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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 325679

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

DONALD K. BINGHAM and JANET L. BINGHAM, husband and wife,

Appellants,

v.

GARY A. HEADRICK and MARY JANE HEADRICK, husband and wife,

Respondents.

REPLY BRIEF OF APPELLANTS

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I. INTRODUCTION

The Bingham's have now filed their Appellants' Brief and the Headricks have filed their Brief of Respondents Headrick in this matter. In short, the Headricks claim that the court should not consider Bingham's argument about the proper interpretation of Judge Bridges' March 2000 order and that, even if it is considered, substantial evidence supports the trial court's interpretation of that order and her decision that the Bingham's clearly and intentionally violated it.

II. ARGUMENT

A. *No Substantial Evidence to Support Contempt Finding.*

The Headricks argue, and the Bingham's concede, that a judge's decision on contempt is reviewed for abuse of discretion, defined as an exercise of discretion which was manifestly unreasonable, based on untenable grounds, or based on untenable reasons. The Bingham's further agree that such review must consider whether substantial evidence supports the contempt finding. In fact, this appeal is based squarely on the contention that no substantial evidence supported a contempt finding

against the Bingham, making the exercise of the trial court's discretion here manifestly unreasonable because it was based on untenable grounds, i.e., the court's decision, without any evidence of explanation, that the March, 2000 order decided something which, on its face, it did not.

The Headricks acknowledge that the proposed dimensions for the "expanded" turnaround area, as mentioned in Judge Bridges' March 2000 order were never expressly agreed upon between the parties, but rather were established unilaterally by the Headricks later when they commissioned a survey of the area they wanted to represent that expansion.¹ They then cite, in the very same paragraph of their brief, to an interchange between the attorneys for the parties, which they take completely out of context. That negotiation involved the request by the Bingham's counsel that the Headricks correct their later survey, which they had unilaterally recorded, to eliminate its incorrect reference to "parking." The Headricks now state, erroneously, at the end of that paragraph, that the survey which they had unilaterally commissioned and recorded was "the location and dimensions of the expanded turnaround

¹ See page 5 of Respondents brief.

area ordered by Judge Bridges”.² This is the same leap of faith made by the trial court in her interpretation of the March, 2000 order, despite the fact that the order provides nothing regarding the location and dimensions of the newly expanded turnaround area. The trial court, as correctly pointed out by the Headricks, just eyeballed the area to the west of the 8x10 original turnaround easement, which had been later included in the survey commissioned by Headricks, which, she stated, “....to me looks like that whole area on this side of the barn,”.....³

The Headricks’ reliance on the fact that the Bingham’s did not contest the fact that the Headricks had recorded their independently commissioned survey, but only asked that it be corrected, is misplaced. As the trial court was told, this exchange between the parties about the survey occurred at a time when the parties were considering a global settlement based, in part, on the Bingham’s willingness to consider conceding the area of that survey as the turnaround area in return for other concessions by the Headricks. Counsel for the Bingham’s objected to introduction of this evidence as violation of ER 408. Later, however, he introduced

² See last sentence on page 5 of Respondents’ Brief.

³ See page 7 of Respondents’ Brief.

evidence that the negotiation failed and there was never such an agreement. RP 8-9; Trial Exhibits 6 and 7 ; CP 776-777). At the time of those ongoing negotiations, while the Bingham still thought they might concede the dimensions of the survey, there was no reason for them to challenge any aspect of it other than its characterization of the area as one for parking. All of this begs the question, “On what evidence did the trial judge conclude that the intent of Judge Bridges order was to more than double the width of the 8x10 easement to one which was 8x23?”

The Headricks’ claim at page 17 of their brief, without citation to any part of the record in support of their argument, that the strongest evidence of Judge Bridges’ intent and the parties understanding in 2000 was that the Bingham acquiesced in Headricks’ use of an area well beyond the original 8x10 without incident for over a decade. While that is far from the truth⁴, there is nothing in this record to sustain or undermine it, nor did the court make her finding of contempt against the Bingham in

⁴ Since this was simply a turnaround easement, unless Bingham were to have set up surveillance of some type, it is unlikely that they would have known whether at various times the Headricks backed into the area outside what they considered the proper easement dimension to turn a vehicle around. Moreover, as the record does reflect, their last move of their barn was intended to stop the Headricks from parking in an area they believed to not be a part of the easement. CP 549, paragraph 6.

reliance on any evidence of that nature.

B. Headricks Contention That Bingham's Argument be Ignored.

The Headricks contend that the court should ignore the Bingham's argument that there existed a much more plausible and reasonable way to interpret Judge Bridges' order because the Bingham's did not directly appeal the court's denial of their current counsel's motion for relief under CR 60. See CP 741-789. The Headricks cite no authority for this position other than *Nguyen v. Sacred Heart Med. Ctr.*, 97 Wn. App. 728, 733-34(1999) and CR 2.5(a), neither of which support their claim that a court will not consider "arguments" which were not raised below as to claims that were asserted. Both CR 2.5(a) and the *Nguyen* case refer to "errors" which were not properly raised below. In *Nguyen* the issue was whether the appellate court would allow a party to argue a claim of outrage that had not been raised or argued below. The assignments of error in this case are more than sufficient to convey to this court that the trial court failed to base her contempt decision on substantial evidence by her failure to adequately "consider what the trial judge who entered the March 23, 2000 (order) intended as the new dimensions of the turnaround area after compliance with his order.." Surely that assignment of error encompasses

whatever argument can be made regarding a proper interpretation of that order, based on the claim that the trial judge failed to adequately consider other possible reasonable interpretations of the order, especially when the argument was made to the court below.

As the record reflects, the argument about a more plausible, reasonable way to interpret Judge Bridges' March 2000 order was made below. CP 741-789. As stated in *State v. Hammond*, 64 Wn.2d 591, 593 (1964) the purpose of the rule generally precluding new claims on appeal is that trial courts "must be given a chance to view and correct the claimed error before the matter can be reviewed" by an appellate court. With respect the trial court's ability to view and correct its failure to consider other possible interpretations of Judge Bridges March 2000 order, that was done not once but twice below, on motion by the Bingham's former counsel for reconsideration, and again by their current counsel by motion under CR 60. Moreover, as the *Nguyen* court acknowledged at page 732, courts have discretion to waive appellate rules to serve the ends of justice. There can be no reasonable argument that denial by this court of consideration of that same argument would serve the purpose of the rule.

C. *Headricks' Argument Re: Effect of Movement of the Northeast*

*Corner, and the Effect of Bingham's Last Movement of the Barn
Before the Contempt Motion.*

At pages 14-15 of their brief the Headricks attempt to support an argument that moving the barn to the limit of the maple tree, to the southwest, would not result in a westward movement of the northeast corner of the barn. In an attempt to illustrate the point the Headricks suggest that the court view a photo showing the barn's location in 2010 and a survey dated December 10, 2013 showing the barn's location at that time, after the Bingham's complied with Judge Allan's last order in this case. Neither illustration helps anyone understand where the northeast corner of the barn was located in 2000 after compliance with Judge Bridges' March 2000 order. It is perplexing why the Headricks don't direct the court to the Weinert Survey, which they presented to the court to represent the dimensions and the location of the barn when they were attempting to define what they wanted to call the new turnaround. CP 551. At that time the barn was still in the location to which it had been moved in compliance with Judge Bridges' order. CP 548-550. Weinert's own survey shows that the northeast corner of the barn was slightly intruding into the eight foot depth of the turnaround, and that its northeast side was

8.99 feet from the retaining wall, which was the eastern side of the turnaround. This is the best evidence showing the attempt to move the barn “to the limit of the maple tree.” It follows that if the barn were to continue back another foot or two its northeast corner would have been slightly more than 10 feet to the west of the eastern side of the turnaround.

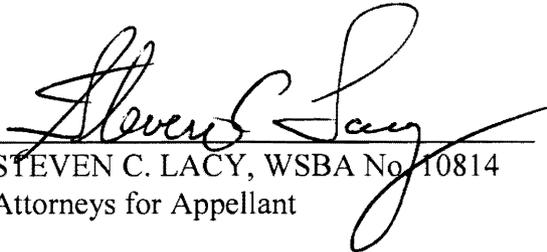
The Headricks also argue at pages 15-16 that the survey showing where the barn was located when they brought their motion to hold the Bingham in contempt supports their contention that the barn had been moved into the expanded area of the turnaround, even accepting the theory that Judge Bridges intended the expansion to be based on the new position of the northeast corner of the barn. That argument is actually contradicted by the very document they cite, CP 554. CP 554, a survey of the area in the fall of 2011, has a scale of one inch for every ten feet. Measurement of .1 inch, using a ruler from the eastern side of the barn to the corner of the 8x10 turnaround, shows that the location of the of the barn’s nearest point is about one foot from the corner of the 8x10 original turnaround. If there is any encroachment into the area of the turnaround which is consistent with the Bingham’s theory of what Judge Bridges intended, such would be diminimus.

III. CONCLUSION

The arguments of the Headricks on appeal simply amplify and confirm that the trial court made a leap of faith, without any evidence to support it, in saying that the March, 2000 order of Judge Bridges was clear. She relied on her own, unsupportable, interpretation of that order to making a finding of contempt and to punish the Bingham for doing only what they honestly believed to be consistent with their legal rights. The court's order of contempt and resulting sanctions should be reversed.

Respectfully Submitted this 13th day of November, 2014.

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