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No. 68526-1

King County Superior Court #10-2-44107-7  
IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

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DAVID ARMSTRONG, an unmarried man;  
GREG MOSLEY, a married man, and JANE DOE MOSLEY,  
and the marital community comprised therein;

Defendants/Appellants,

vs.

GAEL DURAN, a single woman,

Respondent.

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APPELLANT MOSLEYS' REPLY BRIEF

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COURT OF APPEALS  
DIVISION I

ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION..... 1

II. ARGUMENT..... 1

    A. Respondents’ Motion to Dismiss is Entirely Without Merit and Should be Denied. .... 1

        1. No Factual or Legal Basis Exists for Dismissal of this Appeal Based on Any Untimely Filing of Appellant’s Brief. .... 1

        2. The Notice of Appeal was Timely Filed..... 5

        3. This Appeal is Not Barred by Judicial Estoppel..... 10

    B. Numerous Genuine Issues of Material Fact Precluded Entry of Summary Judgment..... 13

    C. Mosley’s Non-Involvement with the Offending Structures Can be Raised on Appeal. .... 15

    D. The Impropriety of the Summary Judgment Order Requires Reversal of all Subsequent Orders of the Trial Court. .... 18

    E. Respondent is Not Entitled to Recovery of Attorneys’ Fees as the Prevailing Party on Appeal. .... 19

III. CONCLUSION..... 19

## Cases

|   |    |
|---|----|
| <i>Bennett v. Hardy</i> , 113 Wash.2d 912, 918, 784 P.2d 1258 (1990).....   | 17 |
| <i>City of Louisa v. Levi</i> , 140 F.2d 512 (C.C.A. 6th Cir. 1944).....  | 9  |
| <i>Collins v. Miller</i> , 252 U.S. 364, 40 S. Ct. 347, 64 L. Ed. 616 (1920).....   | 9  |
| <i>Dodds v. Gregson</i> , 35 Wash. 402, 77 P. 791.....  | 12 |
| <i>Gross v. City of Lynnwood</i> , 90 Wash.2d 395, 400, 583 P.2d 1197 (1978).....   | 17 |
| <i>Hogue v. McAllister</i> , 122 Wash. 347, 210 P. 671.....   | 12 |
| <i>Hontz v. White</i> , 56 Wash.2d 538, 539-540, 348 P.2d 420, 420 - 421 (1960).....  | 9  |
| <i>Jones v. Stebbins</i> , 122 Wash.2d 471, 479, 860 P.2d 1009 (1993).....  | 17 |
| <i>LaRue v. Harris</i> , 128 Wash.App. 460, 463-464, 115 P.3d 1077, 1078 (2005).....  | 12 |
| <i>Logan v. Brodrick</i> , 29 Wash.App. 796, 799-800, 631 P.2d 429, 431 (1981).....   | 14 |
| <i>Lunsford v. Saberhagen Holdings, Inc.</i> , 139 Wash.App. 334, 338, 160 P.3d 1089,<br>1091 (Wash.App. Div. 1, 2007)..... | 18 |
| <i>Maybury v. City of Seattle</i> , 1959, 53 Wash.2d 716, 336 P.2d 878.....   | 10 |
| <i>Maynard Inv. Co. v. McCann</i> , 77 Wash.2d 616, 621, 465 P.2d 657 (1970).....   | 17 |
| <i>Roberson v. Perez</i> , 156 Wash.2d 33, 39-40, 123 P.3d 844, 848 (2005).....   | 17 |
| <i>Ruff v. King County</i> , 125 Wn.2d 697, 703, 887 P.2d 886 (1995).....   | 14 |
| <i>Schafer v. Giese</i> , 135 Wash. 464, 238 P. 3.....  | 12 |
| <i>Scott v. Pacific West Mountain Resort</i> , 119 Wn.2d 484, 502-503, 834 P.2d 6 (1992).....                               | 14 |
| <i>State v. Ford</i> , 137 Wash.2d 472, 477, 484-85, 973 P.2d 452 (1999).....   | 18 |
| <i>State v. Turner</i> , 98 Wash.2d 731, 733, 658 P.2d 658 (1983).....  | 12 |
| <i>State v. Winthrop</i> , 148 Wash. 526, 533-534, 269 P. 793, 796 (1928).....  | 11 |
| <i>Sterling Realty Co. v. City of Bellevue</i> , 68 Wash.2d 760, 770-771, 415 P.2d 627,<br>634 (1966).....                  | 4  |
| <i>Sunnyside Valley Irr. Dist. v. Dickie</i> , 149 Wash.2d 873, 880, 73 P.3d 369, 372 (2003)..                              | 15 |

## Statutes

|                   |              |
|-------------------|--------------|
| RCW 4.24.630..... | 7, 8, 15, 19 |
| RCW 7.40.030..... | 15           |

## I. INTRODUCTION

Appellants Greg and Rita Mosley (“Mosley”) submit this brief in reply to respondent Gael Duran’s response brief. Respondent seeks to dismiss this appeal based on unwarranted claims of untimeliness and fails to address the fundamental salient issue in this case, i.e., the existence of numerous genuine issues of material fact that precluded entry of the summary judgment order issued by the trial court. The appeal, therefore, should not be dismissed and the trial court’s summary judgment order, order for contempt and sanctions, and entry of judgment should be reversed and this matter be remanded for trial on all issues.

## II. ARGUMENT

### **A. Respondents’ Motion to Dismiss is Entirely Without Merit and Should be Denied.**

#### **1. No Factual or Legal Basis Exists for Dismissal of this Appeal Based on Any Untimely Filing of Appellant’s Brief.**

Respondent contends without citation to legal authority, that appellants’ briefs were untimely filed and, therefore, this appeal should be dismissed pursuant to RAP 10.2(i) and 18.9. In support of her motion, respondent attaches three exhibits (Exhibits A-C) to her brief. These exhibits, however, are not materials contained in the record on review and, accordingly, cannot be considered. “An appendix may not include materials not contained in the record on review without permission from

the appellate court, . . . .” RAP 10.4(c). Respondent never obtained such permission therefore has no factual basis for her motion.

Notwithstanding RAP 10.4(c), if the court is inclined to consider Exhibits A-C attached to respondent’s brief, the court should also consider the following documents contained in Appendix 1<sup>1</sup> attached hereto as follows:

1. Proof of filing of Mosley’s opening appellate brief on August 27, 2012, with the Court of Appeals, Division One, and the stamp by said Court reflecting receipt on August 27, 2012. This evidences the timely filing of Mosley’s brief.

(Appendix 1- Exhibit A.)

2. Proof of service of Mosley’s opening appellate brief on respondent’s counsel by email and first class mail on August 27, 2012. This evidences the receipt of Mosley’s opening appellate brief by respondent’s counsel by email on August 27, 2012.

(Appendix 1- Exhibit B.)

3. Copy of e-mail transmittal of Mosley’s opening appellate brief on respondent’s counsel at 2:55 p.m. on August 27, 2012. This evidences the receipt of Mosley’s opening appellate brief by respondent’s counsel on August 27, 2012.

(Appendix 1- Exhibit C.)

Moreover, respondent concedes actual receipt of Mosley’s opening appellate brief on August 28, 2012, a mere one day late. Respondent

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<sup>1</sup> A motion is pending before the Court requesting approval of consideration of these documents.

further misrepresents in her response brief that the order granting the extension of filing of Mosley’s opening brief stated “[t]he order specifically stated that no further extensions would be permitted.” (See, respondent’s brief, p. 3, 10.) This is not accurate. Rather, the order stated: “Granted. However, no further extensions **should be anticipated.**” (Emphasis added.) The order, therefore, did not preclude any further extensions, only that Mosley should not assume that a further extension would be granted. Certainly, the order did not foreclose a further extension for good cause, which Mosley did not need.

Nor does 10.2(i) and 18.9 authorize dismissal, on a **party’s** motion, based on the untimely filing of a brief. RAP 10.2(i) states that “[t]he appellate court will ordinarily impose sanctions under rule 18.9 for failure to timely file and serve a brief. RAP 18.9 states:

**(a) Sanctions.** The appellate court on its own initiative or on motion of a party may order a party or counsel, or a court reporter or other authorized person preparing a verbatim report of proceedings, who uses these rules for the purpose of delay, files a frivolous appeal, **or fails to comply with these rules to pay terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply or to pay sanctions to the court.** The appellate court may condition a party’s right to participate further in the review on compliance with terms of an order or ruling including payment of an award which is ordered paid by the party.

....

(Emphasis added.) RAP 18.9(a), therefore, only authorizes monetary sanctions and not dismissal as a sanction for the untimely filing of a brief based on a motion by a party. Rather, only the Commissioner or Clerk can dismiss for failure to comply with the appellate rules. RAP 18.9(b)<sup>2</sup>. Although a party can move to dismiss pursuant to RAP 18.9(c)<sup>3</sup>, respondent does not allege this as a basis for dismissal and would have no such grounds for such claim in any event.

Further, a motion to dismiss this appeal because of the late filing of an appellant's opening brief should be denied in the absence of a showing of prejudice. *Sterling Realty Co. v. City of Bellevue*, 68 Wash.2d 760, 770-771, 415 P.2d 627, 634 (1966). Respondent has not even attempted to make a showing of prejudice, nor could she. Respondent actually received the brief on its due date of August 27, 2012, and even if she received it one day later she was not prejudiced in the least.

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<sup>2</sup> RAP 19.9(b) states:

**(b) Dismissal on Motion of Commissioner or Clerk.** The commissioner or clerk, on 10 days' notice to the parties, may (1) dismiss a review proceeding as provided in section (a) and (2) except as provided in rule 18.8(b), will dismiss a review proceeding for failure to timely file a notice of appeal, a notice for discretionary review, a motion for discretionary review of a decision of the Court of Appeals, or a petition for review. A party may object to the ruling of the commissioner or clerk only as provided in rule 17.7.

<sup>3</sup> RAP 18.9(c) states:

The appellate court will, on motion of a party, dismiss review of a case (1) for want of prosecution if the party seeking review has abandoned the review, or (2) if the application for review is frivolous, moot, or solely for the purpose of delay, or (3) except as provided in rule 18.8(b), for failure to timely file a notice of appeal, a notice of discretionary review, a motion for discretionary review of a decision of the Court of Appeals, or a petition for review.

## 2. The Notice of Appeal was Timely Filed.

Respondent contends that the notice of appeal was untimely filed since it should have been filed within 30 days after the entry of the court's denial of reconsideration of its summary judgment order instead of the final judgment entered by the trial court. In this respect, respondent argues that appellants failed to timely file the notice of appeal since it was filed **within 30 days of entry of satisfaction of judgment.** (See, Respondents' Brief, p. 10.).

This is yet another misrepresentation in an attempt to divert the court from the dispositive issue regarding the timeliness of appeal, i.e., whether the summary judgment order disposed of all issues in the case. There is absolutely no question that the appeal was filed within 30 days of the final judgment entered in this matter and **not** within 30 days of partial satisfaction of judgment. *CP 330 32; 333-351.*

Respondent identified her complaint as a "Complaint for Injunctive Relief and Damages." *CP 1.* In addition to injunctive relief, in all of her causes of action and in her prayer for relief, she claimed damages as follows:

### III. FIRST CAUSE OF ACTION – ENCROACHMENT

...

5. Defendants Armstrong's and Mosley's actions have prevented Duran from accessing and utilizing the easement, which have proximately resulted in, and continue to result in, **damages to her property and use of her property in an amount to be proven at trial.**

IV. SECOND CAUSE OF ACTION – SPITE FENCE

...

5. Defendant Armstrong's and Mosley's actions of spite fence have proximately caused damage to Duran's property and use of her property, and will continue to cause damage and **damage to the use of her property, all in an amount to be proven at trial.**

V. THIRD CAUSE OF ACTION – TRESPASS

...

3. Armstrong's painting of Duran's property and cedar tree was intentional, willful, and knowingly **caused damage to Duran's property, in an amount to be proven at trial.**

4. Armstrong's and Mosley's actions constitute trespass and have caused and continue **to cause damage to Duran's property and use of her property, for which she is entitled to damages and treble damages in an amount to be proven at trial.**

VII. FOURTH CAUSE OF ACTION – NUISANCE

..

4. Defendants Armstrong's and Mosley's actions in nuisance have proximately **caused and continue to cause damage to Duran's property and use of her property in an amount to be proven at trial.**

VIII. FIFTH CAUSE OF ACTION – INTENTIONAL INFLICTION OF EMOTIONAL DURESS

...

4. Defendant Armstrong's actions of . . . has proximately **caused, and continues to cause to suffer severe emotional distress in an amount to be proven at trial.**

IX. SIXTH CAUSE OF ACTION – NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

...

4. Defendant Armstrong's actions of . . . has **proximately caused, and continues to cause to suffer severe emotional distress in an amount to be proven at trial.**

X. PRAYER FOR RELIEF

...

3. **For damages caused by the installation of the fence;**
4. **For damages caused by the painting of the Duran property and cedar tree;**
5. **For damages for emotional distress;**

6. **For treble damages and attorneys' fees** pursuant to RCW 64.12.030;

7. For plaintiff's fees, expenses, and costs incurred herein, including reasonable attorneys' fees.

*CP 6-12.*

Further, the specific "Relief Requested" sought by respondents' summary judgment motion was for the court to "grant her motion for summary judgment **for removal of a fence and landscaping in an express easement area which prevents Duran from her legal right of ingress and egress.**" (Emphasis added.) *CP 35.* The "Relief Requested" did not, in any respect, seek a summary judgment order granting her the damages alleged in her complaint. *CP 35.* Although her motion went on to request that the court grant summary judgment on all her other claims for a spite fence, nuisance, trespass, emotional distress, and property damage pursuant to RCW 4.24.630, these arguments were all related to injunctive relief premised on the alleged breach of the subject easement. *CP 35-51.*

The summary judgment order entered by the trial court also merely stated:

Duran's motion is GRANTED.

Appellants are hereby ordered to remove the fence, rockery, landscaping, and all their encroachments from the easement area as described in the easement previously

recorded pertaining to the subject property within 30 days of this Order.

*CP 182-184.* It is apparent that the court's order was premised on respondent's allegations regarding breach of the easement pursuant to respondent's requested relief "for removal of a fence and landscaping in an express easement area which prevents Duran from her legal right of ingress and egress." *CP 35.* The order is completely silent regarding imposition of liability based on a spite fence, nuisance, trespass, emotional distress, or property damage pursuant to RCW 4.24.630 and such issues were not resolved.

The order further clearly did not address or dispose of the many monetary damage claims sought by Duran. *CP 182-184.* Nor could it have since Duran provided no evidence regarding the amount any such monetary claim. *CP 35-51.* Also, the order did not contain the express findings "that there is no just reason for delay" and an "express direction for the entry of judgment" which would make the order a final judgment subject to immediate appeal. CR 54(b).

Accordingly, the summary judgment order was not a final judgment subject to appeal since there were numerous and substantive issues remaining to be resolved.

The appellate rules make no effort to define a final judgment, and perhaps wisely so. **At common law, a final judgment was**

**one that disposed of all of the issues as to all of the parties.** Collins v. Miller, 252 U.S. 364, 40 S. Ct. 347, 64 L. Ed. 616 (1920); Crick, The Final Judgment as a Basis for Appeal (1932), 41 Yale L.J. 539. No better definition seems to have evolved.

A federal court, having apparently in mind a winning plaintiff, has said: “**A final judgment is one which disposes of the whole subject, gives all the relief that was contemplated, provides, with reasonable completeness, for giving effect to the judgment and leaves nothing to be done in the cause save superintend, ministerially, the execution of the decree.**” City of Louisa v. Levi, 140 F.2d 512 (C.C.A. 6th Cir. 1944).

(Emphasis added.) 2A WAPRAC RAP 2.2

Moreover, CR 56(c) states, in part that “[a] summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.” In this respect, a determination of liability alone without respect to damages is not a final judgment subject to appeal. As held in *Hontz v. White*, 56 Wash.2d 538, 539-540, 348 P.2d 420, 420 - 421 (1960), (emphasis added):

**The trial court thereupon entered an order granting the defendants’ motion dismissing plaintiff’s complaint and determining the plaintiff liable as a matter of law, leaving only the question of the damages to be awarded to the defendants on their cross-complaint and the matter of costs to be determined at the trial.**

Prior to any further proceedings in the action, the plaintiff instituted this appeal from the trial court’s order.

**We do not reach a consideration of appellant’s assignments of error in this case since the order from which this appeal is taken is not an appealable order.** The order entered by the trial court is within the

contemplation of Rule of Pleading, Practice, and Procedure 19, § 1(c), RCW Vol. O, as appears from the following language:

\* \* \* A summary judgment, *interlocutory in character*, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.’ (Italics ours.)

Although titled an ‘Order Granting Defendants’ Motion for Summary Judgment,’ **such an order, as we pointed out in *Maybury v. City of Seattle, 1959, 53 Wash.2d 716, 336 P.2d 878, is not a final adjudication but is, in effect, an order limiting the issues to be tried. Such an order is not an appealable order*** within the limitations of Rule on Appeal 14, RCW Vol. O:

Following entry of the order, plaintiff did not seek to dismiss her remaining claims. Instead, despite the existence of remaining issues to be resolved on Duran’s claims such as resolution of remaining issues or the amount of monetary damages she was claiming, Duran filed a Motion for Entry of Judgment on the trial court’s summary judgment order and contempt order. *CP 299-306*. It was only at this point in time did Duran effectively drop her remaining claims against appellants making the Judgment entered in February 21, 2012, the final judgment. *CP 28-329, 330-332*.

### **3. This Appeal is Not Barred by Judicial Estoppel.**

Respondent argues that this appeal should be dismissed based on removal of the encroachments and payment of sanctions ordered by the

court. There is no legal authority for this assertion. Nor do any of the cases cited support her position and do not even involve payment of a judgment and an ensuing appeal.

Contrary to respondent's assertion, Washington law is clear on this issue.

Payment of civil money judgment to save debtor's person or property from execution does not waive right of appeal. *State v. Winthrop*, 148 Wash. 526, 269 P. 793, 59 A.L.R. 1265 (1928).

2A WAPRAC RAP 2.2. As stated in *State v. Winthrop*, 148 Wash. 526, 533-534, 269 P. 793, 796 (1928)(emphasis added):

In the text of 2 R. C. L. 65, following reference to holdings of the first above-mentioned class, we read:

**'As a general rule, however, one against whom a judgment or decree for a sum of money has been rendered does not, by voluntarily paying or satisfying it, waive or lose his right to review it upon a writ of error or appeal unless such payment or satisfaction was by way of compromise or with an agreement not to pursue an appeal or writ of error. This rule has been placed upon the ground that one against whom a judgment is entered, if he fails to satisfy it, must expect to see his property seized and sold at a sacrifice, and it is difficult to conceive how his payment of the judgment can give rise to any estoppel against seeking to avoid it for error. The better view accordingly is that, though the execution has not issued, the payment of a judgment must be regarded as compulsory, and therefore as not releasing errors, nor depriving the payor of the right to appeal.'**

**Our own decisions go at least to the extent of holding that coercive payment of a civil money judgment by a**

**judgment debtor does not waive his right of appeal.** Dodds v. Gregson, 35 Wash. 402, 77 P. 791; Hogue v. McAllister, 122 Wash. 347, 210 P. 671; Schafer v. Giese, 135 Wash. 464, 238 P. 3.

As also held in *LaRue v. Harris*, 128 Wash.App. 460, 463-464, 115 P.3d 1077, 1078 (2005) (emphasis added):

**While the appeal was pending, the Estate paid the judgment in full. On January 30, 2004, the trial court entered an order saying the judgment had been satisfied, and LaRue withdrew the proceeds from the registry of the court.**

LaRue contends that the appeal is moot because the Estate has paid the judgment. **A case is moot on appeal when the appellate court can no longer grant relief.<sup>FN1</sup> We can grant relief here, for if we reverse, we can order the trial court to dismiss the suit and LaRue to make restitution.** Accordingly, the appeal is not moot.

FN1. *State v. Turner*, 98 Wash.2d 731, 733, 658 P.2d 658 (1983); *In re Marriage of Olson*, 100 Wash.App. 911, 915 n. 5, 999 P.2d 1286 (2000).

LaRue relies on RAP 2.5(b)(1), which provides:

A party may accept the benefits of a trial court decision without losing the right to obtain review of that decision only (i) if the decision is one which is subject to modification by the court making the decision or (ii) if the party gives security as provided in subsection (b)(2) or (iii) if, regardless of the result of the review based solely on the issues raised by the party accepting benefits, the party will be entitled to at least the benefits of the trial court decision ...

Except in the situations indicated, this rule denies the right of appeal to a party who *accepts* benefits. **It does not, however, deny the right of appeal to a party who complies with an outstanding judgment by *paying* benefits; that party may still pursue an appeal and, if successful, obtain**

**restitution. Because the Estate *paid* benefits, RAP 2.5(b) does not affect its right to appeal.**

Here, there is no question that removal of the encroachments and payment of the sanctions was involuntary and coercive. The court's order mandated removal of the encroachments within 30 days notwithstanding the fact that other issues had yet to be determined. The court also ordered appellants to pay Duran \$2,100 in attorneys' fees and costs and sanctions of \$100 a day until all encroachments are removed. *CP 267-269*. Accordingly, removal of the encroachment and payment of the sanctions were essential to attempt to avoid the significant daily penalties as well as the possible imposition of interest.

Appellants are therefore entitled to full restitution in the event of reversal of the summary judgment order. There is no injustice to respondent who was, or certainly should have been, fully aware of the applicable rules governing appeals and the significant risk that the sanction would be overturned. Rather, the injustice is to appellants who were forced to remove encroachment and pay sanctions without a full trial on the merits.

**B. Numerous Genuine Issues of Material Fact Precluded Entry of Summary Judgment.**

The Court considers all the facts submitted and views all the facts in the light most favorable to the nonmoving party. *Ruff v. King County*,

125 Wn.2d 697, 703, 887 P.2d 886 (1995). The burden is on the moving party to demonstrate there is no issue of material fact. The moving party is held to a strict standard. *Scott v. Pacific West Mountain Resort*, 119 Wn.2d 484, 502-503, 834 P.2d 6 (1992).

Respondent completely ignores the numerous genuine issues of a material fact raised in appellant's opening brief and supported by the record. (*See*, Appellant Mosley's Opening Brief, pp. 14-18.) Instead, respondent urges the court to look only at the initial Plat Easement (CP 137-38) in isolation without regard to the Amended Easement (CP 135-136, 141-144) nor the subsequent conduct of the signatories to these documents and their successors in interest.

As held in *Logan v. Brodrick*, 29 Wash.App. 796, 799-800, 631 P.2d 429, 431 (1981):

In determining the permissible scope of an easement, we look to the intentions of the parties connected with the original creation of the easement, the nature and situation of the properties subject to the easement, and the manner in which the easement has been used and occupied.

Further,

[i]f ambiguity exists, extrinsic evidence is allowed to show the intentions of the original parties, the circumstances of the property when the easement was conveyed, and the practical interpretation given the parties' prior conduct or admissions. *Id.*

*Sunnyside Valley Irr. Dist. v. Dickie*, 149 Wash.2d 873, 880, 73 P.3d 369, 372 (2003).

Respondent continues to ignore the Amended Easement, which unequivocally allowed installation of the fence installed by appellant Armstrong and even requires Duran to pay for any costs in excess of \$400, and the subsequent conduct and use by the parties, which makes clear that the initial Plat Easement was modified or abandoned.

Further, significant genuine issues of material fact existed to preclude removal of the fence as a spite fence pursuant to RCW 7.40.030. Appellants submitted substantial evidenced demonstrating that the fence was installed for a useful and reasonable purpose. (*See*, Appellant Mosley's Opening Brief, pp. 14-18.)

Finally, respondent apparently concedes that numerous and substantial genuine issues of material fact exist in regards to her claims for nuisance, trespass, emotional distress, or property damage pursuant to RCW 4.24.630 as she fails to respond in any respect to the Mosley's argument on these issues.

**C. Mosley's Non-Involvement with the Offending Structures Can be Raised on Appeal.**

Respondent contends that Mosley's argument regarding their complete lack of involvement in the encroachments and improvements

challenged by respondent and the agreed boundary line adjustment should be barred since it was not raised before the trial court. However, this issue was clearly presented to the trial court. Appellants' joint response to summary judgment stated:

7. Boundary Line Adjustment. Subsequently, in consideration of Armstrong's acquiescence to a boundary line adjustment, Mosley agreed to convey or otherwise grant Armstrong any right Mosley might have in the Panhandle Property. In this respect, Mosley has not objected to the construction of any improvement placed by Armstrong in the area of the Panhandle. Mosley, however, has not been involved with the construction or installation of any structures, fence, or other improvements constructed in the Panhandle area and has no ownership interest in any such improvements.

*CP 164.* This was further supported by the Declaration of Greg Mosley as follows:

1. In consideration of defendant Armstrong's acquiescence to a boundary line adjustment, I have agreed with him to convey or otherwise grant him any right my wife and I may have in the panhandle portion of our property. According, I have not objected to the construction of any improvements placed by defendant Armstrong in the area of the panhandle.

2. Neither my wife nor I, however, have had any involvement in building, location, or establishing any structures, fence, or other improvements constructed in the Panhandle area and have no ownership interest in any such improvements.

*CP 154.* Consequently, this issue was raised before the trial court.

Moreover, RAP 2.5(a) states, in part:

**(a) Errors Raised for First Time on Review.**

The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: . . . (2) failure to establish facts upon which relief can be granted, and . . . .

As also held in *Roberson v. Perez*, 156 Wash.2d 33, 39-40, 123

P.3d 844, 848 (2005)(emphasis added):

The Court of Appeals held that the County could argue the failure to establish facts upon which relief can be granted for the first time on appeal. We agree and have previously so held:

In our opinion, this particular statutory limitation on the class of persons entitled to a civil cause of action for age discrimination operates to define the specific facts upon which relief may be predicated. **A party may raise failure to establish facts upon which relief can be granted for the first time in the appellate court. RAP 2.5(a)(2).** Respondent is thus not precluded from raising appellant's failure to establish he is within the protected class.

*Gross v. City of Lynnwood*, 90 Wash.2d 395, 400, 583 P.2d 1197 (1978).

We have consistently stated that a new issue can be raised on appeal

“when the question raised affects the right to maintain the action.”

*Bennett v. Hardy*, 113 Wash.2d 912, 918, 784 P.2d 1258 (1990) (quoting

*Maynard Inv. Co. v. McCann*, 77 Wash.2d 616, 621, 465 P.2d 657

(1970)); *see also Jones v. Stebbins*, 122 Wash.2d 471, 479, 860 P.2d 1009

(1993).

The factual record is undisputed that Mosley had absolutely no involvement with any of the offending encroachments or conduct. Nor is

there even a scintilla of evidence that appellant Armstrong was acting under the direction of or as the agent for Mosley. There is therefore absolutely no factual basis upon which Mosley can have liability for the conduct of appellant Armstrong.

Even assuming, arguendo, that this issue is being first raised on appeal “[i]f an issue raised for the first time on appeal is ‘arguably related’ to issues raised in the trial court, a court may exercise its discretion to consider newly-articulated theories for the first time on appeal. *Lunsford v. Saberhagen Holdings, Inc.*, 139 Wash.App. 334, 338, 160 P.3d 1089, 1091 (Wash.App. Div. 1, 2007) “[B]y using the term ‘may’, RAP 2.5(a) is written in discretionary, rather than mandatory, terms. *See, State v. Ford*, 137 Wash.2d 472, 477, 484–85, 973 P.2d 452 (1999).

**D. The Impropriety of the Summary Judgment Order Requires Reversal of all Subsequent Orders of the Trial Court.**

As set forth in Mosley’s opening brief, the summary judgment order was erroneously granted by the trial court. Accordingly, all orders that ensued from and were premised on this order, including the orders for contempt and for sanctions and the judgment were similarly defective and should be set aside.

**E. Respondent is Not Entitled to Recovery of Attorneys' Fees as the Prevailing Party on Appeal.**

Respondent argues entitlement to recovery of attorneys' fees pursuant RCW 4.24.630. However, although alleged in her complaint, respondent did not pursue this claim or recover damages pursuant to this statute and waived it by seeking entry of judgment. Nor did the court's order reflect, in any respect, that she prevailed pursuant to this statute or recovered any damages or fees pursuant to this statute. RCW 4.24.630 required that appellants wrongfully caused "waste or injury to the land" by "intentionally and unreasonably" committing the acts "while knowing, or having reason to know, that he or she lacks authorization to so act." The court's order made no such finding and merely stated that "Appellants are hereby ordered to remove the fence, rockery, landscaping, and all their encroachments from the easement area as described in the easement previously recorded pertaining to the subject property within 30 days of this Order."

Nor is respondent entitled to fees pursuant to RAP 18.9(a). As reflected above, Mosley's opening brief was timely filed and respondent's contention to the contrary is frivolous.

**III. CONCLUSION**

Based on the foregoing analysis, Mosley respectfully requests this Court to reverse the Superior Court's decisions on Duran's motion for

summary judgment, motion for contempt and sanctions, and entry of judgment and remand this matter to the Superior Court for trial on all issues.

DATED this 22<sup>nd</sup> day of October, 2012.

JOHNS MONROE MITSUNAGA  
KOLOUŠKOVÁ, PLLC

By 

Darrell S. Mitsunaga, WSBA #12992  
Attorneys for Defendants/Appellants  
Greg Mosley and Rita Mosley

*1371-3 Mosley's Reply Appellate Brief 10-18-12F.docx*

No. 68526-1

King County Superior Court #10-2-44107-7  
IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

---

DAVID ARMSTRONG, an unmarried man;  
GREG MOSLEY, a married man, and JANE DOE MOSLEY,  
and the marital community comprised therein;

Defendants/Appellants,

vs.

GAEL DURAN, a single woman,

Respondent.

---

DECLARATION OF DARRELL S. MITSUNAGA  
IN SUPPORT OF APPELLANT MOSLEY'S MOTION FOR CONSIDERATION OF  
MATERIALS NOT CONTAINED IN THE RECORD

---

Atty: Darrell S. Mitsunaga, WSBA #12992  
JOHNS MONROE MITSUNAGA KOLOUŠKOVÁ PLLC  
1601 – 114<sup>th</sup> Avenue S.E., Suite 110  
Bellevue, WA 98004  
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APPENDIX 1

I, DARRELL S. MITSUNAGA, under penalty of perjury under the laws of the State of Washington, declare as follows:

1. I am counsel of record for defendant/appellant Greg Mosley and Rita Mosley ("Mosley"), have personal knowledge of the matters asserted herein, and am competent to testify.

2. Attached as Exhibit A is a true and accurate copy of the proof of filing of Mosley's opening appellate brief on August 27, 2012, with the Court of Appeals, Division One, and the stamp by said Court reflecting receipt on August 27, 2012. This evidences the timely filing of Mosleys' opening brief.

3. Attached as Exhibit B is a true and accurate copy of the proof of service of Mosley's opening appellate brief on respondent's counsel by email and first class mail on August 27, 2012. This evidences the receipt of Mosley's opening appellate brief by respondent's counsel by email on August 27, 2012.

4. Attached as Exhibit C is true and accurate copy of the e-mail transmittal of Mosley's opening appellate brief on respondent's counsel at 2:55 p.m. on August 27, 2012. This evidences the receipt of Mosley's opening appellate brief by respondent's counsel on August 27, 2012.

DATED this 11<sup>th</sup> day of October, 2012, in Bellevue,  
Washington.

  
\_\_\_\_\_  
Darrell S. Mitsunaga

*1371-3 Declaration of Darrell S. Mitsunaga in Support of Motion to File Additional Materials 10-10-12.doc*

Order Number: **20632232**



|  |   |  |   |
|--|---|--|---|
| <b>Seattle</b><br>633 Yesler Way<br>Seattle, WA 98104<br>PH: (206) 521-9000<br>FAX: (206) 625-9247<br>sea@abclegal.com | <b>Tacoma</b><br>603 S. 13th St.<br>Tacoma, WA 98405<br>PH: (253) 383-1791<br>FAX: (253) 272-9359<br>tac@abclegal.com | <b>Everett</b><br>2927 Rockefeller<br>Everett, WA 98201<br>PH: (425) 258-4591<br>FAX: (425) 252-9322<br>eve@abclegal.com | <b>Tumwater</b><br>3400 Capitol Blvd S Ste 103<br>Tumwater, WA 98501<br>PH: (360) 754-6595<br>FAX: (360) 357-3302<br>oly@abclegal.com |
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|-----------------------|---|------------------------------|---------------------------------|
| <b>LAST DAY</b>       | Firm Name<br>Johns, Monroe & Mitsunaga                | Contact<br>Evanna Charlot    | Phone<br>425-467-9964           |
| 08/27/2012<br>5:00 PM | Address<br>1601 114TH AVE SE #110, Bellevue, WA 98004 |                              | Email<br>charlot57TB@jmmlaw.com |
|                       | Case Name<br>Mosley vs. Duran                         |                              | Your ABC Acct. #<br>100188      |
|                       | Cause No.<br>68526-1                                  | Client Reference #<br>1371-3 | Date<br>08/27/2012 2:39 PM      |

Documents  
Appellants Mosley's Opening Brief; Affidavit of Service

|  |   |          |  |  |
|--|---|----------|--|--|
| <input type="checkbox"/> Signature Required On Documents | <input type="checkbox"/> Return Conformed ABC Slip Only | <b>X</b> | <input type="checkbox"/> Return Conformed Copy | <input type="checkbox"/> Return Original Do Not File |
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EXHIBIT A

APPEALS  
0.34.1015  
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No. 68526-1

King County Superior Court #10-2-44107-7  
IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

---

DAVID ARMSTRONG, an unmarried man;  
GREG MOSLEY, a married man, and JANE DOE MOSLEY,  
and the marital community comprised therein;

Defendants/Appellants,

vs.

GAEL DURAN, a single woman,

Respondent.

---

APPELLANTS GREG AND RITA MOSLEY'S  
OPENING BRIEF

---

Atty: Darrell S. Mitsunaga, WSBA #12992  
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COPY

Copy - 10/15/18  
Date: 10/15/18

405 12019

No. 68526-1

King County Superior Court #10-2-44107-7  
IN THE COURT OF APPEALS  
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Defendants/Appellants,

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GAEL DURAN, a single woman,

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---

AFFIDAVIT OF SERVICE

---

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COPY

EXHIBIT B

STATE OF WASHINGTON )  
 )ss.  
COUNTY OF KING )

The undersigned, being first duly sworn on oath, deposes and says:

I am a citizen of the United States of America; over the age of 18 years, am a legal assistant with the firm of Johns Monroe Mitsunaga Koloušková PLLC, not a party to the above-entitled action and competent to be a witness therein.

On this date, I caused to be served via email and US First Class mail, true and correct copies of: APPELLANTS MOSLEY'S OPENING BRIEF; and this AFFIDAVIT OF SERVICE, upon all counsel and parties of record at the address listed below.

Lisa M. Hammel, WSBA #26069  
WILLIAMS & WILLIAMS PSC  
18806 Bothell Way N.E.  
Bothell, WA 98011  
[lmh@williamspsc.com](mailto:lmh@williamspsc.com)  
*Attorneys for Plaintiff*

Gregory P. Cavagnaro, WSBA #17644  
LAW OFFICE OF GREGORY P.  
CAVAGNARO  
2135 - 112th Ave NE  
Bellevue, WA 98004  
[greg@gcavlaw.com](mailto:greg@gcavlaw.com)  
*Attorneys for Defendant Armstrong*

Dated this 14<sup>th</sup> day of July, 2012.

  
\_\_\_\_\_  
Evanna L. Charlot

SIGNED AND SWORN to (or affirmed) before me on July 14, 2012  
by Evanna L. Charlot.

  
\_\_\_\_\_  
Darrell S. Mitsunaga  
Notary Public Residing at Sammamish, WA.  
My Appointment Expires: 1-23-13



**Darrell Mitsunaga**

---

**From:** Evanna Charlot  
**Sent:** Monday, August 27, 2012 2:55 PM  
**To:** lmh@williamspsc.com; greg@gcavlaw.com  
**Cc:** Darrell Mitsunaga  
**Subject:** Armstrong/Mosley vs. Duran - Court of Appeals Cause No. 68526-1  
**Attachments:** Appellant Mosley's Opening Brief 08-27-12.pdf; Affidavit of Service 08-27-12.pdf

Good afternoon, Counsel.

Attached is Appellants Greg and Rita Mosley's Opening Brief and Affidavit of Service. Copies are being mailed to you today as well.

Thank you.

*Evanna L. Charlot*

Legal Assistant for Darrell S. Mitsunaga

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EXHIBIT C