted summary judgment in favor of the Tunisons because Peabody had no evidence these structures harmed his septic system, and had no evidence these structures caused Peabody to be in violation of the local ordinance governing septic systems. The trial court also properly awarded attorney’s fees and costs to the Tunisons in accordance with the attorney’s fees clause in the drainfield easement agreement.

III. STATEMENT OF THE CASE

A. Pre-Litigation Events

Peabody is a sophisticated real estate broker, contractor, investor and developer.¹ In 2013, Peabody purchased waterfront property located in Olalla in Kitsap County to use as his summer residence.² The septic system drainfield for Peabody's property was located on neighboring property now owned by the Tunisons.³ That drainfield was governed by a drainfield easement agreement which defined a large square area of the Tunisons' property as the easement area,⁴ and described the drainfield easement grant as follows:

WILLOCK as owner of the WILLOCK Property hereby grants, transfers and conveys to WELLS FARGO, a *nonexclusive easement* for utilities over, under and across that portion of the real property legally described on Exhibit "A", which is attached hereto and by this referenced incorporated herein as though fully set forth, that lies within the WILLOCK Property and is depicted on the drawing which is attached hereto as Exhibit "B" (hereinafter referred to as "Utility Easement").⁵

Hence, this easement agreement provided a *nonexclusive* easement to Peabody to use his drainfield within the easement area.

¹ CP 352-6.

² CP 357, 359.

³ CP 358.

⁴ CP 361-3. This drainfield easement agreement is found at CP 29-37.

⁵ CP 31 (italics added).

Peabody then heard rumors there was a shed and mobile home located on a portion of the easement area, so he decided to commission a survey.⁶ After the survey confirmed the rumors, Peabody told Mr. Jerry Willock, then the owner of the property subject to the drainfield easement, that he needed to remove the structures.⁷ Mr. Willock ultimately did not remove them.

After Mr. Willock died, his property was inherited by Carla Seton and Kimberly Smith.⁸ When Peabody learned the property was “under contract”, he had his attorney issue a formal letter to Ms. Seton and Ms. Smith demanding they remove the “unlawful encroachments” from the drainfield easement area.⁹

Ms. Seton and Ms. Smith subsequently sold their property to the Tunisons, and the transaction closed on February 23, 2017.¹⁰ On March 9, 2017, Peabody’s counsel issued a letter to the health district demanding the health district remove “all encroachments from the drainfield easement area” and pay his attorney’s fees and costs.¹¹ The health district demurred,

⁶ CP 364-5. The survey map is found at CP 44.

⁷ CP 366.

⁸ CP 367.

⁹ CP 6, 41-4.

¹⁰ CP 393-4.

¹¹ CP 44-5.

noting there were no known violation of the applicable health ordinance.¹²

B. Events During Litigation

In the days leading up to the filing of this lawsuit, Peabody subtly attempted in manipulate the health district into declaring the Tunisons' shed and mobile home were harming his septic system, when in fact there was no harm. These attempts backfired after the health district became aware of what Peabody was trying to do.

Peabody was required to hire a septic maintenance company of his choice to inspect his septic system on an annual basis and issue reports to the health district.¹³ Peabody's septic maintenance company consistently issued annual reports declaring there were no deficiencies and that his septic system was functioning just fine. In fact, all of these past reports answered "NO" to the question as to whether there was an "[i]mproper encroachment (structures/impervious surfaces)".¹⁴ But without any changes in circumstances, on April 11, 2017, Peabody's septic maintenance company submitted an annual inspection report incorrectly declaring for the first time a deficiency in the septic system due to an "improper encroachment".¹⁵

¹² CP 401.

¹³ CP 373.

¹⁴ CP 405-12.

¹⁵ CP 397-8.

Eight days later, and armed with this new annual report, Peabody submitted an application to the health district requesting a property conveyance inspection (PCI) report on the condition of his septic system. In this application, he asserted, “[d]rainfield has an encroachment of 14 feet with neighbors [sic] shed and mobile home”.¹⁶

Two days later, on April 21, 2017, Peabody filed this lawsuit.¹⁷

About a week later, it appeared Peabody received what he wanted when, in reliance on the incorrect annual maintenance report, the health district issued a PCI report stating as follows:

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)¹⁸

However, the director of the health district subsequently learned this PCI report relied upon an incorrect annual report. So the director issued a revised PCI report stating as follows:

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 occurring at this time. The identified reserve drainfield is intact based on the original approval of the area in

¹⁶ CP 413-4. Although a PCI report is typically requested when a party is selling property, in this situation Peabody had no plans to sell his property. See CP 375.

¹⁷ CP 3.

¹⁸ CP 75-6.

2003 and at the time the easement was established in 2012.¹⁹

The director also instructed Peabody's septic maintenance company to withdraw the incorrect annual report and submit a new correct report:

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.²⁰

The director also summarized the health district's position on the Tunisons' structures, 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]*.²¹

Approximately four months after filing this lawsuit, Peabody's own expert, WestSound Engineering, issued a survey map confirming what the Tunisons believed all along: their structures were located on unused portions of the drainfield easement area far away from Peabody's drainfield.²² Thus, there was no plausible way the structures were

¹⁹ CP 425-6.

²⁰ CP 203; CP 411-2.

²¹ CP 203 (italics added).

²² CP 427.

harming Peabody's septic system.

Peabody confirmed this during his deposition in September of 2017. When Peabody was presented with a copy of his expert's survey map, he testified as follows:

Q. This is a survey you recently obtained of the drainfield area; right?

A. Yes.

Q. And this is dated August 17th of this year; right?

A. Yes.

Q. So your surveyor here is showing that the mobile home and the shed are not on the drainfield laterals; correct?

A. The drainfield easement or the laterals?

Q. The laterals.

A. No, it's not on there.

* * *

Do you have any reason to dispute your surveyor's findings here?

A. No.

Q. Do you believe this map is accurate?

A. Yes.²³

Peabody then admitted his septic system was operating without problems:

²³ CP 370-2; 427.

Q. Is it your position that the mobile home and the shed are affecting the operation of your septic system?

A. I'm not a septic person so I cannot answer that. What it is affecting is the expansion of my drainfield.

Q. And we'll get to that, but for the time being, have you experienced any problems with your septic system?

A. Somebody keeps breaking my caps here since the Tunisons have moved in, with a lawnmower or whatever, but other than that, no.

Q. All right.

A. Two of them.

Q. Aside from that, though, you haven't had any problems with the way the septic system has been operating?

A. The septic system appears to be functioning properly.²⁴

Nevertheless, Peabody expressed the opinion that the Tunisons had no right to use any part of the drainfield easement area because Peabody

had exclusive rights to the entire easement area:

Q. Now, your drainfield doesn't cover this entire [drainfield easement] area; correct?

A. No.

Q. So let's talk about the areas that your drainfield is not on. What about for those areas? Do the Tunisons have any rights to use those areas?

A. No.

²⁴ CP 371-2.

Q. And why do you say “no”?

A. Because that area was purchased for the rights for me to use it for my drainfield.²⁵

This subjective opinion was also consistent with the claims in Peabody Complaint.²⁶

Peabody also testified during his deposition that he wished to enlarge his drainfield to allow for a larger home on his property,²⁷ and the health district would not approve an application to expand his drainfield because of the the Tunisons’ structures on the drainfield easement.²⁸ Yet Peabody was unwilling to submit an application to the health district to expand his drainfield due to the cost:

Q. Is there anything preventing you from getting a new septic design showing an expanded drainfield and submitting it to the County?

A. Only money. Do you want to pay for it? Would your clients like to pay for it?

Q. Well, you’ve got the funds to build a six-bedroom house. Do you not have the funds for that?

A. Why would I pay for a septic design that has to be redrawn if the County doesn't approve it? You don't get a partial deal. He doesn't just keep redrawing it.

²⁵ CP 363.

²⁶ CP 3-48.

²⁷ CP 376.

²⁸ CP 377. This assertion was based on hearsay statements which the Tunisons objected to. CP 660-1.

You're obviously not familiar with septic systems, but when they draw it on paper, they charge you the same amount to revise it. There's always revisions, and so forth, and I'm not going to do that.²⁹

After Peabody's depositions, counsel for the Tunisons issued a letter to the health district on October 13, 2017, stating as follows:

[I]f the health district determines at any time that either of [the Tunisons'] structures is impairing the approval of a pending application submitted by Mr. Peabody for the modification of his OSS, then that structure will be promptly removed.³⁰

Yet Peabody waited four additional months before submitting a drainfield expansion application on February 15, 2018.³¹ The health district approved the application on March 1, 2018, conditioned upon the Tunisons removing their structures before installation.³² The Tunisons removed the structures by March 27, 2018 at the cost to them of \$5,000.³³ Peabody then did not start the installation of his drainfield until April 18, 2018.³⁴

²⁹ CP 378-9.

³⁰ CP at 428-29.

³¹ CP 459, 461-5.

³² CP 459.

³³ CP 456.

³⁴ CP 457.

C. Litigation Proceedings

The following proceedings occurred on the trial court level during the above described events.

First, on May 16, 2017, the parties filed a stipulation with submitting all claims to the jurisdiction of the trial court regardless of the mediation or arbitration clauses in the drainfield easement agreement.³⁵

Second, on November 17, 2017, the Tunisons filed their first motion for summary judgment,³⁶ but later struck the hearing after the parties agreed to participate in mediation.

Third, following the mediation process, the parties entered into a series of partial settlements which resulted in the dismissal of the third party defendants Bank of New York,³⁷ Liberty Bay Bank and Laura L. Timlick.³⁸ With regard to Peabody, the parties agreed to dismiss Tunisons' prescriptive easement claim against Peabody, in exchange for the dismissal of Peabody's trespass claim against the Tunisons.³⁹ Following these agreements, only Peabody's breach of contract claim against the Tunisons remained.

³⁵ CP 49-50.

³⁶ CP 95-6.

³⁷ CP 484-8.

³⁸ CP 472-4.

³⁹ CP 467-71.

Finally, on June 29, 2018, after the Tunisons removed their structures from the drainage easement in response to Peabody's drainfield expansion application, the Tunisons filed a second motion for summary judgment.⁴⁰ The trial court issued a written decision granting summary judgment on August 14, 2018,⁴¹ and following, issued a ruling awarding attorney's fees and costs to the Tunisons on October 10, 2018.⁴² Peabody has appealed both of these decisions.

IV. ARGUMENT

A. Peabody Abandoned his Original Claim and Advanced New Claims

Peabody first argues the Tunisons misrepresented Peabody's claim in their summary judgment motion. According to Peabody, his claim "was *not* that he had a right to exclusive use of the drainfield area", but rather that his "claim was that Defendants breached their duties under the drainfield easement and the health ordinances"⁴³

Peabody's argument fails because he ignores the nature of the claim he pleaded in his Complaint. In the Complaint, Peabody advanced a breach of contract claim against the Tunisons by alleging the presence of

⁴⁰ CP 651-2.

⁴¹ CP 676-8.

⁴² CP 809-13.

⁴³ Brief of Appellant 15-6.

the Tunisons' structures within the drainfield easement area constituted "unlawful encroachments",⁴⁴ and hence violated the drainfield easement agreement because "[t]he entire subject easement area was designated for the beneficial use of the plaintiff."⁴⁵ Peabody also attached as exhibits to his Complaint three demand letters, which describe this claim in more detail.⁴⁶ Conspicuously absent in the Complaint or in any of these demand letters was any allegation that the structures harmed Peabody's septic system.

On summary judgment, the Tunisons first argued this claim should be dismissed because Peabody only had non-exclusive easement rights, and because Peabody admitted the structures were not affecting his septic system.⁴⁷

In response, Peabody took no effort to defend the merits of the original claim found in his Complaint, essentially abandoning it.⁴⁸ Instead, Peabody argued two new claims: (1) the structures violated Kitsap County Health Ordinance 2008A-01 (the "health ordinance"),⁴⁹ and (2) the

⁴⁴ CP 6 at ¶ III(H).

⁴⁵ CP 6 at ¶ III(M).

⁴⁶ CP 41-8.

⁴⁷ CP 445-9.

⁴⁸ Peabody also does not argue this position on appeal.

⁴⁹ CP 499-501.

structures impaired his ability to expand the size of his drainfield.⁵⁰ Yet it is undisputed the Complaint said absolutely nothing about these new claims, and Peabody took no efforts to amend his Complaint.⁵¹ It is factually inconsistent with the record for Peabody to now argue these were his claims all along, and that the Tunisons misrepresented his position in their summary judgment motion.

Nevertheless, the Tunisons did not explicitly ask the trial court to disregard Peabody's two new claims on the basis that they were not in the Complaint. And the trial court did not explicitly dismiss Peabody's two new claims on that basis.⁵² It turns out there were ample other reasons to have these two new claims dismissed on summary judgment.

B. Peabody Produced No Evidence Demonstrating a Violation of the Health Ordinance

Peabody next argues the structures in the easement area violated the health ordinance. The health ordinance, however, only applies to encroachments which restricts the proper functioning of a septic system. And since Peabody had no evidence the structures restricted the proper

⁵⁰ CP 501-5.

⁵¹ Peabody asserts he did not need to amend his complaint because the new claims were "tried and litigated" with the consent of the parties pursuant to CR 15(b). Brief of Appellant 16, fn. 72. That is not correct— in this case, there was no trial.

⁵² Yet this Court has the authority to affirm on this alternative basis. See Champagne v. Thurston Cty., 134 Wash. App. 515, 520, 141 P.3d 72, 74 (2006), aff'd on other grounds, 163 Wn.2d 69, 178 P.3d 936 (2008).

functioning of his septic system, summary judgment was appropriate.

Peabody cites to three separate sections of the health ordinance, but only one of them, section 13.C, is relevant. This section states:

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;⁵³

Hence, the health ordinance requires Peabody to protect his septic system from encroachments that prevent “access to, or inspection or the proper functioning of the [septic] system”. Peabody, however, mischaracterizes this duty when he asserts the Tunisons “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*.”⁵⁴ But in reality, the health ordinance only restricted encroachments *on the septic system itself* which impair its function. This distinction is critical, since the structures were within the drainfield easement area, but not on top of the actual

⁵³ CP 673-4.

⁵⁴ Brief of Appellant 18 (italics added).

septic system drainfield. Since Peabody did not have exclusive easement rights, the Tunisons had every right to use the drainfield easement area in any way they saw fit, so long as it did not impair Peabody's easement rights. Colwell v. Etzell, 119 Wash. App. 432, 439, 81 P.3d 895, 898 (2003); Beebe v. Swerda, 58 Wash. App. 375, 384, 793 P.2d 442, 447 (1990).

In their summary judgment motion, the Tunisons submitted ample evidence demonstrating there was no health ordinance violation because the structures did not restrict the "proper functioning" of Peabody's septic system.⁵⁵ As explained above, Peabody's own expert produced an engineering map showing the structures were located away from the drainfield,⁵⁶ and Peabody testified that his septic system was operating perfectly fine.⁵⁷

The summary judgment burden then shifted to Peabody to submit contrary evidence. Pelton v. Tri-State Mem'l Hosp., Inc., 66 Wash. App. 350, 354, 831 P.2d 1147, 1150 (1992). This required Peabody to produce affidavits setting forth "specific facts" demonstrating a violation of the health ordinance. Meyer v. University of Washington, 105 Wn.2d 847,

⁵⁵ Peabody does not allege Tunison's structures prevented access to or the inspection of his septic system, so only the "proper functioning" issue is relevant.

⁵⁶ CP 427.

⁵⁷ CP 371-2.

719 P.2d 98 (1986). He did not.

Peabody submitted a declaration of John Kiess, the director of the health district, as alleged proof that the health ordinance was being violated.⁵⁸ But this declaration only indicates there was a *possibility* the ordinance was violated because the structures *may* be on the reserve drainfield area. According to that declaration, Mr. Kiess reviewed some additional documentation which suggested to Mr. Kiess that:

[I]t appears that the north orientation of the original design drawing is incorrect and the primary septic drainfield was installed ninety (90) degree out of orientation to the approved septic design. *If correct*, the approved reserved drainfield area *may be* located in the area of the existing shed and mobile home”.⁵⁹

Mr. Kiess then stated, “*If* the approved reserve drainfield area is located in the area of the existing shed and mobile home, the requirements of the [health ordinance], Section 13.C.12. are being violated.”⁶⁰ However, Mr. Kiess was also quick to point out that the health district “has not conducted an onsite visit to verify if the septic system was installed out of orientation to the approved design nor has the Health District pursued any enforcement action.”⁶¹

This evidence, even when taken in the light most favorable to

⁵⁸ Brief of Appellant 17-19.

⁵⁹ CP 202-3 (italics added).

⁶⁰ CP 203 (italics added).

⁶¹ CP 203.

Peabody, only demonstrates the possibility that the structures *may* have been located on the reserve drainfield area. And *Peabody submitted no affidavits verifying whether this possibility was in fact a reality*. Thus, Peabody’s evidence amounted to merely speculation, and this was not sufficient. See Doty-Fielding v. Town of S. Prairie, 143 Wash. App. 559, 566, 178 P.3d 1054, 1057-58 (2008) (“the party opposing a motion for summary judgment may not rely on speculation”).

C. A Violation of the Health Ordinance Does Not Give Peabody the “Duty” to Sue the Tunisons

As demonstrated above, there was no evidence the Tunisons’ structures violated the health ordinance. But even if there was a violation, Peabody did not have the “duty” to enforce the ordinance by bringing this lawsuit against the Tunisons. Instead, only the local health district has the authority to enforce the health ordinance, and in this case it is undisputed the health district took no enforcement action.⁶² In short, a health ordinance violation does not give rise to a separate private cause of action against the Tunisons.

Peabody justifies this lawsuit against the Tunisons by arguing he “had a duty . . . under the [health] ordinance to maintain the entirety of the drainage easement, including the reserve area, and to protect it from

⁶² CP 203.

encroachments such as building and structures that encroach or cover the system.”⁶³ Washington law recognizes no such duty. In fact, the applicable regulations and statutes all indicate only the health district has the authority to enforce the health ordinance. The only provision in the health ordinance dealing with enforcement, section 1.G, says nothing about private enforcement, and instead emphasizes that enforcement by the health district is entirely discretionary:

No provision or term of this ordinance is intended to impose any duty whatsoever upon the Health Officer or Health District, or any of its officers or employees, for whom the implementation or enforcement of these regulations shall be discretionary and not mandatory.⁶⁴

The same holds true for WAC chapter 246-272A, which are the state regulations through which the health ordinance was promulgated. WAC 246-272A-0430(2) states, “[w]hen a person violates the provisions under this chapter, the [state] department [of health], local health officer, local prosecutor’s office, or office of the attorney general may initiate enforcement” This is also consistent with RCW 70.05.060(3), which provides that the health district is empowered to “[e]nact such local rules and regulations as are necessary in order to preserve, promote and improve the public health *and provide for the enforcement thereof.*” (Italics added.)

⁶³ Brief of Appellant 17. In this statement, Peabody once again errantly conflates the difference between the drainfield easement area and the septic system itself.

⁶⁴ CP 670.

And in general, an ordinance violation by itself is insufficient to support a private cause of action. In Gardner v. Kendrick, 7 Wash. App. 852, 503 P.2d 134 (1972), the plaintiff sued for damages after slipping on a sidewalk in front of the defendant's property. The plaintiff's claim was based upon the defendant's violation of a city ordinance which required property owners to keep their sidewalks clear of snow and ice. Id. at 852-53, 503 P.2d at 135. In affirming the trial court's dismissal of the plaintiff's claim, the court of appeals stated, "Ordinances which do require adjoining property owners or occupants to perform these services are held to be for the benefit of the organized government, I.e., the municipality as an entity, and not for its individual citizens." Id. The court also quoted favorably from a Nebraska court, as follows:

Where the provisions of an ordinance impose upon property owners the performance of a part of the duty of the municipality to the public and are for the benefit of the municipality as an organized government, and not for the benefit of the individuals comprising the public, a breach of such ordinance is remediable only at the instance of the municipal government, and *no right of action accrues to an individual citizen especially injured thereby.*

Id. at 854, 503 P.2d at 136 (italics added). Accord, Birdsall v. Abrams, 105 Wash. App. 24, 19 P.3d 433 (2001).

Hence, Peabody did not have the right or "duty" to commence this lawsuit against the Tunisons based solely on an alleged violation of the health ordinance, especially when the alleged violation did not result in

any enforcement action from the health district.

D. A Violation of the Health Ordinance Does Not Constitute a Breach of the Drainfield Easement Agreement

Even if there was a health ordinance violation, such a violation does not automatically constitute a breach of the drainfield easement agreement. Peabody argues that because both the drainfield easement agreement and the health ordinance gave him the responsibility of maintaining the septic system, a violation of the health ordinance automatically constitutes a breach of contract.⁶⁵ This argument is both incoherent and illogical. In order to prevail on his breach of contract claim, Peabody has the burden of demonstrating the *Tunisons*, not Peabody, had a specific contractual duty which they breached. See Fid. & Deposit Co. of Maryland v. Dally, 148 Wash. App. 739, 745, 201 P.3d 1040, 1044 (2009). He cannot meet this burden. There is simply no provision in the drainfield easement agreement stating the Tunisons have a contractual duty to prevent technical or trivial violations of the health ordinance, especially when the health district chooses not to enforce the alleged violation.

In addition, as explained above, at most Peabody may argue there was a *possibility* the structures were within the reserve drainfield area.

⁶⁵ Brief of Appellant 16-7.

Even if that possibility turned out to be correct, however, it does not amount to a breach of the drainfield easement agreement. This is because the reserve drainfield area is nothing more than “an area of land . . . dedicated for replacement of the onsite sewage system upon its failure.”⁶⁶ If Peabody’s drainfield failed and the Tunisons subsequently refused to remove their structures, then perhaps Peabody could credibly argue the Tunisons were in breach of the drainfield easement agreement. But of course, Peabody’s septic system did not fail.

E. Peabody has Waived his Argument that Tunison’s Structures Prevented Peabody from Enlarging his Drainfield

As described above, Peabody argued to the trial court that summary judgment should not be granted because the Tunisons impaired his ability to expand his drainfield.⁶⁷ This argument was strongly contested by the Tunisons.⁶⁸ Nevertheless, Peabody has not included an assignment of error on this issue in his briefing, nor presented any argument on this issue. This argument has thus been waived and this Court should not consider it. See Bercier v. Kiga, 127 Wn. App. 809, 824, 103 P.3d 232, 239 (2004).

F. The Tunisons were the Prevailing Party and Thus the Trial

⁶⁶ Kitsap County Board of Health Ordinance 2008A-01, Appendix A, Definitions & Acronyms.

⁶⁷ CP 501-5.

⁶⁸ CP 659-64.

Court Properly Awarded their Attorney's Fees and Costs

The trial court properly awarded attorney's fees and costs to the Tunisons because the applicable drainfield easement agreement had an attorney's fees clause, and the Tunisons were clearly the prevailing party.

The attorney's fees clause in the drainfield easement agreement states as follows:

7. Attorney Fees: In the event that any action is filed in relation to this Agreement or it 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.⁶⁹

It is undisputed Peabody filed this lawsuit "in relation to" the drainfield easement agreement. It is also undisputed the trial court dismissed all of Peabody's claims related to the drainfield easement agreement on summary judgment. *It is frankly difficult to imagine how the Tunisons could have been more successful.*

Nevertheless, Peabody argues he was the "successful party" 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 easement."⁷⁰ This argument is specious because it mischaracterizes Peabody's original claim, and it

⁶⁹ CP 33.

⁷⁰ Brief of Appellant 21.

glosses over the post-lawsuit events which compelled the Tunisons to voluntarily move the structures.

As explained Section IV A above, Peabody filed his Complaint in April of 2017 alleging that the structures constituted a *per se* violation of the parties' drainfield easement agreement simply because they were located in the drainfield easement area. Five months later, Peabody testified in his deposition he wished to expand his septic system drainfield to build a larger house for his family, and the Tunisons' structures were inhibiting his ability to do so.⁷¹ As already explained above, this was a brand new claim inconsistent with Peabody's Complaint, and has been waived on appeal. Nevertheless, the Tunisons responded by providing notice to the health district that they would move their structures whenever it was necessary so Peabody could expand his drainfield.⁷² Peabody then waited four months before finally submitting a drainfield expansion application in February of 2018.⁷³ The Tunisons removed the structures on a timely basis at the cost of \$5,000, and thereafter, a month later, Peabody finally installed his expanded drainfield.⁷⁴

Given these circumstances, the trial court correctly recognized

⁷¹ CP 375-7.

⁷² CP 428-9.

⁷³ CP 459.

⁷⁴ CP 455-7.

these new events did not make Peabody “successful” in this litigation:

While Defendants did remove the structures from the easement area, the actions of Defendants were done because of circumstances not alleged in the original complaint. Plaintiff admitted during deposition that the structures were not interfering with his use of the drain field as was needed by his existing structure. Plaintiff was not entitled to removal of the structures unless they interfered with his use of the easement because this easement is a non-exclusive use easement. As alleged in the complaint, *Plaintiff did not prevail on the relief of removing the structures from the easement.* The need for the removal and the Defendants removal of the structures arose under different circumstances than alleged in the complaint. Defendants removed the structures voluntarily under circumstances not identified in the law suit.⁷⁵

Peabody further mischaracterizes his original claim by arguing that the sole goal of the lawsuit was to have the structures removed from the drainfield easement area.⁷⁶ In fact, Peabody also sought monetary damages against the Tunisons.⁷⁷ Because the trial court dismissed all of Peabody’s claims on summary judgment, including his damages claim, Peabody cannot credibly assert he was the “successful party”.

Finally, Peabody argues the trial court erred in relying upon RCW 4.84.330 to award attorney’s fees and costs to the Tunisons. According to Peabody, RCW 4.84.330 is inapplicable because that statute only applies to unilateral attorney’s fees clauses, not bilateral clauses such as the one at

⁷⁵ CP 811 (italics added).

⁷⁶ Brief of Appellant 21.

⁷⁷ CP 8; CP 493-4.

issue in this case. Peabody's interpretation is out of step with Washington law.

Peabody is correct that the primary purpose of RCW 4.84.330 is to make unilateral attorney's fees clauses operate bilaterally. However, that is not the sole purpose. In fact, Washington courts have consistently applied RCW 4.84.330 to all types of attorney's fees clauses, including specifically bilateral clauses. See, e.g., Mike's Painting, Inc. v. Carter Welsh, Inc., 95 Wash. App. 64, 975 P.2d 532 (1999); State v. Farmers Union Grain Co., Paccar Auto., Inc., 80 Wash. App. 287, 908 P.2d 386 (1996). Hence the trial court properly applied RCW 4.84.330 to this case and awarded attorney's fees and costs to the Tunisons.⁷⁸

G. The Tunisons are Entitled to an Award of Attorney's Fees and Costs on Appeal

The Tunisons should also be awarded their reasonable attorney's fees and costs incurred on appeal. As indicated above, the drainfield easement agreement mandates an award of attorney's fees to the successful litigant. That provision also applies to fees expended on appeal. See Reeves v. McClain, 56 Wash. App. 301, 311, 783 P.2d 606, 611 (1989).

V. CONCLUSION

⁷⁸ It should be noted Peabody is not contesting on appeal the *amount* of attorney's fees and costs awarded by the trial court.

For the reasons explained above, the Tunisons respectfully request that this Court affirm the trial court's order granting summary judgment and awarding attorney's fees and costs to the respondents.

RESPECTFULLY SUBMITTED this 12th day of April, 2019.



ISAAC A. ANDERSON, WSBA #28186
Of Law Office of Isaac A. Anderson, PS
Attorney for Respondents

LAW OFFICE OF ISAAC A. ANDERSON, PS

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