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Court of Appeals No. 71102-4-1

IN THE WASHINGTON COURT OF APPEALS
DIVISION ONE

BRIAN MCKINLEY,

Respondent/Plaintiff/Counterdefendants,

v.

CHING-CHIH MA, a/k/a JASON MA, and CHIH-YI CHANG,
husband and wife, and the marital community composed thereof.

Appellants/Defendants/Counterplaintiffs,

REPLY BRIEF OF APPELLANTS

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I. INTRODUCTION

Mr. Ma responds as follows to Respondent's Brief.

II. ARGUMENT

A. MR. MCKINLEY HAS MISREPRESENTED THE RECORD TO THIS COURT

As is shown in Appellants' Motion to Strike and for Sanctions, Mr. McKinley has openly defied a Commissioner's Ruling in this Court denying his request to submit the verbatim report of proceedings ("Verbatim Report of Proceedings"). In his Brief, Mr. McKinley refers to some of the trial court's oral statements at the hearing as a Clerk's Papers reference. Response Brief, pp. 1, 9-10, 13, 22 & 24. The motion has been filed contemporaneously with this brief.

The following is offered if Motion to Strike is denied. What Mr. McKinley is attempting to do is argue to this court that the trial court considered Mr. Ma's claims to be sanctionable and improperly before her. As this court is engaging in *de novo* review, and as the trial court made no such ruling, these statements are irrelevant to this appeal.

B. MR. MCKINLEY FAILED TO MEET HIS BURDEN ON SUMMARY JUDGMENT

At Pages 6-10 of his Brief, Mr. McKinley claims that Mr. Ma has raised a litany of new issues on appeal. This is incorrect.

As a primary matter, and as is replete in the record and in the briefing, Mr. McKinley failed to meet his burden on summary judgment as a matter of law.

In a summary judgment motion, the burden is on the moving party to demonstrate that there is no genuine issue as to a material fact and that, as a matter of law, summary judgment is proper. The moving party is held to a strict standard. Any doubts as to the existence of a genuine issue of material fact is resolved against the moving party. In addition, we consider all the facts submitted and the reasonable inferences therefrom in the light most favorable to the nonmoving party.

Atherton Condo. Ass'n v. Blume Dev., 115 Wn.2d 506, 515-16, 799

P.2d 250 (1990) (internal citations omitted). Again, RCW

4.24.630(1) states:

Every person who goes onto the land of another and who removes timber, crops, minerals, or other similar valuable property from the land, or wrongfully causes waste or injury to the land, or wrongfully injures personal property or improvements to real estate on the land, is liable to the injured party for treble the amount of the damages caused by the removal, waste, or injury. For purposes of this section, a person acts "wrongfully" if the person intentionally and unreasonably commits the act or acts while knowing, or having reason to know, that he or she lacks authorization to so act. Damages recoverable under this section include, but are not limited to, damages for the market value of the property removed or injured, and for injury to the land,

including the costs of restoration. In addition, the person is liable for reimbursing the injured party for the party's reasonable costs, including but not limited to investigative costs and reasonable attorney's fees and other litigation-related costs.

Mr. McKinley incorrectly chose this statute as his remedy.

As such, he was required to prove all of its elements on his motion for summary judgment.

The record clearly shows that the last person to speak to the contractor was Mr. McKinley. CP 76, 78-79. There is no evidence in the record that Mr. Lin or Mr. Ma instructed the contractor to remove any shrubbery. There is no evidence in the record of what the contractor knew or didn't know as there is no testimony of any kind from her.

On this record, the contractor is the person responsible for the injured shrubbery is the contractor. However, Mr. McKinley chose not to name him as a defendant. Rather, what Mr. McKinley's strategy in this case has been is to equate the contractor with Mr. Ma without any factual support for the contention. Mr. Ma specifically argued that Mr. McKinley did not prove that Mr. Ma acted intentionally, unreasonably or had reason to know that he lacked authorization to act. CP 100.

Mr. McKinley has simply failed to establish that Mr. Ma, either on his own or through the contractor, acted improperly and thus failed to meet his burden as a matter of law. These points are not new issues. CP 96-107. At worst, they are an expansion of the position taken by Mr. Ma at the trial court, which this Court regularly accepts. *Bavand v. OneWest Bank*, 176 Wn. App. 475, 504, 309 P.3d 616 (2013) (expansion of argument made at trial court permitted in appellate court).

C. MR. MCKINLEY PURPOSELY IGNORES THE FULL STATUTORY SCHEME

Mr. McKinley contends that RCW 64.12.030 is not properly before this Court because it was not presented to the trial court. Response Brief, p. 15. This is also incorrect.

RAP 9.12 requires an appellate court only consider issues brought to the attention of the trial court in a summary judgment proceeding. RAP 9.12 does not proscribe additional arguments that relate to the same issue, particularly when a statute which is part of the same statutory scheme is raised. The Washington Supreme Court has stated:

The other issue which defendant maintains was not raised below and therefore is not properly before this Court is plaintiffs' argument that RCW 49.44.090 and RCW Ch. 49.60 create separate and distinct causes of action. The record

does not reveal any specific request by plaintiffs that the court consider the statutes independently from one another. In fact, no mention of RCW 49.40 4.090 is found in plaintiffs' memorandum opposing summary judgment. However, a statute not addressed below but pertinent to the substantive issues which were raised below may be considered for the first time on appeal. *State v. Fagalde*, 85 Wn.2d 730, 732, 539 P.2d 86 (1975). Both RCW 49.44.090 and RCW Ch. 49.60 relate to discriminatory practices in employment. Therefore it is both appropriate and necessary for this court to consider these 2 obviously related statutes in determining whether plaintiffs' cause of action exists.

Moreover, we recognize another exception to the general rule and have considered issues not raised below quote when the question raised affects the right to maintain the action." *Maynard Inv. Co., Inc. v. McCann*, 77 Wn.2d 616, 621, 465 P.2d 657 (1970). *New Meadows Holding Co. v. Washington Water Power Co.*, 102 Wn.2d 495, 498, 687 P.2d 212 (1984). The central issue of this case is plaintiff's right to maintain their action. Under this exception consideration of RCW 49 .44.090 is appropriate.

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

The statute upon which Mr. McKinley incorrectly made his claim is RCW 4.24.630(1). RCW 4.24.630(2) specifically states:

This section does not apply in any case where liability for damages is provided under RCW 64.12.030, 79.01.756, 79.01.760, 79.40.070, or where there is immunity from liability under RCW 64.12.035.

Given this, it is abundantly clear that RCW 64.12.030 is part of the same statutory scheme as RCW 4.24.630 and thus, it is properly before this Court.

D. THE LEGAL DESCRIPTION ISSUE IS NOW MOOT

At Pages 10-12 of his Brief, Mr. McKinley complains that he properly pled a legal description in his Complaint in response to Mr. Ma's argument that Mr. McKinley, and the Order Granting Summary Judgment, did not comply with RCW 7.28.120 which provides that a party seeking to quiet title must provide a legal description. This issue is moot.

As shown in the numerous pleadings in this Court, Mr. Ma identified and reached an agreement with Mr. McKinley regarding submitting a proper legal description to the court. For unknown reasons, Mr. McKinley did not keep this agreement and further, protracted and unnecessary litigation on the point, occurred in this Court and at the Trial Court. Given the state of the record, Mr. Ma will not waste this Court's time on the issue but refer it to the various briefing on the point in this Court, particularly Appellant's Response to Respondent's Motion to Dismiss and Supporting Documents. Given the record, the issue is moot. CP 560-563.

C. THE COURT SHOULD NOT HAVE DISMISSED MR. MA'S TRESPASS CLAIM

At page 14 of his Brief, Mr. McKinley argues that since he did not intend to enter the land of another, the Ma Property, as he

thought the land was his own he is not responsible for trespass.

Again, Mr. McKinley is incorrect.

1. Mr. McKinley Admits His Trespass

In Washington,

[t]he elements for a claim of intentional trespass are: '(1) an invasion affecting an interest in the exclusive possession of property; (2) an intentional doing of the act which results in the invasion; (3) reasonable foreseeability that the act done could result in an invasion of plaintiff's possessory interest; and (4) substantial damages to the res.

Jackass Mt. Ranch, Inc. v. South Columbia Basin Irr. Dist., 175 Wn.

App. 374, 400-01, 305 P.3d 1108 (2013) (quoting *Seal v. Naches-*

Selah Irrigation Dist., 51 Wn. App. 1, 5, 751 P.2d 873 (1988)); see

also 17 WASH. PRAC., *Real Estate* §10.2 (2d ed. 2014)

("[Washington courts] . . . have repeatedly adopted the definition of 'trespass' contained in RESTATEMENT (SECOND) OF TORTS § 158.").

An individual is liable for intentional trespass if the individual

intentionally or negligently intrudes onto another's property. *Id.* at

400, 305 P.3d at 1122 (citing *Borden v. City of Olympia*, 113 Wn.

App. 359, 373, 53 P.3d 1020 (2002)). However, "it is not necessary

that the actor intend to enter the land of another." 16 WASH. PRAC.,

Tort Law And Practice § 14.14 (4th ed. 2013); see also 17 Wash.

Prac., *Real Estate* §10.2 (2d ed. 2014) ("Trespass is a strict-liability

tort, so that even entry under a belief that the intruder owned the

premises may constitute a trespass.”); James A. Henderson Jr., *Intent and Recklessness in Tort: The Practical Craft of Restating Law*, 54 VAND. L. REV. 1133, 1137 (2001) (“[S]ome intentional torts properly involve what amounts to strict liability for the intended consequences of reasonable, well-meaning conduct.”). In fact, “Washington courts apply the Restatement definition of ‘intent’ in determining if a person intentionally trespasses upon another’s property.” *Id.* In sum, Mr. McKinley narrowly construed and failed to articulate the complete definition of intent.

According to the RESTATEMENT (SECOND) OF TORTS § 8A (1965), “[t]he word ‘intent’ is used throughout the Restatement of this Subject to denote that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it.” *See also Bradley v. American Smelting and Refining Co.*, 104 Wn. 2d 677, 682 (1985) (applying RESTATEMENT (SECOND) OF TORTS § 158 (1965) as the standard for intentional trespass and RESTATEMENT (SECOND) OF TORTS § 8A (1965) as the standard for intent). In this case, the issue is not the Respondent’s subjective belief as to whether or not the land belonged to him; rather, it was whether he intended to step on the land. *See* Restatement (Second) of Torts § 158 (1965), cmt.

f (“A tornado lifts A’s properly constructed house from A’s land and deposits it on B’s land. This is not a trespass.”). Stated otherwise, if Mr. McKinley intended to step foot on the Ma Property and was not forced, for instance, by a third party then he has the requisite intent. If this Court followed Mr. McKinley’s unsound line of reasoning, this Court would effectively allow individuals that trespass to merely claim they did not know (i.e. – willful blindness) and defeat the purpose of such a statute. This Court should focus on whether Mr. McKinley intended and successfully accomplished stepping upon the Ma Property. Since he did, he is liable for intentional trespass.

2. A Continuing Trespass Constitutes Damages

At page 16 of his brief, Mr. McKinley claims that Mr. Ma did not present any damages to the trial court. As is stated in the opening brief, a continuing trespass is a damage not to mention the cost of the survey, the cost of the contractor hired to rectify Mr. McKinley’s admitted and continuing trespass. Damages were clearly presented to the trial court irrespective of whether or not a dollar amount was presented to it.

3. Mr. Ma Has Not Asked This Court for Injunctive Relief

Further on page 16 of his Brief, Mr. McKinley makes the curious point that Mr. Ma has asked for injunctive relief in this

Court. This is incorrect. At Page 8 of the opening brief, Mr. Ma argued that he would be entitled to injunctive relief given Mr. McKinley's admitted trespass. That argument is not a request to this Court for injunctive relief.

D. MR. MCKINLEY FAILED TO ESTABLISH ANY TRESPASS BY MR. MA, TIMBER, OR OTHERWISE

On page 18 Mr. McKinley complains that Mr. Ma agreed at the trial court that RCW 4.24.630 applied to this case and his summary judgment papers. Mr. Ma did no such thing. What Mr. Ma did at the trial court was to merely state that Mr. McKinley had elected his remedy by selecting a statutory remedy at the trial court and thus his conversion claim was barred. Mr. Ma did not state, ever, that RCW 64.12.030 did not apply to this matter. CP 102-103.

Further on page 18, Mr. McKinley complains that Mr. Ma should have told him of his error in citing to RCW 4.24.630 and that he would have amended his claim to include RCW 64.12.030. Given the express language of RCW 4.24.630(2), it is difficult to understand why Mr. McKinley needs Mr. Ma to point out the existence of RCW 64.12.030 and its applicability. To research the law as it applies to facts for potential claims and claims is part of

the due diligence imposed upon every litigant. CR 11. Mr. McKinley offers no authority as to why this Court should ignore RCW 64.12.030 in the circumstances presented here.

E. THERE IS NO EVIDENCE OF WILFULNESS BY MR. MA

At Page 23 of the Respondent's Brief, Mr. McKinley complains that treble damages were appropriate. They were not.

In order to obtain treble damages under the correct statute, RCW 64.12.030, a party must prove willfulness, otherwise damages awarded are merely singular. *Broughton Lumber Co. v. BNSF Railway, Co.*, 174 Wn.2d 619, 634, 278 P.3d 173 (2012) (en banc). Here, there is none of that and again Mr. McKinley failed to meet his burden on summary judgment.

Mr. McKinley admits that the shrubs removed by the contractor were ornamental. The record indicates that Mr. McKinley was the last person to speak to the contractor. Mr. McKinley then, in summary fashion, states that the contractor acted willfully without any factual basis therefor. From this point, Mr. McKinley contends that Mr. Ma acted willfully, without any evidence that Mr. Ma or Mr. Lin instructed the contractor to remove the shrubbery, and thus is liable for treble damages. In fact, the trial

court made no such finding in its order granting summary judgment or the order awarding attorneys fees. CP 304-311; 332-333.

F. THE COURT IMPROPERLY AWARDED ATTORNEYS FEES TO MR. MCKINLEY

Again, as there is no evidence, or a finding, of willfulness by Mr. Ma, attorneys fees are not properly awarded to Mr. McKinley either under RCW 4.24.630. Again, as is conceded by Mr. McKinley, ornamental trees were damaged by the contractor. Thus, as a matter of law RCW 64.12.030 applies which statute does not provide for an award of attorneys fees in this matter.

As for Mr. McKinley's claim for fees in this Court, obviously Mr. Ma opposes that request.

III. CONCLUSION

For the above stated reasons, the trial court should be reversed and this matter remanded for further proceedings.

Dated this 31st day of July, 2014.

THE LAW OFFICE OF CATHERINE C. CLARK PLLC

By: 

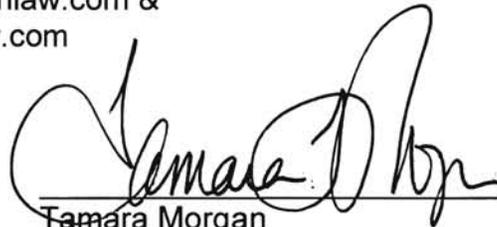
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Certificate of Service

I hereby certify that I caused the foregoing document to be served upon the below named individual in the identified manner on this 31st day of July, 2014:

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