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No. 53372-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

DAVID MILNER,
Appellant,

vs.

CARPENTER GROUP, LLC,
Respondent.

APPELLANT'S BRIEF

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A. ASSIGNMENT OF ERROR

Assignment of Error

I. INTRODUCTION

The Cowlitz County Superior Court erred when it:

a. Dismissed, as a matter of law, Appellant's First Cause of Action for Prescriptive Easement, and did not grant Appellant's motion. CP 339-342.

b. Dismissed, as a matter of law, Appellant's Second Cause of Action for Injury to Shrubs and Violation of RCW 64.12.030. CP 83-95.

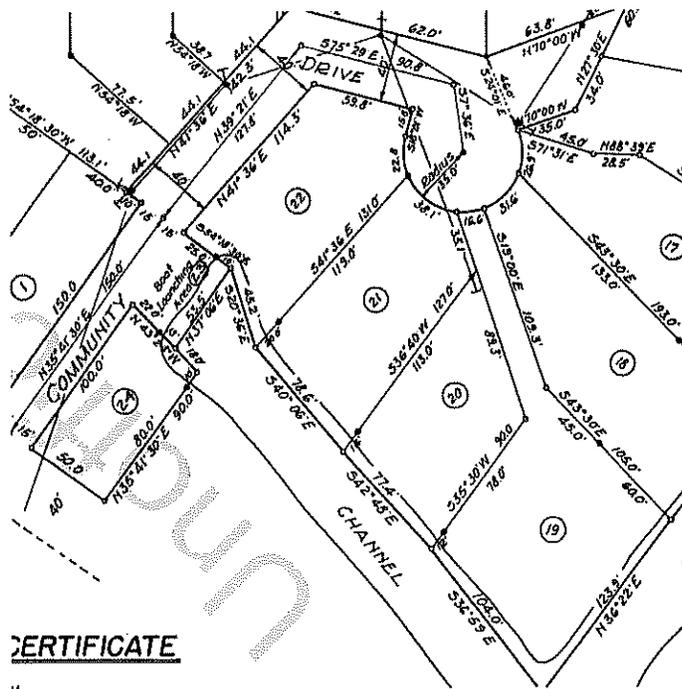
c. Entered findings of fact and conclusions of law, over Appellant's objection, in its Order Granting Motion for Summary Judgment Re: Prescriptive Easement. CP 339-342.

B. STATEMENT OF THE CASE

I. PRESCRIPTIVE EASEMENT

a. In 1959, Johnson Mt. View Tracts subdivision, in Silver Lake, Washington, was platted as a residential community. At that time, Lot 21's access (now owned by Appellant) to Community Drive, a public road, was directly over a 38.1' wide section of Lot 21's own frontage on a public *cul de sac*. CP 6.

b. The neighboring Lot 19 (now owned by Respondent) had access to the same public *cul de sac* via a 16.6' wide portion of Lot 19, which access was shared with adjacent Lots 18 (owned by Respondent until 2015) and 20 (now owned by Respondent) under the terms of the plat. CP 6.



CERTIFICATE

c. On or about March 1, 2006, Appellant DAVE MILNER purchased Lot 21, also known as "104 Community Drive", from W. Raymond and Alice Marie West. CP 159. He spends 20 to 22 days each month at his Silver Lake property, but also owns a second residence in Renton, Washington. CP 34, CP 155.

d. However, when Mr. MILNER purchased Lot 21, thick and very old hedges openly and visibly blocked the 38.1' of direct access to the *cul de sac* from Lot 21. Long before 2005, the only means for any owner of Lot 21 to access the public road was to drive through the opening in the hedges, and then traverse a short portion of the 16.6' wide strip of Lot 19 in order to access the public *cul de sac*. CP 41, 53, 109, 134, 138-140, 141, 145, 146, 167, 218. That has been the only means for Lot 21 to access Community Drive since long before Mr. MILNER purchased Lot 21 in March of 2006. There is no evidence that the use was ever with the permission of the owners of Lot 19.

e. In addition, Mr. Milner has testified that his Lot 21's access to the *cul de sac* across the 38.1' frontage, as envisioned by the 1959 plat, has never been a practical alternative. That area of Lot 21, during wet weather, is "swampy", and the water drains toward his residence, not toward the street. CP 134.

f. When Mr. MILNER purchased Lot 21, the prior owners (the Wests) told him that "his driveway" was through the hedges as a matter of right:

Q. What did you talk about the [Lot 19] driveway that goes adjacent to the property?

A. Yes.

Q. What did you talk about regarding the [Lot 19] driveway?

A. He just said, "This is the driveway."

CP 153. The reasonable inference of this testimony is that the prior owner used that section of Lot 19's driveway, believing it to be as a matter of right, and that it had never been used with permission of the owner of Lot 19.

g. Until a survey was conducted in August of 2017, by all evidence, Lots 18, 19, 20 and 21 had always accepted that Lot 21 - Mr. MILNER's lot - shared the easement, as a matter of right, over Lot 19's "finger" access to the *cul de sac*. From 2006 to the present, Mr. MILNER maintained the hedges, and there is no evidence that the owners of Lots 18, 19 and 20 ever granted permission to Mr. MILNER, or the prior owners of Lot 21, to use a portion of Lot 19 to ingress/egress to the public street. The presence of these thick and impassable hedges, clearly visible to all, made it the only ingress/egress possible. CP 35.

h. Ms. Jean Carpenter, one of the principals of the Respondent, testified that when they purchased 110 Community Drive (Lot 18) in 2005, the hedges in front of Mr. MILNER's property (Lot 21) were already "very old," and she never recalled a time since when the shrubs were not there as they presently exist. CP 153-154. There is no evidence that from 2005 until 2017, Mr. MILNER's, or the prior owner of

Lot 21, use of a portion of Lot 19 was ever permissive by the owner of Lot 19. From 2005 until the present, there is no evidence that there is any other way for Lot 21 to access the public road except through the opening in Mr. MILNER's hedge and across a small portion of Lot 19.

i. It is undisputed that since 2006, there was very little or no contact between Mr. MILNER and the Eatons (who owned Lot 19 from before 2006 until 2015) and certainly no evidence that they permitted Mr. MILNER's use of Lot 19's lower driveway. At his deposition, Mr. MILNER testified as follows:

Q: After you moved in, did you ever talk to the Eatons—the Eatons who own the property where the Carpenters now live, right?

A: I don't—I don't really know the Eatons.

Q: Did you have any discussions with the Eatons?

A: No. I don't talk to - I don't talk to the Eatons no more than I do talk to Mr. and Mrs. Carpenter.

Q: So I'm just going to follow that with one more question.

A: Okay.

Q: Did you ever talk to the Eatons about using the driveway to access your property? . . .

A: No. I never talked to them about using it. No.

CP155-156. Mr. MILNER further testified that he never spoke to the Carpenters prior to 2015, when they purchased Lots 19 and 20. CP156.

j. Furthermore, the testimony of Mr. and Mrs. Carpenter, who lived on Lot 18 from 2005 to 2015, and owned Lots 19 and 20 beginning in 2015, is consistent with Mr. MILNER's use of Lot 19's driveway not being permissive. Mr. Carpenter complained to Mr. MILNER in 2017 about Mr. MILNER parking his car on the Lot 19 driveway when the Carpenters were trying to move into Lot 19, and that is why Mr. Carpenter ordered a survey to be done. But he did not complain about Mr. MILNER's use of a portion of his Lot 19. And Mrs. Carpenter's testimony clearly showed that the Carpenters, prior to the 2017 survey, did not think Mr. MILNER's use was permissive and testified as to Mr. MILNER's shock at the result of the survey:

Milner said to me, "I'm going to sue you." And I said, very nicely, "Why would you do that?" And he said, "You're taking my property." And I said, "No, we are not. I don't want your property. We just need to establish where our property is."

CP 156. Her words are evidence that Mr. MILNER's use of Lot 19 was never with permission of the owner of Lot 19.

k. However, the trial court ruled in favor of the Respondent, on summary judgment, because, in light of *Gamboa* and *Tiller*, he believed that the presumption of permissive use of a road by a neighbor

could only be refuted by the claimant of a prescriptive easement by proving some interference by the claimant of that owner's easement:

So, absent some sort of assertion or claim in some way communicated to the owner - and I don't think it has to be limited to, you know a verbal or written communication; but, in some way there has to be the message clearly given to the actual owner that I have the right to use this in a manner that interferes with your use, the facts asserted here aren't sufficient to establish that element of hostility.

I think maybe the result would've been different if this case were in front of me in about 2014. But based on *Gamboa* and *Tiller*, I believe I do have to grant the Motion to Strike the First Claim.

Court's Ruling April 10, 2019, page 43, lines 3-14. The trial court so held even though at oral argument, counsel for Appellant argued:

In the case of a [prescriptive] easement, that does not mean that others had to be denied their use. If Lot 21 had denied Lots 18, 19, and 20 to use the lower drive, then this case would be one of adverse possession, not prescriptive easement.

Id., page 37, lines 16-20.

II. RCW 64.12.030 VIOLATION

a. Ever since Mr. MILNER purchased Lot 21 in March of 2006, he maintained the hedges, both those along his front (his ingress/egress route) and those between his lot and the adjacent Lot 20 (now owned by the Respondent). CP 35.

b. In September 2017, Respondent owned both Lot 19 (which was connected to the *cul de sac* by its 16.6' strip) and Lot 20, which was

between Lot 19 and Appellant. The same hedge which ran along the front of Appellant's Lot 21 turned at a right angle and ran along the boundary between Lots 21 and 20. A tree on Appellant's Lot 21 had branches which overhung the residence on Lot 20. CP 41. The parties had co-existed without incident from 2006 to 2017 until a conflict about parking lead to a survey, which led to this litigation.

c. On September 8, 2017, Mr. Carpenter, the second principal of the Respondent, delivered a letter to Mr. MILNER informing him:

Please be advised your tree limbs are resting on the roof of 106 Community Drive creating a damage, in addition to overhanging on our property.

Let us know when these limbs will be removed. We will need a response within the next 10 days from the date of this letter. We would expect the project to be done in a professional and timely manner.

CP 41, 43.

d. However, before the ten-day deadline for a response could expire, the Carpenters trespassed on Mr. MILNER's property, hacked his hedges back to the shrubs' trunks - not mentioned in the letter – and then erected a cyclone fence along the surveyed border flush against the shrubs. In the process, they killed several of Mr. MILNER's shrubs. CP 15, 35-77. The photos show that the dead shrubs extended well into Mr. MILNER's lot, providing evidence of the Carpenters' trespass over

the survey line in violation of RCW 64.12.030. CP 47, 49, 51, 57, 59, 73, 75, 77.

e. On June 26, 2018, Respondent moved for partial summary judgment, arguing “a virtual absolute right to trim shrubs on its side of the boundary line except in limited circumstances, not present here.” CP 14. However, they failed to address the issue of whether they crossed the boundary, as they must have done in order to do such damage to Appellant’s hedge. Such radical “self-help” is often a part of these adverse possession/prescriptive easements and should be discouraged by the law where possible.

f. However, apparently overlooking the genuine issues of material fact whether Respondent violated RCW 64.12.020 by crossing the boundary and injuring Appellant’s shrubs, the Court ruled:

I’m going to find that based on what’s been presented here, there is no material issue of fact as to the adverse possession claim, because the possession and use argued is not hostile, and therefore Defendant is entitled to summary judgment on that issue.

Court’s Ruling, August 1, 2018, page 9, lines 11-16.

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III. FINDINGS OF FACT/CONCLUSIONS OF LAW INAPPROPRIATE

a. Respondent included Findings of Fact and Conclusions of Law in its Proposed Order Granting Motion for Summary Judgment Re: Prescriptive Easement. CP 251-254.

b. Appellant objected to the Findings of Fact and Conclusions of Law, on the basis of *Oltman v. Holland Am. Line USA, Inc.*, 163 Wash. 2d 236 (2008) and proposed an order without the findings and conclusions. CP 286, 335-336.

c. The Court entered the order, proposed by the Respondent. CP 339-342.

C. ARGUMENT

1. The Trial Court erred when it ruled as a matter of law that Appellant and his predecessors in interest, as owners of Lot 21, had to interfere with Lot 19's use of the 16.6' strip, for ingress/egress to the cul de sac, in order to gain a prescriptive easement over the said strip.

(a) *Elements of Prescriptive Easement.* "An easement of right of way across the land of another . . . may be acquired by prescription."

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Nw. Cities Gas Co. v. W. Fuel Co., 13 Wash. 2d 75, 82–83, 123 P.2d 771, 775 (1942). In 2015, the Washington Supreme Court confirmed the black letter law to be:

To establish a prescriptive easement, the person claiming the easement must use another person’s land for a period of 10 years and show that:

- (1) he or she used the land in an “open” and “notorious” manner,
- (2) the use was “continuous” or “uninterrupted,”
- (3) the use occurred over “a uniform route,”
- (4) the use was “adverse” to the landowner, and
- (5) the use occurred “with the knowledge of such owner at a time when he was able in law to assert and enforce his rights.”

Gamboa v. Clark, 183 Wash.2d 38, 43, 348 P.3d 1214 (2015).

The burden of proving a prescriptive right rests upon the one who is to be benefited by the establishment of such right. *Id.*, 183 Wash. 2d at 43. The first three elements of the cause of action are fairly straight forward and have not generated debate in this case. The last two elements at issue here are: First, when was the use of the servient land (in the case now before the court the finger drive of Lot 19) by the dominant owner (Mr. MILNER and his predecessors) “adverse”? Second, did the use by the dominant owner (Lot 21) occur with the permission of the servient owner (Lot 19)?

In the case now before the Court, these questions really merge into one: did the Wests and Mr. MILNER use the lower finger drive in a way

that claimed as a matter of right that was known, or should have been known, by first the Eatons and then the Carpenters for over ten years? If there was no hedge blocking direct access to the *cul de sac*, this might raise a genuine issue of material fact, because of the lack of necessity and/or periodic use of direct access by Mr. MILNER. However, when the open and notorious use of the lower finger drive by Lot 21 is combined with the planting, growth and maintaining of the thick and “ancient” hedge by the same owners, which blocked direct access between Lot 21 and the *cul de sac*, as originally envisioned in the 1959 plat (now over sixty years ago), this was a clear assertion of right by the owner of Lot 21 to use a portion of Lot 19 for ingress and egress – i.e., a claim of prescriptive easement, against Lot 19.

(b) *Burdens of Proof.*

(1) Plaintiff does not have to prove a negative, and the Carpenters have offered no evidence that the Wests’ and Mr. MILNER’s use of the lower finger drive was actually with the Eatons’, the Carpenters’ or anybody else’s permission. Therefore, this Court must follow the allocation of the burden of proof (which is subject to shifting in these cases). First, the burden of proving a prescriptive right rests upon the one who is to be benefitted by the establishment of the right. *Nw. Cities Gas Co. v. W. Fuel Co.*, 13 Wash. 2d at 84. In this case, Mr. MILNER.

(2) However, “proof that the use by one of another’s land has been open, notorious, continuous, uninterrupted, and for the required time creates a *presumption* that the use was *adverse*, unless otherwise explained, and, in that situation, in order to prevent another’s acquisition of an easement by prescription, the burden is upon the owner of the servient estate to rebut the presumption by showing that the use was permissive.” *Nw. Cities Gas Co. v. W. Fuel Co.*, 13 Wash. 2d at 85.¹ Mr. MILNER has shown such use, as a matter of right, since at the very least from 2006, so the burden to prove that his use was permissive shifts to the Carpenters. They have failed to produce any evidence of permissive use.

(3) Under the law of prescriptive easements, the nature of the property can be “of controlling importance when considering whether the user was open, notorious, and hostile.” *Downie v. City of Renton*, 167 Wash. 374, 381, 9 P.2d 372, 375 (1932). In 2015, the Supreme Court elaborated:

However, we have limited the presumption of permissive use to three factual scenarios. First, the presumption applies to cases involving unenclosed land. . . . Second, the presumption applies to enclosed or developed land cases in which “it is reasonable to infer that the use was permitted by neighborly sufferance or acquiescence.” . . . Third, the presumption applies when the evidence demonstrates that the owner of the property created or maintained a road and

¹ “Failure on the part of the owner of the servient estate to interrupt the user of a right of way across his land by another is strong evidence that the parties thought that the way was used as a matter of right.” *Nw Cities Gas Co*, 13 Wash. 2d at 87.

his or her neighbor used the road in a noninterfering manner. *Cuillier*, 57 Wash.2d at 627, 358 P.2d 958.

Gamboa v. Clark, 183 Wash. 2d at 44. Nonetheless,

The claimant may defeat the presumption of permissive use “when the facts and circumstances are such as to show that the user was adverse and hostile to the rights of the owner, or that the owner has indicated by some act his admission that the claimant has a right of easement.”

(*Emphasis added.*) *Gamboa v. Clark*, 183 Wash. 2d 38, 44–45, 348 P.3d 1214, 1218 (2015). Such use has been proven in this case by Mr. MILNER and has not been rebutted.

(4) Applying the above law to the facts before the Court, the undisputed evidence shows that the Wests and Mr. MILNER (owners of Lot 21) used the lower portion of the finger driveway of Lot 19 to ingress/egress Lot 21 in a way that was open, notorious, continuous, hostile and uninterrupted for over ten years and that the owner of Lot 19 had knowledge of such use, or should have had knowledge, when they had the right to challenge it. From 2006 until the present (this lawsuit was filed in 2017), Mr. MILNER has used the lower finger drive continuously, plus, because of the hedge wall, there has never been, and still is not, any other

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way for him to access the public *cul de sac*.² While it might be reasonable to argue that Lot 21's use of the lower finger drive was "permitted by neighborly sufferance" and that Lot 21 used a road created and maintained by Lot 19 in a non-interfering manner if the hedge did not exist, such argument is unreasonable given the fact that the owner of Lot 21 also planted, grew and maintained a hedge across its legal access and used the lower portion of the finger drive exclusively since before 2005 (when the Carpenters first observed it) and probably long before then (given that the hedge was "very old" in 2005, according to Ms. Carpenter).³ This was proof, or at least raises a genuine issue of material fact, that (1) Lot 21 claimed the lower finger drive easement as of right, and (2) Lot 19 acquiesced to that claim since at least 2005 and probably long before that. Clearly, in 2006, Mr. West viewed that easement as his by right when he showed Mr. MILNER "your driveway." Clearly, up until the survey in

² "To create the presumption of a grant of right of way [by prescriptive easement], the circumstances attending its use must be such as to make it appear that it was established for the benefit of the claimant or that its use was accompanied by a claim of right, or by such acts as manifested an intention to enjoy it, without regard to the wishes of the owner of the [servient] land." *Roediger v. Cullen*, 26 Wash. 2d 690, 712, 175 P.2d 669, 681 (1946).

³ "In determining what acts are sufficiently open and notorious to manifest to others a claim to land, the character of the land must be considered. *Kona v. Brett*, 72 Wash. 2d 535, 433 P.2d 858 (1967). "The necessary use and occupancy need only be of the character that a true owner would assert *in view of its nature and location*." *Kona*, at 539, 433 P.2d 858. *Chaplin v. Sanders*, 100 Wash. 2d 853, 863, 676 P. 2d 431, 437 (1984). "Use of another's land is "open and notorious" when a reasonably diligent owner would discover the usage. See *Nw Cities*, 13 Wash. 2d at 87, 123 P.2d 771; 17 William B. Starbuck, *Washington Practice: Property Law* §2.7 at 101 (2ed 2004)." *Erickson v. Chase*, 156 Wash App 151, 160, 231 P.3d 1261, 1266 (2010).

2017, the owners of Lot 19 respected that claim, and clearly, when the Carpenters reversed their position after the survey, in an excited utterance, Mr. MILNER gave vent to his belief that the Carpenters were trying to “steal his land.”

© *Genuine Issue of Material Fact.*

In the alternative, whether or not the owners of Lot 19 knew, or should have known, that the Wests and Mr. MILNER used the lower portion of the finger drive as a matter of right, for over ten years, raises a genuine issue of material fact, and therefore, the trial court’s award of summary judgment in Respondent’s favor was in error.

CR 56(c). As stated in Washington Practice,

The motion is not appropriate where a genuine issue of material fact exists or the moving party cannot demonstrate that he is entitled to judgment as a matter of law and the motion may not be used as a substitute for trial on disputed issues of fact. *Green v. A.P.C.*, 136 Wn.2d 87, 960 P.2d 912 (1998); *Tran; Barovic v. Cochran Electric Co.*, 11 Wn.App. 563, 524 P.2d 261 (1974); *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 160 P.3d 13, 2007 WL 1574839 (May 31, 2007).

...

The moving party bears the burden of demonstrating both the absence of a genuine issue of material fact and entitlement to judgment as a matter of law. *Knox v. Microsoft Corp.*, 92 Wn.App. 204, 962 P.2d 839 (1998). A material fact is one upon which the outcome of the case depends. *Tran.* If reasonable minds could reach two different conclusions from the evidence concerning

whether the claimant should prevail on the claim, then summary judgment is inappropriate. *DePhillips v. Zolt Constr. Co.*, 136 Wn.2d 26, 959 P.2d 1104 (1998); *Nishikawa v. U.S. Eagle High, LLC*, 138 Wn.2d 841, 158 P.3d 1265 (2007).

The object and function of summary judgment procedure is to avoid a useless trial. A trial is not useless, but is absolutely necessary where there is a genuine issue as to any material fact. *Kelley v. Tonda*, 198 Wash. App. 303, 310–311, 393 P.3d 824 (Div. 1 2017). Importantly, even if the basic facts are not in dispute, if the facts are subject to reasonable conflicting inferences, summary judgment is improper. *Kelley v. Tonda*, 198 Wash. App. 303, 310–311, 393 P.3d 824 (Div. 1 2017). Indeed, summary judgment procedures are not designed to resolve inferential disputes. In situations where, though evidentiary facts are not in dispute, different inferences may be drawn therefrom as to ultimate facts such as intent, a summary judgment would not be warranted. *Kelley v. Tonda*, 198 Wash. App. 303, 310–311, 393 P.3d 824 (Div. 1 2017).

(*Emphasis added.*) § 56.1 Introduction, 10A Wash. Prac., Civil Procedure Forms § 56.1 (3d ed.).

2. The Trial Court erred when it dismissed, as a matter of law, Appellant’s claim under RCW 64.12.030, as genuine issues of material fact existed as to (a) whether Respondents intentionally or willfully crossed over the boundary and injured the Appellant’s shrubs, and (b) whether Respondents thereby injured Appellant’s shrubs.

RCW 64.12.030 provides in relevant part:

Whenever any person shall . . . injure any . . . shrub on the land of another person, . . . without lawful authority, in an action by the person . . . against the person committing the trespasses or any of them, any judgment for the plaintiff

shall be for treble the amount of damages claimed or assessed.

“Where a person, with knowledge of a bona fide boundary dispute, intentionally enters the disputed area for purposes of destroying trees, and does destroy them, his acts are neither casual nor involuntary, nor justifiable on the basis of believed ownership, but are without lawful authority and will subject him to treble damages. *Maier v. Giske*, 154 Wash. App. 6, 21-22, 223 P.3d 1265 (2010) (citing *Mullally v. Parks*, 29 Wash.2d 899, 911, 190 P.2d 107 (1948)). Mere subjective belief in the right to cut the trees is not sufficient for mitigation of damages pursuant to RCW 64.12.040. *Happy Bunch*, 142 Wash. App. at 96, 173 P.3d 959.” (*Emphasis added.*) *Ofuasia v. Smurr*, 198 Wash. App. 133, 148, 392 P.3d 1148, 1156–57 (2017).

RCW 64.12.030 applies when a defendant commits a direct trespass causing immediate injury to a plaintiff’s trees, timber or shrubs. *Broughton Lumber Co. v. BNSF Ry Co.*, 174 Wash. 2d 619, 637, 278 P.3d 173 (2012). The question of the character of the trespass - whether it was willful or involuntary and in good faith is for the jury. *Gibson v. Thisius*, 16 Wash. 2d 693, 695, 134 P.2d 713 (1943). Furthermore, once the trespass has been proved, the burden establishing the defendant’s affirmative defense that the trespass was inadvertent and not willful falls on the defendant. *Longview Fibre Com v. Roberts*, 2 Wash App 480, 483 (1970); *Broughton Lumber Co.*

174 Wash. 2d at 625. Where a person with knowledge of a bona fide boundary dispute, intentionally enters the disputed area for purposes of destroying trees, and does destroy them, his acts are neither casual nor involuntary, nor justifiable on the basis of believed ownership, but are without lawful authority and will subject him to treble damages. *Ofuasia v. Smurr*, 198 Wash. App. 133, 148, 392 P.3d 1148 (Div 2 2017);

The undisputed photographic evidence shows that the deadened portion of Mr. MILNER's shrubs extended well past the surveyed boundary and into Mr. MILNER's lot. While most shrubs survived the cutting and the placement of the fence, many did not. The evidence shows this action by the Carpenters was deliberate and probably vindictive.

3. The Trial Court erred when it entered findings of fact and conclusions of law, over Appellant's objection, in its Order Granting Motion for Summary Judgment Re: Prescriptive Easement.

Paragraph 5 of the Order Granting Motion for Summary Judgment Re: Prescriptive Easement, dated May 8, 2019, erroneously included findings of fact and conclusions of law. CP 339-342. The Supreme Court has ruled that:

findings and conclusions are inappropriate on summary judgment. *Hemenway v. Miller*, 116 Wash.2d 725, 731, 807 P.2d 863 (1991) ("findings of fact on summary judgment are not proper, are superfluous, and are not

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considered by the appellate court"); *Chelan County Deputy Sheriffs' Ass'n v. County of Chelan*, 109 Wash.2d 282, 294 n. 6, 745 P.2d 1 (1987).

Oltman v. Holland Am. Line USA, Inc., 163 Wash. 2d 236, 249, 178 P.3d 981, 989, fn 10 (2008). The findings and conclusions were entered over Appellant's objection. CP 286.

D. CONCLUSION

Appellant requests this Court rule that:

1. As a matter of law, Appellant has established the existence of a prescriptive easement over Lot 19 from the opening in the hedge to the *cul de sac*. In the alternative, that this issue raises a genuine issue of material fact and the matter should be returned to the trial Court for trial.
2. Whether the Respondent violated RCW 64.12.030 raised a genuine issue of material fact which must be resolved at trial.
3. The trial court's conclusion of ruling of fact and conclusions of law in its order was inappropriate.

DATED: September 13, 2019.

Respectfully submitted,



FRANK F. RANDOLPH, WSBA #32572
Of Attorneys for Appellant

CERTIFICATE

I certify that on this day I caused a copy of the foregoing APPELLANT'S BRIEF to be mailed, postage prepaid, to Respondent's attorney, addressed as follows:

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DATED this 13th day of September 2019, at Longview,
Washington.



JOYCE A. DONALDSON

WALSTEAD MERTSCHING PS

September 13, 2019 - 2:44 PM

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