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No. 72027-9

DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

MARK F. and LINDA H. BRESSLER, husband and wife,

Plaintiffs-Appellants,

v.

KEVIN F. AND LINDA SULLIVAN, husband and wife,

Defendants-Respondents,

v.

GMAC MORTGAGE, LLC, & MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.,

Defendants.

ON APPEAL FROM
ISLAND COUNTY SUPERIOR COURT
(The Honorable Vickie I. Churchill)

Appellants' Reply Brief

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I. Introduction

An appellate court reviews challenged findings of fact to determine if they are supported by substantial evidence and determines whether the findings of fact support the conclusions of law. Willener v. Sweeting, 107 Wn. 2d 388, 393, 730 P. 2d 45 (1986). Yet, in defending the trial court's decision, the Sullivans cite not one of the detailed findings of fact and rely instead on an alternate version of events. As the Bresslers see it, the Sullivans' defense of the trial court's decision permitting them to reinstate an abandoned easement is not based on the facts as found by the trial court because the decision is not supported by its findings. The Sullivans' legal arguments fare no better, and review of the trial court's conclusions of law is de novo. Robel v. Roundup Corporation, 148 Wn. 2d 35, 42, 59 P. 3d 611 (2002). On the facts as found by the trial court, it is clear as a matter of law that the portion of the trial court's decision allowing the Sullivans to reinstate an abandoned easement should be reversed.

II. Argument

A. Abandonment and Estoppel are Different Doctrines.

While reporting confusion as to the, "exact nature" of the Bresslers' claims of error, Respondents' Brief at 10, the Sullivans had no difficulty identifying the, "central question" on which the decision permitting them to reinstate the easement was based: that they could repudiate their

abandonment unless they were equitably estopped. Id. at 9; see Opening Brief at 4, Assignment of Error # 1. The lone authority cited by the trial court for its conclusion was Edmonds v. Williams, 54 Wn. App. 632, 774 P. 2d 1241 (Div. I, 1989). CoL 3. But Edmonds did not involve abandonment by the holder of an easement but rather adverse use by the servient tenement. 54 Wn. App. at 634, 636. Termination of an easement by prescription turns on the conduct of the owner of the servient tenement, Id., who does not start the statute of limitations running by erecting a fence across an unopened access easement until a need for the easement arises, the holder demands that it be opened, and the owner of the servient tenement refuses. Id. at 636-37.

In contrast, abandonment is not based on the conduct of the owner of the servient tenement or even on an interplay between the servient owner and the easement-holder. Abandonment is based on the conduct of the holder of the easement. Heg v. Alldredge, 157 Wn. 2d 154, 161, 137 P. 3d 9 (2006). Having found that the Sullivans abandoned the easement by intentionally putting a fence in the middle of an improved easement, FoF 29, the trial court erred in allowing them to reinstate it based on a test that would properly have been used to determine whether the Sullivans' fence started the statute of limitations running on the Bresslers' power to enforce their own rights under the easement.

The trial court found that, after intentionally abandoning the easement, FoF 29, the Sullivans changed their minds. FoF 15-18. The question -- identified as concerning the trial court -- is whether the Sullivans could unilaterally reinstate an easement after abandoning it. CoL 3. The Sullivans assert that their conduct did not, "ripen into 'irrevocable' abandonment", Respondents' Brief at 11, before they repudiated it because the Bresslers did not try to bring in a boat before the Sullivans changed their minds.[1] But Edmonds does not stand for the proposition that there are two kinds of abandonment -- revocable and irrevocable -- or that abandonment by the easement-holder requires action by the servient owner to, "ripen". Just the opposite is true: abandonment requires acts by the holder that are decisive and unequivocal and inconsistent with the existence of the easement. Heg, 157 Wn. 2d at 161.

Although the Sullivans acknowledge that there was an interval before they attempted to repudiate their abandonment, they ignore its significance, asserting that they retained rights over the Bresslers' property that they could later reinstate. Respondents' Brief at 13-14. But the

[1] The Sullivans' claim that Mr. Bressler not only did not then own a boat but also, "had no intention of buying a boat", Respondents' Brief at 8, is inconsistent with Mr. Bressler's testimony, RP 279-80, and with the finding that Mr. Bressler refused Ms. Sullivan's offer in 2009 to give up the easement so that she could put her fence on the boundary because he did not want to lose his own easement rights. FoF 6.

Sullivans' abandonment did not have consequences only for the Sullivans: it had consequences for the Bresslers too. Abandonment of an easement results in the removal of the encumbrance on the servient tenement, II AMERICAN LAW OF PROPERTY, § 8.98 at 304 (1952): not just the potential for removal of the encumbrance that requires reliance by the owner of the servient tenement to fulfill. The Sullivans did not need to sign the extinguishment instrument to remove the easement as an encumbrance on the Bresslers' property: the Bresslers' property was freed at the point at which the Sullivans abandoned the easement. See Haggart v. United States, 108 Fed. Cl. 70, 96-97 (2012)(citing Heg and applying Washington law, court holds value of property subject to abandoned railroad easement taken under Trails Act, 16 U.S.C. § 1247(d), is determined by fee unencumbered by easement).

The Sullivans distinguish Radovich v. Nuzhat, 104 Wn. App. 800, 16 P. 3d 687 (Div. I, 2001), as reflecting the difference between "abandoning" an easement and "extinguishing" it. Respondents' Brief at 14. This is a distinction without a difference. After the Sullivans abandoned the easement, nothing more was required to reinstate it than was required to create the easement in the first instance. Radovich, 104 Wn. App. at 806. But nothing less was required either: the standards for creating an easement and for recreating it are the same. Id. The Bresslers'

property having been freed from the encumbrance of the easement by the Sullivans' abandonment, the easement was not revived or reinstated by the Sullivans' unilateral attempt to repudiate their abandonment.

The Restatement of the Law of Property distinguishes between termination of an easement by abandonment, Section 504, and by equitable estoppel, Section 505. See Opening Brief at 33-35. The Sullivans assert that Comment *d* to Section 504, concluding that an easement is extinguished by abandonment without need for proof of estoppel, has not been expressly adopted in any jurisdiction. Respondents' Brief at 13. But the Restatement of the Law Third, Property, Servitudes (2000) supports the same distinction: abandonment is a voluntary, unilateral act by the easement-holder, § 7.4, Comment *a* at 352, while, "estoppel differs from abandonment in that it requires an interaction between benefitted and burdened parties..." Id. at 353.[2]

In any event, the Bresslers need not rely on authority from other jurisdictions to establish that abandonment and equitable estoppel are

[2] The Sullivans also complain that the Bresslers' arguments in this regard are, "an unwarrranted extension" of Humphrey v. Jenks, 61 Wn. 2d 565, 379 P. 2d 366 (1963), Respondents' Brief at 12, even as they quote Humphrey for the proposition that, assuming proof of conduct inconsistent with the continued existence of the easement by the holders, the servient tenement must also prove reliance and resulting hardship to estop the holders from asserting the easement. Respondents' Brief at 13. But Humphrey involved holders who never abandoned use of the subject property or indicated their intention of relinquishing the easement, 61 Wn. 2d at 568, while the trial court specifically found that the Sullivans abandoned the easement, FoF 29, that their abandonment was intentional, Id., and that the Sullivans told Mr. Saar that they would sign papers to relinquish the easement. FoF 15.

different doctrines. According to the Sullivans, the appellate court's opinion in Heg v. Alldredge, 124 Wn. App. 297, 99 P. 3d 914 (2005), "clearly recognized the right of a party, even after a finding of abandonment of an easement, [to] seek revival absent ... equitable estoppel." Respondents' Brief at 11. But they are wrong: the appellate court expressly reasoned that, "[t]hus, where the conduct of an owner of an easement ... does not suffice to establish abandonment of the easement, it may nevertheless suffice to bar enforcement where there has been a change in position by the owner of the servient estate and resulting hardship." 124 Wn. App. at 310, *rev'sd on other grounds*, 157 Wn. 2d 154, 137 P. 3d 9 (2006). Change in position by the owner of the servient easement and resulting hardship are thus relevant **only if** the conduct of the easement-holder is not sufficient to establish abandonment. Both Heg opinions treat abandonment and equitable estoppel as establishing independent grounds to terminate an easement. 157 Wn. 2d at 161-167; 124 Wn. App. at 299, 310. Contrary to the Sullivans' assertion that the Court, "did not reach the alternative basis of equitable estoppel", Respondents' Brief at 10-11, the Washington Supreme Court, 157 Wn. 2d at 156-57 (emphasis added), squarely held:

> We hold mere nonuse of a recorded easement coupled with use of alternate routes of ingress and egress does not, by itself, support a finding of abandonment. Because the

> record contains no other evidence Ms. Heg or her predecessors in interest intended to abandon the easement, she is entitled to summary judgment. **We also hold equitable estoppel does not bar Ms. Heg from enforcing her easement rights** because the record contains no evidence of admissions, statements, or acts by Ms. Heg inconsistent with her present claim...

The Sullivans note that the trial court below was the trial court in Heg. Respondents' Brief at 2. Had the trial court considered either Heg opinion as supporting the Sullivans' right to repudiate their abandonment unless the Bresslers proved that they were estopped from doing so, the trial court could have cited Heg for that conclusion. CP at 208; CoL 3. Instead, after the evidence came in, the Bresslers expressly argued that the Sullivans could not revive an easement after abandoning it, CP at 469, 476, and the trial court candidly acknowledged that the question had concerned it. CP at 208; CoL 3. As the Bresslers see it, the question concerned the trial court because its conclusion was erroneous.

B. Alternate Grounds Are Weaker: Not Stronger.

According to the Sullivans, the, "stronger" basis on which to affirm is their claim that they did not abandon the easement. Respondents' Brief at 9, 20-22. But the Sullivans did not file a cross-appeal and challenge no findings of fact. The trial court may properly be affirmed on any basis supported by the record. Amy v. Kmart of Wash., LLC, 153 Wn. App. 846, 868, 223 P. 3d 1247 (Div. I, 2009). But unchallenged findings of

facts are verities on appeal, Robel, 148 Wn. 2d at 42, and abandonment is generally a question of fact. In re Trustee's Sale of Real Property v. Brown, 161 Wn. App. 412, 415, 250 P. 3d 134 (Div. III, 2011). And the Sullivans' argument on this, "stronger" point is based on a version of events[3] that the trial court expressly rejected.

For example, the Sullivans erroneously assert that the Bresslers informed them by letter of November 9, 2011, Ex. 54, that the Sullivans needed to decide whether to move their fence or abandon the easement. Respondent's Brief at 7. But the Sullivans' fence was installed in two phases: a chain-link fence, running from the east end of the stone-paver corridor out to the bulkhead, FoF 11, and a wooden fence, running through the stone-paver corridor west out to the street. FoF 13; see also Ex. 36 and Ex. 39 at 1. The letter requiring the Sullivans to either move their chain-link fence (and their mailbox) or commit to sign off on paperwork extinguishing the easement was not sent on **November 9, 2011**. That letter was sent on **October 24, 2011**, Ex. 45: after the Sullivans had installed their chain-link fence, Ex. 36, and after Mr. Saar said that they

[3] The Sullivans have been relying on this same rejected version of events at least since they unsuccessfully tendered defense to this action to their title insurer. Ex. 88 at 2. The key errors of fact are that (1) the Sullivans finished their fence before they received verification that an easement did exist; (2) the Sullivans removed their fence promptly upon learning that an easement existed; and (3) when the Sullivans removed their fence, they restored it to its original location. Id.. As described in text above, each, "fact" is at odds with the trial court's express findings.

had done so in the mistaken belief that no easement existed, Ex. 45 at 2, but before the Sullivans installed their wooden fence. Ex. 54 at 1. Instead of removing the chain-link fence or committing to sign off on an extinguishment by the November 4, 2011 deadline, Ex. 45 at 2, the Sullivans added their wooden fence. FoF 13; Ex. 54 at 1. The trial court specifically found that Ms. Sullivan's testimony that they finished their fence after learning about the recorded easement because the posts, standing alone, would be dangerous was not credible. FoF 29.

The Sullivans also assert, without citation to the record, that it was clear prior to litigation that both the parties and their attorneys understood that the easement could be extinguished only by an appropriate writing. Respondents' Brief at 17. The Sullivans are in error. See, e.g., Ex. 45 at 2; Ex. 77 at 2. The Bresslers certainly sought a formal written extinguishment and the Sullivans, after stalling the Bresslers, certainly reneged on their commitment to sign one. But a formal written instrument is only one way to terminate an easement. 17 STOEBUCK & WEAVER, WASHINGTON PRACTICE: REAL ESTATE: PROPERTY LAW, § 2.12 at 119 (2nd Ed. 2004). An easement can also be terminated by abandonment, by equitable estoppel, by merger, or by adverse use of the owner of the servient estate through the statute of limitations. Id. at 119-21; Heg, 157 Wn. 2d at 165-67. A written instrument is not required to

terminate an abandoned easement: the writing is an alternative to quiet title litigation as a means to confirm that the easement was terminated.

As for the Sullivans' self-serving characterizations of Mr. Saar's initial representations, Respondents' Brief at 21, they later unequivocally told the Bresslers that they would execute the extinguishment instrument. FoF 30; see Ex. 60. Similarly self-serving characterizations of events that occurred before the Sullivans installed their fence, Respondents' Brief at 22, as insufficient to constitute abandonment miss the mark when the trial court found that the easement was abandoned when they installed their fence. FoF 29. The Sullivans complain about the trial court's use of the Sullivans' emails to Mr. Saar, see, e.g., FoF 15 (Ex. 57), FoF 12 (Ex. 39), and FoF 13 (Ex. 47), as evidence of their intentions. Respondents' Brief at 21. But they waived their attorney-client privilege, CP at 689-92, to argue that their abandonment was not intentional, CP at 826, and the trial court properly relied on the Sullivans' emails in finding that their actions were indeed intentional. The Sullivans are also wrong in asserting that the Bresslers were not contemporaneously aware of the Sullivans' intentions. Respondents' Brief at 21. The Bresslers having given the Sullivans a copy of the easement on October 25, 2011, Exs. 45 and 46 and FoF 13, after Mr. Saar represented that the Sullivans were not aware of it, the Bresslers

were certainly aware that the Sullivans then proceeded to extend their fence all the way down the easement's common corridor. Ex. 54 at 1.

Finally, the Sullivans' claim that they removed their fence when the Bresslers asked them to do so, Respondents' Brief at 22, is at odds with unchallenged findings. Presented with proof of a recorded easement, the Sullivans finished their fence, FoF 29, and instructed Mr. Saar to, "keep [the Bresslers] humming." FoF 13. After learning that their title company would not pay for another boat launch, FoF 21, 22, the Sullivans kept their fence, FoF 30, and later informed the Bresslers only that they would not sign the extinguishment, "at this time". Ex. 74. Only after they learned that the Bresslers believed that the easement was no longer enforceable and mediation had been scheduled did the Sullivans finally move most of their fence out of the easement. FoF 23. Even then, the Sullivans reconfigured their sliding gate to divert traffic over the Bresslers' reserve drainfield, Id., even though they knew or should have known that it encroached on the easement. FoF 31. The Sullivans' mailbox, installed in the easement in 2009 despite Mr. Bressler's objection, FoF 4, was not moved until after this case was filed. FoF 32. The Sullivans' reconfigured fence and additional obstacles continued to block off a material portions of the easement through trial. FoF 28, 26.

The trial court fairly characterized the Sullivans' removal of most of their fence some six months after they installed it down the middle of the easement as an effort to repudiate their abandonment and revive the easement, CoL 3: not as making the Sullivans' prior conduct any less unequivocal, decisive, and inconsistent with the existence of the easement than the trial court found it to be. The trial court's error was in concluding that the Sullivans were entitled to reinstate the easement that they had abandoned unless the Bresslers proved that they were equitably estopped from doing so: not in finding that the Sullivans abandoned the easement.

C. Sullivans' Claims of Good Faith are not Supported.

The Bresslers argue that the Sullivans are not entitled to repudiate their abandonment under Washington's, "good faith mistake" authorities. See, e.g., Arnold v. Melani, 75 Wn. 2d 143, 449 P. 2d 800 (1969). Opening Brief at 37-39. The Sullivans blame Mr. Saar for their fence blocking the easement.[4] Respondents' Brief at 6-7. The Sullivans ignore the trial court's express finding that, while they may have started installing

[4] In this regard, however, the Sullivans are simply wrong in asserting that they decided to consult Mr. Saar because they wanted to, "approach...fence location and installation properly." Respondents' Brief at 5. The Sullivans' first chain-link fence was set back five feet from the property line based on the guidance that Mrs. Sullivan got from the property's developer. CP at 933, 935. The Sullivans' first chain-link fence was installed in 2009, FoF 6, some two years before they consulted Mr. Saar. FoF 8. The reason that the Sullivans sought legal advice in September of 2011 was because they intended to start using the easement, Ex. 131; FoF 8: not because they wanted help in determining where to put a fence that they had installed two years ago.

their fence based on misinformation from Mr. Saar, they intentionally finished it after verifying that the easement existed. FoF 29. The Sullivans describe the Bresslers' argument as based on, "testimony", Respondents' Brief at 16; it is rather based on findings of fact regarding the Sullivans' intentional decision to finish their fence, FoF 29, and to keep their fence in the middle of the easement while intentionally stalling the Bresslers, FoF 30. Opening Brief at 38.

While thus ignoring contrary findings, the Sullivans attribute their abrupt effort to repudiate their abandonment to the unsatisfactory results of their investigation into getting their own boat launch. Respondents' Brief at 6, 16. But the trial court rejected Ms. Sullivan's alternate explanations in finding that her main purpose in stalling the Bresslers and her own attorney after being informed that an easement did indeed exist was to determine whether she could get someone else to pay for a boat launch that she would not have to share with the Bresslers. FoF 22. On the facts found by the trial court, the problem was not, "environmental laws and costs," Respondents' Brief at 6, or "changes in the environmental laws," Respondents' Brief at 16: the problem was that Ms. Sullivan wanted someone else to pay a boat launch of her own. FoF 17.

Assertions of environmental impracticality are also inconsistent with the Sullivans' claim that their commitment to sign off on the

extinguishment instrument was contingent on getting $30,000 to cover their out-of-pocket costs and the installation of their own boat launch. Respondent's Brief at 7. And, here again, their claim is inconsistent with the trial court's express findings that Ms. Sullivan's claim that she never wanted to sign off on the extinguishment was not credible, FoF 15, that the Sullivans never told Mr. Saar that there were conditions on their commitment to complete it, FoF 16, and that the Sullivans unequivocally told the Bresslers that they would sign it. FoF 30.

The trial court decided to allow the Sullivans to reinstate the easement based on the erroneous conclusion that the Bresslers had to prove all elements of equitable estoppel in order to preclude them from doing so, CoL 3, 4: not because the trial court found that the Sullivans had acted in good faith. On the facts found by the trial court, it is clear as a matter of law that the Sullivans are not entitled to avoid the consequences of their abandonment on grounds of a good-faith mistake.

D. No Substantial Justice; No End to Litigation.

The Sullivans dispute both the Bresslers' characterization of the intended purpose of the trial court's remedy, Respondent's Brief at 18, and its results. Id. at 16-18. But the former is not reasonably in question. After concluding that the Bresslers were required to prove equitable estoppel to preclude the Sullivans from repudiating their abandonment,

CoL 4, and that the Bresslers had proved the first two elements thereof, CoL 5, the trial court defined the third element as undue hardship, CoL 6, and concluded that the Bresslers had suffered undue hardship. CoL 7. But the trial court concluded that they would not suffer undue hardship if the Sullivans removed their obstacles from the easement and paid the Bresslers' legal expenses, Id., and gave the Sullivans an opportunity to reinstate the easement by doing so. CP at 4-5. The manifest purpose of the trial court's remedy was to give the Sullivans an opportunity to, "un-do" the undue hardship element: not to achieve substantial justice.

As for the Sullivans' claim that the trial court's remedy achieved substantial justice, they regard the, "fundamental difference" in this case as the Sullivans' pre-litigation repudiation of their actions: "a de facto return to the original state of affairs." Respondents' Brief at 13-14. But the record does not support their claim.[5] The Sullivans' trial counsel conceded that the Bresslers had spent $2,500 on legal fees before the Sullivans gave notice that they would not sign the extinguishment, "at this time". RP at 10 (May 12, 2014). Though put on notice of these fees, Ex.

[5] According to the Sullivans, the court found specific actions by the Sullivans as indicating that they were not going to execute a formal relinquishment and were going to assert their easement rights. Respondents' Brief at 14. But the Sullivans cite no such findings to support their assertions, and the references to the record that they do provide are to Mr. Bressler's testimony about Ex.56, RP 291-92, one of Mr. Saar's early, less definitive emails (ignoring Mr. Bressler's testimony about Ex. 60, RP 300-01) and to their next attorney's email regarding the Sullivans' intent to restore their fence to its original location, Ex. 80: which the trial court found as fact that the Sullivans did not do. FoF 23.

76, the Sullivans do not claim that they reimbursed the Bresslers or offered to do so. As for the Sullivans' pre-litigation reconfiguration of their fence, Respondents' Brief at 19, their tortured explanation of how it came to pass that, even as they moved most of their fence out of the easement, they put their sliding gate in it, Ex. 140, ignores the trial court's express finding that they knew or should have known that they were continuing to block the easement. FoF 31. The Sullivans refused to move that mis-placed gate, even after Bresslers notified them of the problem, Id.; in Ms. Sullivan's words, "Well, you know what, when we get to court, if the judge deems that, then I'll change my fence ..." CP at 1001-02. The Sullivans ignore altogether the trial court's findings regarding the additional obstacles that they installed in the easement after the case was filed and through to trial. FoF 26.

Before this case was filed, the Sullivans attempted to repudiate their abandonment and revive the easement. CoL 3. But the Sullivans did not then offer to restore, and did not restore, the Bresslers to what the Sullivans call, "the original state of affairs." Respondents' Brief at 13-4. The Sullivans mischaracterize the Bresslers' opening arguments as asserting that, but for the Sullivans' mis-placed mailbox, the Bresslers could have kept their mouths shut. Respondents' Brief at 17. But the Sullivans are criticizing an argument that the Bresslers did not make. It is

the Sullivans who, from the start of this case, asserted that their conduct lacked the requisite intent to abandon because their installation of a fence on the property line was based on Mr. Saar's mistaken advice that there was no easement. CP at 879, 882. But the Bresslers gave the Sullivans both a copy of the easement, FoF 13, and a mulligan: a real, meaningful opportunity to, "return to the original state of affairs" by moving their chain-link fence and their mailbox out of the easement by the November 4th deadline. Instead, the Sullivans extended their fence, FoF 29, and intentionally stalled the Bresslers so that they could try to get someone else to pay for a boat launch of their own. FoF 14 and 22.

The Bresslers are not basing their appeal on their version of disputed facts: their appeal is based on unchallenged findings. The trial court did not characterize its decision to give the Sullivans a chance to reinstate the easement on the facts as found by the trial court as achieving substantial justice, and the Bresslers respectfully submit that it is clear as a matter of law that reinstatement of the easement after the Sullivans abandoned it on those facts did not achieve substantial justice.

As for putting an end to litigation, the Sullivans acknowledge that the trial court's decision put an end only to, "this aspect" of the litigation. Respondents' Brief at 18. The Sullivans know best about their plans to soldier on with their $2.25 million-dollar malpractice claims, CP at 613-

14, despite the finding that they intentionally stalled Mr. Saar as well as the Bresslers.[6] FoF 22. But the trial court's conclusion that the Sullivans had repeatedly mis-used the easement while this case was pending, CoL 11, and its permanent injunction if the Sullivans reinstated the easement, CP at 7, demonstrates the likelihood of future disputes over the reinstated easement: the trial court had to be satisfied that the Bresslers had proved a well-grounded fear of immediate invasion of their clear legal or equitable rights by the Sullivans. See Federal Way Family Physicians, Inc., v. Tacoma Stands Up for Life, 106 Wn. 2d 261, 265, 721 P. 2d 946 (1986).

E. Remedy did not Fully Ameliorate Undue Hardship.

As regards the insufficiency of the trial court's remedy, there is a conflict between the finding that the Bresslers incurred on-going attorney's fees due to the Sullivans' on-going encroachments into the easement, over and above the fees incurred before the Sullivans attempted to repudiate their abandonment, FoF 33, and the challenged finding that the Sullivans needed only to reimburse the latter to avoid undue hardship. FoF 35;

[6] The Sullivans are apparently asking the appellate court to take judicial notice of Mr. Saar's disbarment and bankruptcy. Respondent's Brief at 6. Judicial notice may be taken at any stage of the proceedings, ER 201(f), but a judicially noticed adjudicative fact must be one that is not subject to reasonable dispute. ER 201(b). As the Bresslers see it, Mr. Saar's disbarment and bankruptcy are not subject to reasonable dispute, but the Sullivans' implication that there is therefore no solvent party responsible to make them whole for his alleged wrongful conduct most certainly is: the Sullivans' $2.25 million-dollar damages claim was filed against Mr. Saar's former law firm and partner as well as Mr. Saar. CP at 613-14.

Opening Brief at 4, Assignment of Error # 4. The Sullivans defend the trial court's decision, Respondents' Brief at 17-19, but do not attempt to reconcile these inconsistent findings.

The conflict is based on the discrepancy between the trial court's original discussion of the harm suffered by the Bresslers as a result of the Sullivans' wrongful acts, CP at 209, and its later findings of fact. FoF 33 and 35. In entering the findings, the trial court observed that there was no authority to condition reinstatement on reimbursement of the Bresslers' reasonable attorney's fees. RP at 9 (May 12, 2014). But it would have been the Sullivans' choice whether to fulfill such a condition. See CoL 9. The Sullivans baldly assert that Carpenter v. Folkerts, 29 Wn. App. 73, 627 P. 2d 559 (Div. III, 1981), does not apply to this case. Respondents' Brief at 19. But the Sullivans do not take issue with the principles for which the Bresslers cited Carpenter, Opening Brief at 43,44: although the trial court does not have authority to award reasonable legal fees in the absence of a statutory, contractual, or recognized equitable grounds, a trial court exercising equitable jurisdiction has broad powers to craft a remedy to make an injured party whole. 29 Wn. App. at 80.

As for emotional hardship, the Sullivans assert that the Bresslers offer no objective evidence that the Sullivans' actions caused emotional distress. Respondents' Brief at 20. But Mr. Bressler was panicked, upset,

and scared by Ms. Sullivan's use of anti-Semitic and disability slurs, RP at 107, and he called law enforcement after Ms. Sullivan threatened his son. RP at 108. The Sullivans' trial attorney acknowledged the emotional impact of the Sullivans' actions on the Bresslers, RP at 299-300, during the interval that they were intentionally stalling the Bresslers. FoF 14. And, despite the Sullivans' complaint, Respondents' Brief at 20, expert testimony is not required to establish that use of offensive slurs is sufficient to satisfy the, "intentional or reckless infliction of emotional distress" element of an action for outrage. Robel, 148 Wn. 2d. at 50-52.

The Sullivans are correct that the trial court made no findings about emotional hardship. Respondent's Brief at 20. But the Sullivans nowhere answer the Bresslers' final assignment of error, Opening Brief at 5, challenging the trial court's failure to make a finding of fact regarding Ms. Sullivans' use of anti-Semitic and disability slurs. There is ample evidence to support this finding.[7] The trial court's repeated exclusion of challenged evidence of the Sullivans' bad faith on grounds that it was

[7] In addition to Mr. Bressler's testimony describing the October 10, 2009 incident, RP at 106-07, and the report reflecting his contemporaneous call to law enforcement, Rejected Exhibit 19, Ms. Sullivan's email to Mr. Saar apologized for, "name-calling" Mr. Bressler by referencing her own Jewish heritage. Ex. 26. Ms. Sullivan denies using the anti-Semitic and disability slurs, CP at 952-55, but the trial court repeatedly found Ms. Sullivan's testimony not to be credible as regards disputed facts. FoF 15, 19, 22, and 29. Furthermore, Mr. Bressler and Ms. Sullivan agree that communications between the two ceased after the October 10, 2009 incident. RP at 111; Ex. 131.

irrelevant to abandonment, RP at 110, 150-51, 257-58, and Rejected Ex. 115, demonstrates the trial court's opinion that whether Ms. Sullivan used the slurs was not relevant to abandonment: not a finding that Ms. Sullivan did not use them. See Douglas Northwest, Inc., v. O'Brien & Sons Construction, 64 Wn. App. 661, 682, 828 P. 2d 565 (Div. I, 1992) (application of common-law presumption of negative finding is unrealistic in absence of some indication that omission was intentional).

The Sullivans' complaint that the Bresslers did not make a claim for emotional distress misses the point. Respondents' Brief at 20. The Bresslers did not seek an award of damages. But, in determining whether allowing the Sullivans to reinstate the easement would cause undue hardship, the trial court erred in failing to consider the emotional hardship resulting to the Bresslers from restoring Ms. Sullivan's rights to use their property under the easement that she had intentionally abandoned.

F. Missing Response to Evidentiary Claims of Error.

The Sullivans have not responded to the Bresslers' claims of evidentiary error. Opening Brief, Assignment of Error # 5. A respondents' brief should answer the appellants' brief, RAP 10.3(b); when respondents choose not to address an issue, the court makes its decision based on the appellants' argument and the record. Adams v. Department of Labor & Industries, 128 Wn. 2d 224, 229, 905 P. 2d 1220 (1995). Despite multiple

findings detailing the Sullivans' bad faith in their dealings with the Bresslers, FoF 13, 14, and 19, the Sullivans are urging their own good faith -- albeit without citation to the record -- as a basis for defending the trial court's decision to allow them to reinstate their easement on the Bresslers' property. Respondents' Brief at 16. The rejected evidence of the Sullivans' bad faith and the missing finding regarding Ms. Sullivans' use of anti-Semitic and disability slurs are manifestly relevant to determining whether the trial court properly allowed them to do so.

G. Missing Record References Reveal a Different Truth.

Under RAP 10.3(a)(5) and (6), record references must be provided for every assertion of fact in a party's statement of the case and argument. A missing or errant record reference will occasionally be overlooked. In the case of Respondents' Brief, however, there are a bewildering number of errant or missing record references: over and above the self-serving references that are not consistent with unchallenged findings. The Bresslers have already attempted to note the most relevant errors, but it is not possible to note all in the space allotted.

But the Bresslers must address one set of errors: those involving one of their autistic sons. The Sullivans assert that Kevin Bressler often intruded into the Sullivans' house. Respondent's Brief at 5. But the cited portions of the record, RP 62-64 and Dep. of L. Sullivan at 167 (CP at

960), fairly support only Ms. Sullivan's belief that the Bresslers do not properly supervise one of their autistic sons. The Sullivans alleged that Kevin Bressler entered their house in their counterclaims, CP at 830, and the Bresslers came to trial prepared to prove that he did not. CP at 447-48. But the Sullivans -- not the Bresslers, as the Sullivans mistakenly assert, Respondent's Brief at 5 -- withdrew their nuisance and trespass counterclaims in opening argument. RP at 19; FoF 27. Indeed, the Sullivans' trial counsel said that the Bresslers were excellent parents who appropriately supervised their children. RP at 19. The Bresslers having thereafter been stopped from putting on testimony about the Sullivans' desire to get rid of the easement because of their concerns about Kevin Bressler, see, e.g., Ex. 39, on the basis that such evidence was, "solely inflammatory", RP at 63-64, it is particularly unfair for the Sullivans to now resurrect the claims that they chose not to pursue at trial.

There is no support in the record for the Sullivans' assertion of fact that Kevin Bressler often (or ever) entered their house. But the Sullivans' decision to ignore the requirements of RAP 10.3(a)(5) in order to take an unsubstantiated swipe at an autistic child does fairly bear on the likelihood of future disputes that was created by the reinstated easement. See Section II.D *infra*. It also vividly demonstrates the Sullivans' animus towards the Bresslers -- as reflected in the findings of bad faith, FoF 13,14, and 19, the

evidence of anti-Semitic and disability bias as to which no finding was made, see ftn. 7 *infra*, and the evidence of bad faith that was improperly excluded, Opening Brief at 47-48 -- as one of the relevant circumstances that should have been considered in determining whether it was reasonable to restore the Sullivans' right to use the Bresslers' property. RESTATEMENT OF THE LAW OF PROPERTY (1944), § 505 at 3088; see also Opening Brief at 46.

H. Unsupported Request for Award of Fees on Appeal.

The Sullivans ask for an award of attorney's fees under RAP 18.1. Respondent's Brief at 21. To recover reasonable attorney's fees, however, there must be a substantive basis for an award. RAP 18.1; 3 TEGLAND, WASHINGTON PRACTICE: RULES PRACTICE at 441 (8th Ed. 2014). A party who is entitled to an award of reasonable attorney's fees at trial is ordinarily also entitled to an additional award if that party prevails on appeal. Gray v. Bourgette Construction, LLC, 160 Wn. App. 334, 345, 249 P. 3d 644 (Div. I, 2011). But every party who prevails on appeal is not entitled to reasonable attorney's fees just by complying with RAP 18.1.

As the Sullivans argued below, CP at 63-66, and elsewhere on appeal, Respondents' Brief at 18-19, there is no statutory, contractual, or equitable basis for an award of reasonable attorney's fees. The Sullivans are simply wrong in characterizing the trial court's decision as awarding

reasonable attorney's fees to anyone. Respondent's Brief at 23. The trial court conditioned easement reinstatement on reimbursement of $2,500 of the Bresslers' legal fees, CP at 5 and FoF 35, but whether to satisfy that condition was up to the Sullivans, CoL 9: the trial court awarded only statutory attorney's fees. CP at 3, 7. No matter who prevails, there is no basis for an award of reasonable attorney's fees on appeal.

III. Conclusion

The Bresslers respectfully request that the trial court's decision be reversed and remanded with instructions to enter an unconditional decree quieting title in both the Bresslers' property and the Sullivans' property free of the Boat Launch Declaration.

DATED this 27 day of February, 2015.

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Bressler, Appellants

WSBA No. 14301