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Division II
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Court of Appeals No. 53229-8-II
Trial Court No. 17-2-00870-3

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

SHARON DOERR and RANDALL BECK,
Plaintiffs and Respondents

v.

DEL RAY PROPERTIES, INC., a Washington
corporation,
Defendant and Appellant.

CITY OF LONGVIEW,
Plaintiff,

v.

DEL RAY PROPERTIES, INC., a Washington
corporation,
Defendant.

APPELLANT DEL RAY PROPERTIES, INC.'S REPLY BRIEF

Scott S. Anders WSBA #19732
scott.anders@jordanramis.com
Jordan Ramis PC
1499 SE Tech Center Place, Ste. 380
Vancouver, Washington 98683
Telephone: (360) 567-3900
Facsimile: (360) 567-3901
Attorneys for Appellant

Robyn L. Stein WSBA #39708
robyn.stein@jordanramis.com
Jordan Ramis PC
Two Centerpointe Dr., 6th Flr
Lake Oswego, OR 97035
Telephone: (503) 598-7070
Facsimile: (503) 598-7373
Attorneys for Appellant

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I. INTRODUCTION

In response to Del Ray’s *Opening Brief*, Doerr relies on a series of *non sequiturs* in a thinly veiled effort to refocus the Court’s attention away from the facts. The indisputable fact, viewed, as required, in the light most favorable to Del Ray, is that Del Ray relied on statements from the City of Longview (“City”) in issuing its October 22, 2018 notice (“the notice”) to Doerr. The notice did not amount to harassment—which was, in any event, an undefined term.

II. NO SUBSTANTIAL EVIDENCE OF HARASSMENT

Doerr’s front-line argument is that Del Ray issued “a notice to Ms. Doerr containing a fabricated claim that the City was demanding that she move her home, and in the same notice, telling her because of the age of her home, she could neither move nor sell it.” *Brief of Respondent*, P. 2. However, what is clear is that the City commented on the application that “(t)railers currently in the right of way would need to be moved.” (Indeed, the evidence before the trial court was that the *City* wrote this on the application permit.) CP 373. Doerr, and the trial court, however, relied on irrelevant statements from the City made *after* the application permit and *after* Del Ray issued the notice to Doerr. *Brief of Respondent*, P. 16-17. It is axiomatic that the City’s post-notice decision to move the goal posts simply cannot serve as a basis for contempt. Del Ray became aware of the City’s new position only after the notice was issued. CP 352.

Doerr continues to direct this Court's attention to the various other communications as context for the alleged offending notice. *Brief of Respondent*, Pp. 1-2, and 5-7. The additional notices were *not* part of the trial court's basis for finding contempt. Rather, the trial court found, instead: "(t)he fact that Del Ray tends to use some fairly nonbusinesslike language * * * is unfortunate and helps cloud the issue, ***but that in and of itself isn't a violation of that order.***" RP 112. (Emphasis added.) The additional communications were not relied upon by the trial court, and, respectfully, they should not be here either.

III. NO SUBSTANTIAL EVIDENCE OF RETALIATION

Doerr argues in the alternative that, even if there is insufficient evidence establishing harassment, there was, nonetheless, sufficient evidence to establish retaliation. *Brief of Respondent*, P. 18. The trial court, however, made no finding of retaliation. Doerr argues that the Court may rely upon alternate grounds for the finding of contempt. Del Ray concedes the general point of law that "an appellate court may affirm a trial court's correct result on any grounds established by the pleadings and supported by the record." *Lane v. Skamania County*, 164 Wash.App. 490, 497 (2011). The record, however, does not establish retaliation, the trial court did not find any retaliation, and the burden to do so remains with Doerr. *Empire South, Inc. v. Repp*, 51 Wash.App. 868, 881 (1988).

Here, Del Ray submitted an application to improve its real property. Taking steps to follow through with the improvement of real property is a perfectly valid action: a person's right to develop property is "beyond question a valuable right in property." *Louthan v. King City*, 94 Wash.2d 422, 428 (1980). Doerr implies that the timing of the notice ("almost nine months after the City of Longview issued a permit") merits a finding of contempt. *Brief of Respondent*, P. 16. There is no evidence in the record, however, that the application had become invalid. Doerr, also in support of an alternative finding of retaliation, further argues that the "threatened eviction served no lawful purpose because it was completely the Appellant's creation that Ms. Doerr would need to move." *Brief of Respondent*, P 16. Del Ray had a right to develop its real property and had sought a permit to do just that. Del Ray is not required to justify that action—it is "a valuable right in property," and it certainly cannot serve as a basis for contempt. *Louthan, supra*.

IV. IMPROPER AWARD OF ATTORNEY FEES

The trial court did not make necessary findings as to the reasonableness of fees awarded to Doerr. Doerr suggests that the Court's statement on the record that the "proof of all the communications was certainly within what was appropriate to establish that the one that I found as the bases for contempt was a product of something other than a mistake(,)" is sufficient. It is, however,

inconsistent with the Court’s prior finding on the record, cited above, that the other communications amounted to “nonbusinesslike language” and did not constitute “a violation of (the) order.” In any event, that statement is the sum-total, even by Doerr’s implied admission, of a finding of the reasonableness of the fees. To the extent it is a finding, however, it still does not comport with the trial court’s obligation to “take an active role in assessing the reasonableness” of the award. *Berryman v. Metcalf, et. al.*, 177 Wn.App. 644, 657 (2013), quoting *Mahler v. Szucs*, 135 Wash.2d 398, 343-35 (1998). That was not done here.

V. CONCLUSION

The trial court erred in finding Del Ray in contempt for harassment—an undefined term. The trial court’s reliance on the City’s post-notice position on whether Doerr would be required to move her residence cannot serve as a sufficient basis for contempt.

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Even if the trial court's ruling is sustained, however, the award of fees was in error. The trial court is required to take an active role in determining the reasonableness of the fees, and place its findings in the record. That was not done here, and the trial court's award should be overturned too.

DATED: November 25, 2019

JORDAN RAMIS PC
Attorneys for Appellant Del Ray
Properties, Inc.

By: *s/ Scott S. Anders*

Scott S. Anders, WSBA #19732

scott.anders@jordanramis.com

Robyn L. Stein, WASBA 39708

robyn.stein@jordanramis.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies as follows:

1. My name is Rose Hedrick. I am a citizen of the United States, over the age of eighteen (18) years, a resident of the State of Oregon, and am not a party of this action.

2. On 25th day of November, 2019, the foregoing REPLY BRIEF was electronically filed using the Court's Appellate e-filing system and delivered the same by electronic service and by first-class United States mail, postage prepaid to the following persons:

James J. McNamara
City of Longview
1525 Broadway
PO Box 128
Longview, WA 98632-7080
Phone: (360) 442-5004
Fax: (360) 442-5950
james.mcnamara@ci.longview.wa.us
Attorney for City of Longview

Lisa Marie Waldvogel
Northwest Justice Project
1338 Commerce Ave Ste 210
Longview, WA 98632-3726
lisaw@nwjustice.org
Phone: (360) 425-1537 EXT 0837
Fax: (360) 578-0241
Attorney for Plaintiffs

Jeffrey S. Myers
Law Lyman Daniel Kamerrer et al
PO Box 11880
2674 R W Johnson Blvd SW
Olympia, WA 98508-1880
jmyers@lldkb.com
Phone: (360) 754-3480
Fax (360) 357-3511
Attorney for Counter-Defendant City of Longview

Tegan D. Schlatter
Law Offices of Kathryn Morton
PO Box 4400
650 NE Holladay St
Portland, OR 97208-4400
tegan.schlatter@libertymutual.com
Phone: (503) 736-7976
Attorneys for Appellant

**I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF
THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE
AND CORRECT.**

DATED: November 25, 2019
At: Lake Oswego, Oregon

s/ Rose Hedrick _____
Rose Hedrick,
Legal Assistant to Attorney Scott S. Anders

JORDAN RAMIS, PC

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- litparalegal@jordanramis.com
- tegan.schlatter@libertymutual.com

Comments:

Sender Name: Scott Anders - Email: scott.anders@jordanramis.com

Address:

1499 SE TECH CENTER PL STE 380

VANCOUVER, WA, 98683-9575

Phone: 360-567-3904

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