

68526-1

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Court of Appeals No. 68526-1-1

IN DIVISION ONE OF THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON

DAVID ARMSTRONG and GREG MOSLEY

Appellants,

v.

GAEL DURAN,

Respondent.

8
MAY 11 2012
COURT OF APPEALS
DIVISION ONE
SEATTLE, WA

BRIEF OF RESPONDENT

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A. ASSIGNMENTS OF ERROR BY DEFENDANTS/APPELLANTS

The Defendants contend that the trial court erred in entering summary judgment against them and ordering the removal of a fence which encroached on Plaintiff's access easement, and erred in entering judgment on sanctions that were paid for their contempt of the Court's Order on Summary Judgment.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether Defendant Armstrong's Appeal should be dismissed as untimely when his brief was not received until September 10, 2012, and whether Defendant Mosely's Appeal should be dismissed as untimely when his brief was not received until August 28, 2012, in violation of the Court's Order requiring opening briefs to be received by August 27, 2012?
2. Whether the Defendants' Appeal should be dismissed as untimely when it was filed more than thirty days from the Court's final Order on Summary judgment?
3. Whether judicial estoppel renders Defendants' Appeal as moot when Defendants complied with the Court's Order on summary judgment by removing the encroaching fence and the rockery?
4. Whether the Court properly granted Plaintiff's claims for summary judgment and ordering the removal of the fence and rockery which prevented Plaintiff from having lawful access to her easement?

5. Whether the Court abused its discretion by refusing to grant Defendants' motion for reconsideration the grant of summary judgment when Defendants failed to demonstrate obvious error pursuant to CR 59 which would justify reconsideration of the trial court's rulings?
6. Whether the Court correctly ordered sanctions against Defendants for contempt when they failed to comply with the Court's order on summary judgment?
7. Whether entry of judgment was properly entered when Defendants were found to be in contempt of the Order on Summary Judgment?
8. Whether Plaintiff is entitled to reimbursement of her attorney's fees for responding to this appeal?

C. COUNTERSTATEMENT OF THE CASE

1. Relevant Procedural History.

On December 21, 2010, Plaintiff filed a Complaint against Defendants requesting the Court Order the removal of a fence and rockery erected by Defendants which prevented her from being able to access her lawfully recorded easement. (CP 1-20) On August 12, 2011, the Court granted Plaintiff's motion for summary judgment, and ordered Defendants to remove the encroachments and restore the property to its pre-existing condition. (CP 182-184) On September 12, 2011, the Court entered an Order denying Defendants' motion for

reconsideration. (CP 214-215) Because Defendants failed to comply with the Court's order and remove the encroachments, Plaintiff moved for contempt and sanctions, which was granted by the Court on November 28, 2011. (CP 267-270) The Order imposed sanctions at a daily rate until the encroachments were removed and the property restored in accordance with the Court's August 15, 2011 Order on Summary Judgment. (Id.). Plaintiff moved for entry of judgment on the sanctions, and Defendants subsequently removed the fence and rockery, and paid sanctions in the amount of the daily rate accruing until the time that the encroachments were removed. (CP 299-306; 330-332) Plaintiff filed a motion for partial satisfaction of judgment, because while the fence and rockery were removed and some sanctions paid, the property was not returned to its pre-existing flat condition sufficient to render the easement property useable in full compliance with Court's Order. (Id.) On March 21, 2012, Defendants filed a Notice of Appeal. (CP 333-351) Defendants subsequently requested the Appellate Court grant an extension to file their opening briefs. The Court granted the request, and ordered opening briefs to be filed by August 27, 2012. (*See*, Appellate Court Order and Schedule Entered on July 19, 2012.) The Order specifically stated that no further extensions of time would be permitted. (*Id.*).

2. Relevant Factual Summary.

Gael Duran is the owner of real property which is part of part of a short plat located in Bothell, King County, Washington. (CP 1, CP 89) Defendant

Armstrong owns the adjoining property to the north of the Duran Property. (CP 2) Defendant Mosley owns property in the short plat which includes a narrow strip (often referred to as a “pan handle”) that is located between the Duran and Armstrong properties. (CP 3-4)

All three properties in the short plat are subject to an easement which is recorded under 800805713, SP-80-071. (CP 14-20; CP 90; CP 100-111) The Mosley property is burdened by the easement; the Duran property is benefited by the easement. (CP 65-75)¹ The easement provides for ingress, egress, drainage, and utilities, and expressly prohibits the erection of structures, including fences, in the easement area: “... No structures, including fences, shall be permitted on this easement.” (CP 105-110)

Plaintiff Duran purchased her property in September, 1996. (CP 89) The easement area runs along the north end of her property line between her residence and Armstrong’s residence and is physically located on Mosley’s property. (CP 4, 91) She made use of the easement area regularly, and it provided her means of turning her vehicle around such that she could safely drive forward out of her driveway onto busy Waynita Way. (CP 92)

¹ Mosley purchased their property from Conrad Liptau in 1996. The Deed reflects the easement at issue in this litigation. (CP 85). Duran purchased her property in September, 1996 from Jonathan and Amy Ross. The deed identifies the easement at issue. (CP 86-88). Liptau and Ross had recorded an agreement in 1992 regarding the easement, which allowed Liptau to relocate the then-existing wired fence, and in doing so agreed that Ross’s property would not have its ingress and egress blocked at any time during construction.” (CP 96-116). This recorded agreement again recognizes that the easement is for the benefit of the now-Duran property, and the need for access to the easement. Nothing in the agreement allows a new fence to be constructed in the easement area which would block Duran’s access to the easement property.

A wooden fence was in place to enclose the Armstrong property at the northern edge of the easement. (CP 92, 117-120) The fence did not encroach on the easement. (Id.). However, in 2006, Armstrong began constructing a new wooden fence on the panhandle portion of Mosley's property and in the easement area. (CP 91; CP 120-134) The position of the new fence blocked Duran's access to the easement. (Id.) Duran talked to both Armstrong and Mosley to remove the encroachments which blocked her ability to use the easement, without success. (CP 91)

The fence significantly impacted Duran's ingress and egress from Waynita Way, and forced her to back her vehicle out onto the busy road. (CP 92; CP 123-30) In the summer of 2008, Armstrong spray painted threatening graffiti on Duran's side of the fence, which essentially subjected her to being harassed on a daily basis. (CP 93; 127-129)

The City of Bothell required the graffiti removed at the end of 2010. (CP 93-94; 79-83)

Sometime in late 2009-early 2010, Defendants Mosley and Armstrong applied to the City of Bothell for a Boundary Line Adjustment, although the adjustment was never finalized. (CP 76-78) The survey filed with the City of Bothell for the adjustment identifies the fence in the easement area, and notes that it may need to be removed as it encroaches on the easement. (CP 84) It also identifies the location of the 30 foot easement at issue in this litigation being for

ingress, egress and utilities per SP 0-80-071 and #8008070087, as well as the panhandle agreement for the easement as recorded under 9203181629. (Id) In addition to the fence, Armstrong has erected a rockery and landscaping in the easement area. (CP 94; CP 129-134) The fence, rockery, and landscaping all violate the express language and intent of the recorded easements, and prevents its beneficiary, Duran, from access and use of the easement area.

After Plaintiff was unable to obtain cooperation from Defendants to have the encroachments removed and access to her easement restored, she filed a lawsuit against Defendants seeking a Court Order compelling the restoration of her easement. (CP 1-20; 94-95)

On August 12, 2011, the trial court granted Plaintiff's motion for summary judgment, finding that Defendants had violated the terms of the recorded easement which specifically prohibited the erection of fences or other permanent structures in the easement area. (CP 182-184) The Court Ordered the encroachments to be removed and the property to be restored to its pre-existing condition so as to allow Plaintiff use of the easement for ingress, egress, and utilities, as recorded. (Id.) The Court denied Defendants' motion for reconsideration on September 12, 2011 (CP 214-215)

When Defendants still failed to comply with the Court's final Order, Plaintiff moved for contempt and sanctions. (CP 216-224) The Court granted the motion for contempt and imposed sanctions at a daily rate until the Order was

complied with and the encroachments removed. (CP 267-270) Plaintiff then successfully moved for entry of judgment on the sanctions, afterwhich Defendants did remove the fence and rockery, and paid the accrued sanctions. (CP 299-306; CP 330-332) Defendants filed Notice of Appeal on March 21, 2012. (CP 333-351)

D. SUMMARY OF ARGUMENT

Defendants' appeals should be dismissed as untimely, as neither brief was received by the extended deadline of August 27, 2012. Appellant Mosely's brief was not received until August 28, and Appellant Armstrong's brief was not received until September 10, 2012. As Appellants failed to comply with this Court's scheduling Order, their appeal should not be considered by this Court.

Defendants' appeal should also be dismissed as untimely, as it was filed six months after the Court entered its order denying reconsideration of its Order on Summary Judgment. The subject of the appeal is the Summary Judgment Order which compelled removal of the encroachments. That Order was entered on August 15, 2011, and reconsideration denied on September 14, 2011. Accordingly, Defendants were obligated to file their appeal within 30 days of the September 14 Order. RAP 5.2(a) They failed to do so, waiting for six months – until March 21, 2012, before filing a Notice of Appeal. Accordingly, their Appeal should be dismissed as untimely filed.

Judicial Estoppel also bars Defendant's appeal. Defendants complied with the Court's Order on Summary Judgment by removing the encroaching fence and rockery, and paying the sanctions accrued for failing to comply with the Court's Order. Abiding by the Court's Order bars Defendants from now arguing that the trial Court improperly ruled.

Summary judgment was properly entered against Defendants in Ordering the removal of the easement encroachments because the lawfully recorded easement specifically stated that fences and permanent structures were prohibited from being erected in the easement area, and because the encroachments prevented Plaintiff from being able to access the easement property for ingress, egress, and utilities as identified in the easement language specifically recorded against Plaintiff's and Defendants' properties.

Reconsideration was properly denied because the Defendants failed to meet the requisite showing that the Court committed obvious error in its decision to Order Defendants to remove the encroachments and abide by the express terms of the easement language.

The Court correctly ordered sanctions for contempt when Defendants failed to abide by the Court's Order on summary judgment to remove the encroachments.

Judgment on the Order of Contempt was correctly entered when Defendants were in violation of the Summary Judgment Order, when they failed

to timely respond to the motion for entry of judgment, and when their response was an improper re-argument of the August summary judgment motion.

Plaintiff is entitled to reimbursement of her attorney fees for responding to this appeal because it is frivolous, untimely, and because RCW 4.24.630 allows recovery of attorney fees for on cases involving injury to real property.

E. MOTION TO DISMISS APPEAL

Defendants move, pursuant to RAP 17(d), for dismissal of the Appellant's Appeal as Untimely and as Barred by the Doctrine of Judicial Estoppel.

1. The Court Should Dismiss Defendants' Appeal For Failing to File their Opening Briefs By the August 27, 2012 Scheduling Order Deadline.

Defendants requested, and were granted by this Court, an extension of time for which to file their opening briefs. (*See*, Court Order entered July 19, 2012, Ex. A) The Order required the briefs to be filed by August 27, 2012, and specifically warned that no further extensions would be granted. (*Id.*) Despite this admonishment, neither Defendant submitted their brief on time. Appellant Mosley's was received on August 28, 2012. (Ex. B) And Appellant Armstrong didn't file his brief until two weeks after the deadline --- on September 10, 2012. (Ex. C)

Under RAP 10.2(i) and 18.9, the Court can impose sanctions for untimely filings, including dismissing the appeal. In this case, dismissal is

warranted, as, after granting a continuance, the Court specifically advised that no further extensions would be granted. Defendants' failure to heed the Court's Order justifies dismissal of the appeal.

2. The Court Should Dismiss Defendants' Appeal As Untimely, As It Was Filed Six Months After the Date of the Court's Order Denying Reconsideration of the Order on Summary Judgment.

Under RAP 5.2(a), Defendants were required to file their notice of appeal within 30 days after the entry of the decision to be appealed. Defendants have appealed the trial court's Order on Summary Judgment, which was entered on August 12, 2011, and upheld on reconsideration on September 12, 2011. (CP 182-184; CP 214-215) Accordingly, they were required to file their notice of appeal no later than October 14, 2011. *Carrara LLC vs. Ron & E Enterprises Inc.*, 137 Wn. App. 822, 826, 155 P.3d 161, 163 (2007) As they did not file this appeal until six months after the Court's Order on Summary judgment became a final order, (CP 333-351), their appeal is untimely, and therefore should be dismissed by this Court.

The appeal is not made timely by filing it within 30 days of entry of a satisfaction of judgment. The judgment was for sanctions accrued for Defendants' failure to abide by the Court's Order on Summary Judgment. It does not impact in any way shape or form the Court's Order to remove

easement encroachments which was the subject of the appeal. It does not impact the “finality” of that Order; the entry of judgment was only related to the sanctions paid by the Defendants for contempt. To hold otherwise would essentially extend the appeal filing deadline infinitely on any matter which involved payment of a judgment. Parties could then strategically choose to wait years to pay a judgment and then file an appeal of the underlying matter, which could render tremendous advantage for the appealing party, and result in tremendous expense and prejudice to the party who prevailed years before in the underlying matter. Allowing an unlimited deadline for filing an appeal in this manner removes all semblance of certainty and finality for the prevailing party, and undermines the spirit and purpose of RAP 5.2 (a).

In *Carrera, supra*, the Appellate Court held Carrera’s appeal of a summary judgment order as untimely when the Order was entered on July 8, 2005, but the notice of appeal was not filed until October 21, 2005. The Court held that Carrera could not couch its appeal of the underlying summary judgment motion in its appeal of a subsequent attorney fee award on the matter. (*Carrera, supra*, at 826) The Court here should similarly hold. Defendants were required to file their appeal by October 14, 2011. They failed to do so, and therefore the Court should dismiss Defendant’s Appeal as untimely filed, in violation of RAP 5.2(a).

3. Judicial Estoppel Bars Defendant's Appeal.

Judicial estoppel precludes a party from gaining an advantage by taking one position and then seeking a second advantage by taking an incompatible position in a subsequent action." *Johnson v. Si-Cor Inc.*, 107 Wn. App. 902, 906, 28 P.3d 832 (2001). Judicial estoppel precludes a party from taking an inconsistent position from one which was previously taken to the detriment of the opposing party. *Markley v. Markley*, 31 Wn.2d 605, 614-617, 198 P.2d 486 (1948). Judicial estoppels applies when are so inconsistent that one necessarily excludes the other. *Mastro v. Kumakichi Corp.*, 90 Wn. App. 157, 163-64, 951 P.2d 817 (1998).

In this case, complying with the Court's Order on summary judgment by removing the encroaching fence and rockery, and paying the sanctions Ordered is entirely inconsistent with the position now taken on Appeal that the Court's rulings were incorrect. To allow the appeal to proceed would render great injustice to Respondent Duran, as she has relied upon the Defendants' compliance with the Order in both the removal of the encroachments and the payment of the sanctions. The Court should not now permit the Defendants to take an entirely different position that the Court's Orders were incorrect, and should dismiss this Appeal on the basis of judicial estoppel.

F. COUNTER ARGUMENT ON APPEAL

1. **The Court Correctly Granted Plaintiff’s Motion for Summary Judgment, as the Recorded Easements Unequivocally Prohibit Fences or Permanent Structures in the Easement Area and Allow Plaintiff Use of the Easement Area for Ingress, Egress, and Utilities.**

a. **Standard of Review for Summary Judgment**

When reviewing an order granting summary judgment, the appellate court engages in the same analysis as the trial court. *Hanson vs. City of Snohomish*, 121 Wn.2d 552, 556, 852 P.2d 295 (1993). A plaintiff moving for summary judgment has the initial burden of showing there is no dispute as to any issue of material fact. Once that burden is met, the burden shifts to the Defendant to produce admissible evidence. In a summary judgment motion, the moving party bears the initial burden of showing the absence of evidence on an issue of material fact. This initial burden may be met, without affidavits, by merely “pointing out” to the Court that the nonmoving party lacks evidence to support its case. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

“When the moving party has carried its burden under Rule 56(c), the opponents must do more than simply show that there is some doubt as to the material facts or that unresolved factual questions exist.” *Bates v. Grace United Methodist Church*, 12 Wn. App. 111, 115 529 P.2d 466

(1974); *Blakely v. Housing Auth.*, 8 Wn. App. 204, 505 P.2d 151 (1973).

The opponents must come forward with specific facts that show there is a genuine issue for trial. The whole purpose of summary judgment procedure would be defeated if a case could be forced to trial by a mere assertion that an issue exists without any showing of evidence. (Id.)

Accordingly, it has long been the rule that each party must furnish the factual evidence upon which he relies. (Id, citing *Lundgren v. Kieren*, 64 Wn. 2d 672, 677, 393 P.2d 625 (1964)).

The purpose of CR 56 is “to examine the sufficiency of the evidence behind the plaintiff’s formal allegations in the hope of avoiding unnecessary trials where no genuine issue as to a material fact exists.” *Morris v. McNicol*, 83 Wn.2d 491, 519 P.2d 7 (1974); *Barovic v. Cochran Elec. Co.*, 11 Wn. App. 563, 524 P.2d 261 (1974). In other words, summary judgments serve to avoid useless trials on issues which if factually supported, could not lead to a favorable result for the non-moving party as a matter of law. *Burris v. General Ins. Co. of Am.*, 16 Wash. App. 73, 75, 553 P.2d 125 (1976).

Under CR 56, summary judgment is appropriate if, viewing the evidence and all reasonable inferences in the light most favorable to the non-moving party, (1) there is no genuine issue of material fact, (2) a reasonable person could reach but one conclusion, and (3) the moving

party is entitled to judgment as a matter of law. *Am. Mfrs. Mut. Ins. Co. v. Osborn*, 104 Wash. App. 686, 696, 17 P.3d 1229 (2001); *Safeco Ins. Co. of Am. V. Butler*, 118 Wash.2d 383, 394-95, 823 P.2d 499 (1992).

b. The Trial Court Correctly Held That the Recorded Easement Was Valid, Its Terms not Modified or Abandoned, and the Fence and Rockery Improperly Encroached on the Easement.

An easement is a right to use another's land in some way without compensation. *Richardson v. Cox*, 108 Wn. App. 881, 884, 26 P.3d 970, 34 P.3d 828 (2001). Because they are interests in land, express easements must comply with the statute of frauds. *Ormiston v. Boast*, 68 Wn.2d 548, 550, 413 P.2d 969 (1966).

In determining the scope of express easements, courts look to the deed's language, the intention of the parties connected with the original easement, the circumstances surrounding the deed's execution, and the manner in which the easement has been used. *Scott v. Wallitner*, 49 Wn.2d 161, 162, 299 P.2d 204 (1956); *Brown v. State*, 130 Wn.2d 430, 437, 924 P.2d 908 (1996); *Logan v. Brodrick*, 29 Wn. App. 796, 799, 631 P.2d 429 (1981).

The intent of the original parties to an easement is determined from the deed as a whole. *Zobrist v. Culp*, 95 Wn.2d 556, 560, 627 P.2d 1308 (1981). If the plain language is unambiguous, extrinsic evidence will not

be considered. *City of Seattle v. Nazarenius*, 60 Wn.2d 657, 665, 374 P.2d 1014 (1962).

The trial court correctly held that the recorded easement was clear and unambiguous in its express language: "... No structures, **including fences**, shall be permitted on this easement." (CP 14-20; CP 57-75; CP 85-88; CP 105-110) The easement was identified on the original short plat documents for ingress, egress, and utilities. (Id.). It was recorded against the Defendants' properties, and appears on their title reports, and had not been modified or eliminated at any time. (Id.). Appellant's argument that the fence was permitted by the 1992 Liptau-Ross agreement was not supported by any recorded document or writing. In fact, that agreement was expressly limited to the relocation of the then-existing fence, and specifically stated that access to the easement would not be blocked, consistent with the terms of the original easement. (CP 110-115) Further, the easement restrictions were even noted by the survey company which recorded a proposed boundary line adjustment between the Defendants in 2010, wherein they noted that the fence was located in the easement and "may need to be removed." (CP 53-54; CP 84)

Defendants' argument that the Court's Order was not proper because the easement area was not used as a road is without merit, and was not supported by any *evidence*. Defendants are not permitted to

determine how and when Ms. Duran can and did use the easement area. The Court correctly found that the recorded easement language controlled, and there was no objective evidence to counter Ms. Duran's statements under oath that she had in fact been using the easement area regularly for access and that the fence not only prevented her access, but also prevented access to utilities. (CP 94). Defendants' argumentative assertions to the contrary were not sufficient evidence to defeat summary judgment. *Thompson vs. Everett Clinic*, 71 Wn. App. 548, 555, 860 P.2d 1054 (1993). Further, even the survey performed at the Defendants' direction and recorded with the City of Bothell recognized that the fence blocked access to utilities and ingress and egress and needs to be moved. (CP 84). The Court correctly found that no material issue of fact existed regarding the easement's current validity and use, and properly ordered the encroachments to be removed. *Arnold v. Melani*, 75 Wn. 2d 143, 146, 449 P.2d 800, 450 P.2d 815 (1968). The Appellate Court should uphold the trial court's decision.

c. The Trial Court Correctly Found Defendants Violated the Spitefence Statute and Ordered its Removal.

RCW 7.40.030 provides. "An injunction may be granted to restrain the malicious erection, by any owner or lessee of land, of any structure intended to spite, injure or annoy an adjoining proprietor. And

where any owner or lessee of land has maliciously erected such a structure with such intent, a mandatory injunction will lie to compel its abatement and removal.”

Courts can order the removal of a fence or other existing structure if it is determined that (1) the structure damages the adjoining landowner's enjoyment of his property in some significant degree; (2) the structure is designed as the result of malice or spitefulness primarily or solely to injure and annoy the adjoining landowner; and that the structure serves no really useful or reasonable purpose. *Baillargeon v. Press*, 11 Wn. App. 59, 521 P.2d 746, *review denied*, 84 Wn.2d 1010 (1974).

The trial court correctly found that the fence was erected maliciously and without any purpose other than to spite, injury and annoy Ms. Duran. The evidence was undisputed that Defendant Armstrong’s property was already enclosed by a fence that did not encroach upon the easement area before the erection of the unlawful fence on property he didn’t even own – property that was owned by Defendant Mosely. (CP 91; CP 116-129) Defendant Armstrong sprayed hostile graffiti on it which was only removed when the City of Bothell stepped in. (CP 93-94; CP 79-83; CP 127-9). The court correctly concluded that the new fence served no purpose other than to maliciously injure, spite, and annoy Ms. Duran who was the beneficiary of the easement, and ordered its removal.

The evidence was undisputed that both Defendants knew of the easement and knew that the fence was encroaching upon it --- yet they allowed the fence to be constructed anyway. The Court correctly granted Plaintiff's motion for summary judgment on spite fence, and ordered it to be removed from the easement area, and that decision should be upheld by this Appellate Court.

2. Argument by Mosely Pertaining to his Uninvolvement in the Erection of the Fence and Rockery and by Armstrong for Declaratory Relief, and Arguments Pertaining to Agreed Boundary Line Adjustments Are Improperly Raised in this Appeal

Defendant Mosely's arguments that summary judgment was improperly entered against him because he did not erect the fence or rockery, and Defendant Armstrong's Arguments for Declaratory Relief and arguments pertaining to agreed boundary line adjustments were not raised at the trial court level, and therefore Plaintiff does not need to address these portions of their briefs. RAP 2.5 (a); *Demelash vs. Ross Stores, Inc.*, 105 Wn. App. 508, 527, 20 P.3d 445 ("We generally will not review an issue, theory or argument not presented at the trial court level."), *review denied*, 145 Wn.2d 1004 (2001); *Brower vs. Ackerley*, 88 Wn. App. 87, 96, 943 P.2d 1141 (1997) ("An issue not briefed or argued in the trial

court will not be considered on appeal."), *review denied*, 134 Wn.2d 1021, 958 P.2d 315 (1998).

3. The Trial Court Properly Denied Defendants' Motion for Reconsideration.

Although Defendants moved for reconsideration of the Court's Order on Summary judgment compelling removal of the encroaching structures, they failed to meet the requirements under CR 59 to justify reconsideration of the Court's decision. Defendants presented no evidence to refute the validity of the recorded easement and did not dispute that the fence and rockery were in fact encroaching in the easement area. There was no other inference that could be drawn from the evidence that was before the court to justify reconsideration of its Order on Summary judgment pursuant to CR 59, and that decision should be upheld by this Appellate Court.

4. Sanctions Were Correctly Ordered Against Defendants For Contempt.

RCW 7.21.010 (1)(b) defines contempt of court as any intentional disobedience of any lawful judgment decree or order of the court. Courts are authorized to impose sanctions against parties found to be in contempt of court. RCW 7.21.020; in fact, Courts have a duty to sanction parties for

failing to comply with its orders. *State v. McCoy*, 122 Wash. 94, 209 P. 1112 (1922).

A punitive sanction is one imposed to punish past contempt of court for the purpose of upholding the authority of the court. RCW 7.21.010(2). A remedial sanction is one imposed for the purpose of coercing performance when the contempt consists of the omission or refusal to perform an act that is yet in the person's power to perform. RCW 7.21.010(3). Plaintiff requested the Court impose punitive and remedial sanctions for Defendants' failure to comply with the terms of the Summary Judgment Order.

Pursuant to RCW 7.21.030(2), the Court had broad authority of the scope of sanctions it could have awarded – up to \$2,000.00 per day. In this case, the Court correctly concluded that Defendants intentionally refused to comply with the Court's Order on Summary Judgment by removing the fence, rockery, and landscaping which encroach upon Plaintiff's easement within 30 days. The behavior was consistent with their actions which led to the Complaint in the underlying matter. (CP 216-224; CP 227-230)

The Court correctly concluded that it needed to need to impose sanctions against Defendants to coerce them into complying with the Court's Order on Summary Judgment. (CP 267-270) The trial court's

order of daily sanctions of \$100.00/day until the Order was complied with and the encroachments were removed was exceedingly reasonable and well-within the scope of its authority. (Id.). Defendants' argument that the amount was excessive in that the fence value was "only \$400" is without merit and completely misplaced. The sanctions were imposed for contempt, and were for the purpose of compelling compliance with the Court's Order. They were not a "restitution value" as Defendant seems to argue to this Court. Further, the \$400 "value" is without any basis in law or fact; the fact that \$400 was the contractual value placed on the relocation of an old wire fence, and has absolutely nothing to do with the value the erection of a different, more permanent cedar fence, rockery, and landscaping which preventing Ms. Duran from *any* access to the easement area, and denied her use of her lawful property right. (CP 99; CP 216-224; CP 227-230)

Further, the trial court correctly ordered reimbursement of Duran's attorney fees for having to present the motion for contempt; there was no dispute that the Defendants had failed to comply with the Order even when Duran's counsel advised that she would move for contempt if the Order was not complied with. (Id.). Clearly it took a motion and sanctions to compel the Defendants to obey the Court's ruling; it was completely reasonable and within its authority to include reimbursement

for attorney fees in having to prepare a motion to compel action that was already demanded by prior Court Order.

Finally, the imposition of said sanctions did serve to effectuate compliance with the terms of the Order in that the fence and rockery were in fact removed. (CP 330-333) Thus, the Court's decision was both justified and legally-sound, and should not now be overturned by this Court on appeal.

5. Entry of Judgment on Sanctions Was Correctly Entered, and Is Not A Proper Subject of Appeal.

On November 28, 2011, the trial court entered an Order granting Plaintiff's motion for contempt, and to compel compliance with the Court's Order on Summary Judgment, and awarded attorney fees and continuing monetary sanctions until Defendants complied with the terms of the Order. (CP 267-270). The Court's Order compelled Defendants to pay \$2,100.00 for reimbursement of Plaintiff's attorney fees, and \$100.00/day as of October 12, 2011 for each day that Defendants failed to comply with the Order. (Id.).

Defendants' opposition to the motion was untimely, and merely re-hashed arguments made in the underlying summary judgment motion. (CP 246-253; CP 256-259) It failed to address the substance of Plaintiff's motion – which was simply for entry of judgment on the sanctions --- and

thus the Court correctly granted Plaintiff's motion for entry of the judgment. (CP 328-329) Plaintiff, in fact, pointed out again to the Court that it appeared that Defendants were trying once again to re-argue their position on summary judgment when the time limit for filing an appeal had long-since run. (CP 256-259). The Court correctly agreed, and entered judgment which was in fact paid by Armstrong, and a satisfaction of judgment filed. (CP 325-332)

Defendants' appeal of the entry judgment is misplaced, as they did not raise arguments against the subject of that motion in their opposition, and thus it is inappropriate for that issue to be raised for the first time on appeal. See, e.g., RAP 2.5(a); *Brower vs. Ackerley*, 88 Wn. App. 87, 96, 943 P.2d 1141 (1997). Further, it was merely a request for a judgment on sanctions to be entered – for Defendants' failure to comply with the order on summary judgment. Defendants failed to appeal the Order on Summary judgment – and their failure to do so gave no basis for using the request for entry of on sanctions as a platform to attempt to assert an appeal at the trial court level. The Court properly entered judgment *on the sanctions*, and the issue is not ripe for appeal.

6. Plaintiff Is Entitled To Reimbursement of Attorneys Fees As The Prevailing Party On Appeal.

Pursuant to RAP 18.1(b), Plaintiff requests the Court order and Defendants to reimburse her for her attorney's fees in defending against this appeal. *Brust vs. McDonalds Corp.*, 34 Wn. App. 199, 660 P.2d 320 (1983). RCW 4.24.630 allows for recovery of fees and costs against Defendants who intentionally and unreasonably cause waste or injury to land. (CP 180) The Court's Order on Summary Judgment finding that Defendant's erecting encroachments in express violation of the easement terms which prevented her lawful access and use of the easement provides a sufficient basis to compel Defendants to reimburse her for her attorney fees and costs incurred in this appeal to defend her property rights already ordered by the Court. (CP 182-184). Further, as the appeal was untimely made, reimbursement of attorney fees are proper to Respondent for having to unnecessarily expend time and expense in responding to it. RAP 18.9 (a). Accordingly, the Court should order Defendants to reimburse Plaintiff for the fees and costs incurred in responding to this appeal.

G. CONCLUSION

Defendants' appeal should be dismissed for several reasons: 1) for failing to file their opening briefs by the August 27 case scheduling deadline; 2) for failing to file their Notice of Appeal within 30 days of the Court's final Order on Summary judgment as required by RAP 5.2(a), and 3) because complying with

the Order on Summary Judgment by removing the encroachments and paying sanctions renders the appeal moot under the doctrine of Judicial Estoppel.

In addition, the trial court properly granted Plaintiff's motion for summary judgment and ordering the removal of the encroachments from the easement area because the recorded easements specifically prohibited the erection of fences and other permanent structures in the easement area, and specifically granted Plaintiff use of the easement area for ingress, egress, and utilities, for which those encroachments so prevented.

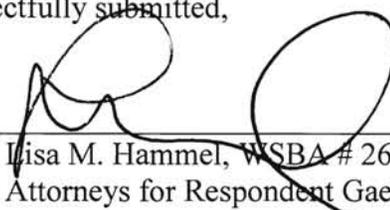
The trial court properly denied Defendants' motion for reconsideration as Defendants failed to show that the Court's decision was obvious error. Sanctions were properly imposed for failing to comply with the Court's Order on Summary Judgment, and were proper to impose until such time that the encroachments had in fact been removed.

For these reasons, the Court should uphold the trial court's rulings in ordering the fence, rockery, and other encroachments in the easement area be removed, and enter an award of attorneys fees to Respondent pursuant to RAP 18.1.

Dated this 21 day of September, 2012.

Respectfully submitted,

By:



Lisa M. Hammel, WSBA # 26069
Attorneys for Respondent Gael Duran

Certificate of Service

I, Christine M. Knoke, affirm and state:

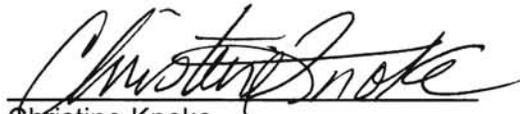
That on September 26, 2012, I caused to be served a true and correct copy of the Brief of Respondent to which this certificate is attached, by the method indicated below, and addressed to each of the following:

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XX By delivering to a messenger company on September 26, 2012, full, true and correct copies thereof for delivery to the attorneys as shown above on September 26, 2012.

Dated this 26th day of September, 2012.



Christine Knoke
Assistant to
Lisa M. Hammel

The Court of Appeals
of the
State of Washington

RICHARD D. JOHNSON,
Court Administrator/Clerk

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July 19, 2012

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CASE #: 68526-1-I
Gael Duran, Respondent v. David Armstrong & Greg Mosely, Appellants

Counsel:

The following notation ruling by Richard D. Johnson, Court Administrator/Clerk of the Court was entered on July 18, 2012, regarding appellant Mosley's motion for extension of time to file appellant's brief until August 27, 2012:

"Granted. However, no further extensions should be anticipated."

Sincerely,



Richard D. Johnson
Court Administrator/Clerk

ssd

EXHIBIT A



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

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SEP 19 2012

COURT OF APPEALS, DIVISION ONE AT SEATTLE
FOR THE STATE OF WASHINGTON

No: 68526-1

David Armstrong, a single man; Greg Mosely a married man and Jane Doe Mosely and the marital community composed thereof, *Appellant*,

v.

Ms. Gael Duran, a single person, *Respondent*.

BRIEF OF APPELLANT,
DAVID ARMSTRONG

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