

No. 34571-4-II

**COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON**

ROBERT DUNN and SHIRLEY DUNN, individually,

Appellants/Defendants,

vs.

HAROLD AND ENID ROBERTS, a married couple.,

Respondent/Plaintiffs

FILED
COURT OF APPEALS
DIVISION II
06 DEC 22 AM 11:46
STATE OF WASHINGTON
BY *SR*
SHIRLEY

REPLY BRIEF

Jon E. Cushman
Cushman Law Offices, P.S.
924 Capitol Way South
Olympia, WA 98501

360-534-9183

Attorneys for Appellants

TABLE OF CONTENTS

I.. STATEMENT OF THE CASE 1

II. STATEMENT OF ISSUES 4

III. ARGUMENTS 5

 A. RCW 10.14 Does Not Support an Award of Either Damages or Attorney’s Fees in this Case 5

 B. Roberts Interpret the 2003 Settlement Agreement in a Manner That is at Clear Odds with its Language, and Not Supported By the Evidence 8

 C. The Trial Court Incorrectly Applied Nuisance and Harassment Theories in its Findings and Conclusions in a Manner That is Not Supported by the Evidence and Does Not Fit the Damages and Injunctive Relief Awarded 13

 D. The Dunns Properly Objected Below to Claims From the 2000 Litigation That Were Barred by *Res Judicata* 15

 E. The Roberts Fail to Demonstrate Why the Trial Court’s Refusal to Permit Amendment of the Pleadings to Try Issues Relating to the Dunns’ Easement Over the Roberts’ Driveway Does Not Create a High Likelihood That There Will Be Inconsistent Adjudications Between the Two Cases 17

 F. Respondents Fail to Explain or Justify the Trial Court’s Improper Characterization of Non-Taxable Costs as Attorney’s Fees Under RCW 10.14.090(2) 17

 G. The Trial Court Erred in its Award of Damages 19

IV. CONCLUSION AND REQUEST FOR
ATTORNEY'S FEES 20

TABLE OF AUTHORITIES

Table of Cases

<i>Berg v. Hudesman</i> , 115 Wn.2d 657, 801 P.2d 222 (1990)	9, 10
<i>Berschauer Phillips Constr. Co. v. Seattle Sch Dist No. 1</i> , 124 Wn.2d 816, 831, 881 P.2d 986 (1994)	13
<i>Board of Regents v. Seattle</i> , 108 Wn.2d 545, 551, 741 P.2d 11 (1987)	13
<i>Bowman v. Webster</i> , 42 Wn.2d 129, 253 P.2d 934 (1953)	12
<i>Cowiche Canyon Conservancy v. Bosley</i> , 118 Wn.2d 801, 809, 828 P.2d 549 (1992)	6
<i>DePhillips v. Zolt Const. Co., Inc.</i> , 136 Wn.2d 26, 32, 959 P.2d 1104 (1998)	10
<i>Emmerson v. Weilep</i> , 126 Wn.App. 930, 110 P.3d 214 (2005) <i>rev. den.</i> 155 Wn.2d 1026, 126 P.3d 820 (2005)	6, 7
<i>Gnash v. Saari</i> , 44 Wn.2d 312, 367 P.2d 674 (1954)	12
<i>Hayseeds, Inc. v. State Farm Fire & Cas.</i> , 177 W.Va. 323, 352 S.E.2d 73, 79 (1986)	18
<i>Helman v. Sacred Heart Hosp.</i> , 62 Wn.2d 136, 149, 381 P.2d 605 (1963)	11
<i>Ledgerwood v. Landsdowne</i> , 120 Wn.App. 414, 85 P.3d 950 (2004)	6
<i>Lybbert v. Grant County</i> , 141 Wn.2d 29, 35, 1 P.3d 1124 (2000)	13
<i>Mays v. Emery</i> , 3 Wn.App. 315, 321, 475 P.2d 124, 129 (1970)	12

<i>Olympic Steamship Co. v. Centennial Ins. Co.</i> , 117 Wn.2d 37, 811 P.2d 673 (1991)	18
<i>Panorama Village Condominium Owners Ass'n Bd. of Directors</i> <i>v. Allstate Ins. Co.</i> , 144 Wn.2d 130, 26 P.3d 910 (2001)	17
<i>Panorama Village Homeowner Ass'n v. Golden Rule</i> <i>Roofing, Inc.</i> , 102 Wn.App. 422, 10 P.3d 417 (2000)	8, 9
<i>State v. Lord</i> , 117 Wn.2d 829, 853, 822 P.2d 177 (1991)	6

Rules and Regulations

CR 52	12
RAP 2.5(a)	12
RAP 18.1	21
RAP 10.3(a)(5)	6
RCW 4.24.500	7
RCW 4.24.510	7
RCW 4.24.520	7
RCW 4.84.010	17, 18
RCW 10.14	3, 5, 6, 14, 19, 20
RCW 10.14.010	5
RCW 10.14.040	5
RCW 10.14.080	3, 20
RCW 10.14.090(2)	3, 5
RCW 10.14.150	6

I. STATEMENT OF THE CASE

In 1994, Charles Dunn and Shirley Dunn negotiated a sale of adjacent property at 4928-8 Cooper Point Rd. NW to Harold and Enid Roberts. In 1998, the Roberts demolished the pre-existing home, and designed and constructed a very large house. Charles Dunn negotiated the transfer of more property to the Roberts so that they could comply with Thurston County's permeable surface requirements. This process resulted in the Dunns transferring to the Roberts a triangular strip of property pursuant to BLA 970029 (Ex. 111) on the northern edge of the Dunn property, just north of the "Bliss Beach Road" common driveway. (RP 114-16).

Additionally, the Roberts located a sand filter, measuring approximately 15' x 32' in the Dunns' front yard, just south of Bliss Beach Road. (RP 86). After Charles Dunn's death, litigation ensued between his widow, Shirley Dunn, and the Roberts under Thurston County Superior Court Cause No. 00-2-1644-9. The parties eventually settled that lawsuit pursuant to an October 9, 2002 Settlement Agreement (Ex. 114). One of the litigated issues in that case had been fires in the Dunn's outdoor fireplace. On August 2, 2002, Judge Richard Strophy ruled on a Motion for a Preliminary Injunction brought by Roberts wherein they requested that the Court require the Dunns to abate beach fires and fires in the Dunns' outdoor fireplace. (Ex. 23, pp. 2, 4, and 10). Judge Strophy denied the requested injunction against burning. (Ex. 23, p. 27).

In 2003, the Roberts sued Robert Dunn in Thurston County Superior Court under Cause No. 03-2-30079-6. (*See* Orders admitted as Ex. 20). That case culminated in a 4-day trial in front of the Hon. Christine Pomeroy, whose oral ruling appears at CP 473-83. In that case, Judge Pomeroy again denied the Roberts' request to enjoin the Dunns' fires on the beach and in their outdoor fireplace. (CP 343). The parties also fully litigated the issues of scaffolding on the Dunn property; chicken compost in the trench; placement of appliances and objects near the Roberts' wall; wood chips thrown over the Roberts' wall; mailbox issues; the writing of "remove this wall" on the Dunns' pavement; the mailing of magazine subscriptions; and the placement of the compost bin on the Dunn property. (CP 474-480). All of these issues culminated in a February 28, 2003 Order for Protection, which was extended and modified by "Order Modifying/Terminating Order for Protection-Harassment" dated May 23, 2003 (Ex. 20).

The Roberts commenced the present litigation in 2004. Their Complaint recites a litany of allegations, most of which were the subject of the two prior lawsuits. The Trial Court did not exclude the issues which Dunns maintain were barred by *res judicata*, and also granted the Roberts relief that they were not entitled to, and which was not supported by the evidence at trial. The first such error was the Court's decision that the 2002 Settlement Agreement only required the "exploration of alternatives" for moving the Roberts' sand filter, as opposed to the plain

language of the contract, which required the Roberts to make actual permit applications to Thurston County. The Court either held that the Dunns waived the requirements of the agreement in the absence of substantial evidence, or improperly rewrote the agreement between the parties.

The Court also ordered the Dunns to cut their vertical log wall down to an 8-foot height, without stating a legal basis in Conclusion of Law 14, and without substantial evidence as to why the structure was considered a “fence.” The Court also did not have a basis on which to rule that Roberts have a private cause of action for code violations on the Dunn property.

After Trial, the Court granted Roberts damages, attorney’s fees, and injunctive relief under RCW 10.14. This was a misapplication of RCW 10.14, which prescribes a specific statutory procedure for obtaining Anti-harassment Protection Orders. The Court had no authority to order permanent injunctions under that statute in excess of one year duration without making the mandatory findings required by RCW 10.14.080(4), which the Court failed to do. The Court further erred by awarding general damages under the statute, when RCW 10.14 makes no provision therefor, and in derogation of the clear legislative intent of the statute, which is to prevent unlawful harassment, not to provide redress for past injuries. The Court erred in awarding costs and attorney’s fees under RCW 10.14.090(2).

The Court also found that the Dunns' firewood wall constituted a nuisance, despite the fact that it was located entirely on the Dunn property, did not affect any property rights of the Roberts, and there was no evidence that it prevented them from accessing the sand filter located on the Dunn property.

Finally, the May 26, 2006 Judgment is erroneous. In derogation of Conclusion 20, which awarded \$5,000.00 against Robert Dunn only, and Finding 5 which specified that only Robert Dunn mailed the offending magazine subscriptions, the trial court nevertheless awarded the full amount of damages – including \$10,850.00 for the magazine subscriptions – jointly and severally against Robert Dunn and Shirley Dunn.

II. STATEMENT OF ISSUES

A. Respondents fail to demonstrate that RCW 10.14 supports an award of either damages or attorney's fees in this case.

B. Roberts interpret the 2003 Settlement Agreement in a manner that is clearly at odds with its language, and is not supported by the evidence.

C. The trial court incorrectly applied nuisance and harassment theories in its findings and conclusions in a manner that is not supported by the evidence and does not fit the damages and injunctive relief awarded.

D. The Dunns properly objected below to claims from the 2000 litigation that were barred by *res judicata*.

E. The Roberts fail to demonstrate why the trial court's refusal to permit amendment of the pleadings to try issues relating to the Dunns' easement over the Roberts' driveway does not create a high likelihood that there will be inconsistent adjudications between the two cases.

F. Respondents fail to explain or justify the trial court's improper characterization of non-taxable costs as attorney's fees under RCW 10.14.090(2).

G. The trial court erred in its award of damages.

III. ARGUMENTS

A. RCW 10.14 Does Not Support an Award of Either Damages or Attorney's Fees in This Case.

The trial court erred in awarding general damages, costs and attorneys fees based on RCW 10.14. Dunns did make this argument to the trial court. As the Dunns argued in their Trial Brief:

There is no general civil action for a cause of action of "harassment," except as provided for by RCW 10.14.010, *et seq.* The civil remedy in that case is a creature of the criminal procedure statute, and requires that a petitioner follow the procedure contained in RCW 10.14.040. This is no such proceeding, and the Plaintiffs have no separate theory of recovery based on a cause of action for "harassment".

See, Trial Brief of Defendants Robert Dunn and Shirley Dunn, CP 727, note 5. Dunn's counsel also reiterated this argument on January 20, 2006 at the hearing on post-trial attorney's fees and costs. *See*, January 20,

2006 Report of Proceedings, p. 7. The Dunns fully preserved this argument on appeal. Roberts' contention that Dunns waived RCW 10.14 arguments by failing to make a motion to dismiss such claims is unsupported by any legal authority. Arguments that are not supported by citation to legal authority will not be considered on appeal. RAP 10.3(a)(5); *see also Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); *State v. Lord*, 117 Wn.2d 829, 853, 822 P.2d 177 (1991).

Neither *Ledgerwood v. Landsdowne*, 120 Wn. App. 414, 85 P.3d 950 (2004) nor *Emmerson v. Weilep*, 126 Wn. App. 930, 110 P.3d 214 (2005) *rev. den.* 155 Wn.2d 1026, 126 P.3d 820 (2005), cited by Respondents, offer any support for the trial court's award of general damages, costs and attorneys fees under the anti-harassment statute.

Ledgerwood stands for the proposition that by conferring original jurisdiction on the District Court per RCW 10.14.150, the legislature did not divest the Superior Court of its original jurisdiction. This proposition is immaterial to the issues in the present case, since the Dunns do not challenge the original jurisdiction of the superior court to hear an anti-harassment case under RCW 10.14. Roberts fail to address the real issues, which are (1) the trial court's erroneous award of general damages under a harassment theory, when no part of RCW 10.14 allows such an award, and (2) the trial court's erroneous award of costs and attorney's fees in a lawsuit not properly brought under that statute. Since Roberts have

offered no authority to support the trial court’s action, the judgment must be reversed.

Emmerson is authority for the Dunns’ position, not that of Roberts. Emmerson, a municipal code enforcement officer, obtained a temporary order of protection in Spokane County District Court against a disgruntled citizen, Weilep, who was harassing him. *Emmerson*, 126 Wn. App. at 934-35. At trial, Weilep moved to dismiss the anti-harassment case, contending that Emmerson’s suit was barred by RCW 4.24.520, Washington’s anti-SLAPP (“Strategic Lawsuits Against Public Participation”) statute, which was designed to prevent civil lawsuits for damages against citizens who make good faith reports to governmental agencies. On appeal from denial of his motion to dismiss, Weilep argued that the text of RCW 4.24.510 expressly provides for immunity from “civil liability” as opposed to immunity from a civil action for damages. The Court of Appeals, Division III rejected this argument:

The term ‘civil liability’ should not be read in isolation, but construed within the context of the statute’s intent and purpose to mean a civil action for damages. . . . A petition for a temporary order of protection is not a civil action for damages, as contemplated by RCW 4.24.500 and .510. . . . The initial proceeding before the trial court was limited to whether or not the facts certified in the petition warranted a temporary order of protection. . . .

Id., at 937. The same logic applies to the present case, based on the authorities and arguments contained in Dunn’s opening brief. The purpose of the anti-harassment statute is not to provide redress for past injury, or to create a general tort cause of action for “harassment,” but

rather, to provide for temporary orders of protection through a specified statutory procedure.

B. Roberts Interpret the 2003 Settlement Agreement in a Manner That is at Clear Odds with its Language, and Not Supported By the Evidence.

The Roberts–Dunn Settlement Agreement required Roberts to “immediately apply” for waiver of the septic sand filter requirement, or, failing that, to “immediately apply” for approval of an aerobic device to obviate the need for the sand filter, and failing those options, to “apply for approval” to move the sand filter to a different piece of property. Exh. 117. Without making a finding that the language is ambiguous, the trial court rewrote the contract to only require Roberts to “explore other options” as opposed to making actual permit applications. Not only is this finding unsupported by the evidence; it directly conflicts with the evidence.

Panorama Village Homeowner Ass’n v. Golden Rule Roofing, Inc., 102 Wn. App. 422, 10 P.3d 417 (2000), *rev. den.* 12 Wn.2d 1018, 16 P.3d 1266 (2001), cited by Roberts, offers no support for their position. Golden Rule Roofing, the contractor, did not dispute that the contracts at issue in that case required roofs with 10-year manufacturer’s warranties on materials. Rather, it contended it met the warranty requirement by issuing backdated manufacturers’ warranties and by issuing its own 10-year labor and materials warranty. *Id.*, 102 Wn. App. at 424. After hearing conflicting testimony, including expert testimony as to the performance

properties of the roofs and the degree of significance of the deviations from manufacturer's specification, the trial court found that Golden Rule breached the contract. The Court of Appeals, Division I affirmed, finding that substantial evidence supported the findings of fact, and that the findings of fact supported the conclusions of law. *Id.*, at 425-26.

The instant case is distinguishable. In *Panorama*, no ambiguity was found in the 10-year warranty provision. Therefore, the issue was not interpretation of the contractual language but rather whether Golden Rule Roofing substantially complied with the plain language. The court did not have to examine the extrinsic evidence and perform a contractual interpretation analysis of the type referred to in *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990).

In the present case, Finding of Fact No. 4 imputes an intent to the parties (i.e., to "explore other options" as opposed to making applications with the county) that varies significantly from their writing. No court could reach this result without implicitly finding ambiguity in what the parties wrote. The trial court made no such finding of ambiguity, and erred in failing to apply a *Berg* analysis in determining the parties' intent.

The court's role is to interpret a contract - *i.e.*, determine what the parties intended by the contract language - by (1) considering the actual language of the agreement, (2) viewing the contract as a whole, (3) the subject matter and objective of the contract, (4) all circumstances surrounding the making of the contract, (5) the subsequent acts and

conduct of the parties to the contract, and (6) the reasonableness of respective interpretation advocated by the parties. *Berg*, 115 Wn.2d at 667. A court may resort to parol evidence for the limited purpose of ascertaining the otherwise clear and unambiguous language of a contract in order to determine the intent of the parties. *Id.*, at 669. But, parol evidence may not add to, subtract from, modify, or contradict the terms of a fully integrated written contract. *DePhillips v. Zolt Const. Co., Inc.*, 136 Wn.2d 26, 32, 959 P.2d 1104 (1998). Here, the trial court erred in using limited parol evidence of conversations that occurred *after the date the contract was formed* to derive an intent that contradicts the plain language of the writing. First, the language of the Settlement Agreement is precise and clear. The Roberts were obligated to specifically apply for permits in one of three different ways to rid the Dunn property of the sand filter. All of the other evidence of the circumstances surrounding the making of the contract, and the reasonableness of the parties' respective interpretations, supports this intent, and none of the evidence contradicts such intent. Dunn and Roberts were engaged in complicated, contentious litigation, at the center of which was (a) Shirley Dunn's insistence that the sand filter be removed from her property and (b) the Roberts' insistence that Shirley deed them certain land in a Boundary Line Adjustment. Shirley Dunn agreed to give up a substantial amount of property in the boundary line adjustment in order to rid herself both of the ongoing litigation and the Roberts' sand filter in her yard. In summary, the only reasonable intent

that can be derived from both the writing and the surrounding circumstances is that reflected in the unambiguous language of the agreement.

The trial court nevertheless rewrote the critical language based on evidence of a single verbal statement by Robert Dunn and evidence of a single verbal statement by Shirley Dunn assenting to leave the sand filter where it was. This was erroneous.

First of all, such alleged statements would have been made in late 1992, *after* the agreement was signed. Without more, these statements are too vague and too late in time relative to the contracting process for any reasonable fact finder to relate back an intent that so dramatically contradicts the writing. The alleged statements of the Dunns do not rise to the level of substantial evidence of the parties' meeting of the minds at the time of contracting. "Substantial evidence" does not mean "any evidence." "Substantial evidence" is to be distinguished from a "mere scintilla" of evidence: it is "that character of evidence which would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed". *Helman v. Sacred Heart Hosp.*, 62 Wn.2d 136, 149, 381 P.2d 605 (1963). A proper analysis under *Berg* can only reasonably lead to a finding that the contract means exactly what it says.

Roberts jumble the concept of waiver with the concept of contract interpretation to argue that Dunn verbally *waived* enforcement of the contract. This argument fails for two reasons: First, the evidence does not

support a knowing, intentional waiver of the contract provisions, based on the argument and authorities contained in Dunn's opening brief. Second, the trial court made no finding or conclusion based on a waiver theory. Under CR 52, as construed by several decisions of the Supreme Court, it is necessary for the trial court to make ultimate findings of fact concerning all of the material issues. *See Bowman v. Webster*, 42 Wn.2d 129, 253 P.2d 934 (1953). *See also, Gnash v. Saari*, 44 Wn.2d 312, 367 P.2d 674 (1954).

The record in this case is devoid of sufficient evidence and of any particular finding that would support a finding of waiver. Where the findings are so incomplete as to deprive appellant of an opportunity to challenge them and where consideration of the legal questions involves speculation as to the legal theories the trial court pursued, it is necessary to set aside the judgment and remand the cause with instructions to the trial court to enter or clarify the findings on material issues. *See, Mayes v. Emery*, 3 Wn. App. 315, 321, 475 P.2d 124, 129 (1970).

Finally, Roberts argue that Dunns are equitably estopped from enforcing the contract, based on verbal statements that Roberts could leave the sand filter where it was. This argument fails for two reasons. First, the issue was not raised in the court below, and therefore may not be considered on appeal for the first time. RAP 2.5(a). Secondly, as with waiver, there are no findings of fact or conclusions of law to support such a theory.

The elements of equitable estoppel are: (1) an admission, statement, or act inconsistent with a claim afterwards asserted, (2) action by another in reasonable reliance upon that act, statement or admission, and (3) injury from allowing a party to contradict or repudiate the prior act, statement or admission. *Board of Regents v. Seattle*, 108 Wn.2d 545, 551, 741 P.2d 11 (1987). Equitable estoppel must be shown by clear, cogent, and convincing evidence. *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 831, 881 P.2d 986 (1994); *Lybbert v. Grant County*, 141 Wn.2d 29, 35, 1 P.3d 1124 (2000).

The biggest failure of this argument is the lack of any action on the part of the Roberts to their detriment by taking no action to move the sand filter. There is no evidence of damages that would be sustained by the Roberts if they were required to remove the sand filter from the Dunn property. In summary, even if Roberts had raised the equitable estoppel theory below, such theory fails on the merits, since the record is devoid of any evidence, findings or conclusions to support it.

C. The Trial Court Incorrectly Applied Nuisance and Harassment Theories in its Findings and Conclusions in a Manner That is Not Supported by the Evidence and Does Not Fit the Damages and Injunctive Relief Awarded.

Respondents fail to explain the hopeless incongruity among the findings of fact and conclusions of law relative to the injunctive and monetary relief that was awarded. For example, the Court found that Robert Dunn sent magazine subscriptions to harass the Roberts (Finding 5), but in Conclusion 3, awarded \$10,850.00 in compensatory damages,

based on an RCW 10.14 harassment cause of action and an outrage theory, without differentiating the basis for the damages award. As to the firewood wall, the only factual findings were that the wall was placed so as to upset the Roberts (Finding 7) and that some of the wood blocked the view of the Roberts' house coming down the road (Finding 8). These findings simply do not meet the definition of or support the conclusion of nuisance (Conclusion 5). Mrs. Roberts' self-serving testimony at RP 158-61, in which she stated in a conclusory manner her belief that she was prevented from accessing the sand filter is insufficient to prove that she was so prevented, because there is no evidence that the Roberts ever tried but failed to get to their sand filter.

Respondents fail to explain or justify the Trial Court's heavy-handed regulation through permanent injunctions of what it wanted to see on the Dunn property and its award of \$5,000.00 general damages based on a haphazard application of nuisance and harassment theories. Most if not all of the permanently enjoined activities are on the Dunn property. For example, the Court found that the stacking of certain items next to the wall by the Dunns *on the Dunn property* had been to harass the Roberts (Finding 10), and then went on in Conclusion 8 to issue a detailed permanent injunction regulating where the Dunns can park, where they can place objects, where they can plant landscaping – *all on their own property*. Based upon a finding that Robert Dunn had built some fires in his outdoor fireplace “to vex or annoy,” the Court went on to issue a

detailed permanent injunction as to how many times per year and on what occasions the Dunns are permitted to build fires on their own property, all without articulating any finding of nuisance, harassment, trespass, or other legal basis in the conclusions of law to justify the permanent injunction. Without articulating any factual or legal standard, the Court declared that the Dunns' vertical wall was a "fence" (Finding 16) and ordered them to cut it to less than 8 feet in height (Conclusion 14), similarly without specifying the basis of the ruling. The Roberts offer no legal authority or argument to explain or justify this type of judicial legislation other than to posit "nuisance law does not require a 'breaking of the close' as would a trespass claim." Respondents' Brief, p. 25. However, they cite no legal authority to support this position.

In summary, the Dunns' Assignments of Error on the above points are well taken, and compel reversal of the trial court's ruling.

D. The Dunns Properly Objected Below to Claims From the 2000 Litigation That Were Barred by *Res Judicata*.

The Dunns did not waive the argument that *res judicata* barred (1) relitigation of Judge Strophy's ruling regarding fires in Cause No. 00-2-01644-9 and (2) relitigation of issues regarding scaffolding, chicken compost in the trench, objects stacked near the Roberts' wall, wood chips thrown over the wall, etc., and denial of relief regarding fires, that had all been tried before Judge Pomeroy in the 2003 anti-harassment suit (Cause No. 03-2-30079-6). First of all, as acknowledged by Roberts, the Dunns pled *res judicata* in their Answer, Affirmative Defenses and

Counterclaims (RP 203), and specifically referenced the settlement of the lawsuit under Cause No. 00-2-01644-9 in their counterclaim. (RP 205). At trial, counsel for the Dunns objected to photographic evidence from the prior proceedings at RP 53-57 as being irrelevant and overly prejudicial, and while not specifically arguing the elements of *res judicata* substantially made the argument in opening statement as follows:

In summary, Your Honor, we're going to request that the Court deny the plaintiffs' claims for nuisance. At most they amount to harassment allegations that were dealt with within the Judge Pomeroy order in her order that was dated in 2003, May 23, 2003. Those orders have a life span of a year. If there was violations of her order, really the proper forum to take that up in could have been Judge Pomeroy's court and I'm not - - I don't know that I have a good argument that it's *res judicata* or what, but what they're making out at most seems to be reading the words on the page and trying to make the tune out of them. I think they give rise to harassment allegations and this really is not the forum for it.

The Dunns' counsel further made repeated objections to evidence from the earlier litigation on the basis of relevance and concerning acts barred by the statute of limitations. *See, e.g.*, RP 88, 101, 136-37, and 138-39.

In summary, this Court should reverse the ruling of the trial court as specified in the Dunns' opening brief as to all claims barred by *res judicata* because of rulings in the prior 2000 and 2003 lawsuits.

E. The Roberts Fail to Demonstrate Why the Trial Court's Refusal to Permit Amendment of the Pleadings to Try Issues Relating to the Dunns' Easement Over the Roberts' Driveway Does Not Create a High Likelihood That There Will Be Inconsistent Adjudications Between the Two Cases.

The Roberts incorrectly contend that Appellants' complaint for injunctive relief and damages filed under Cause No. 05-2-01699-7 (CP 648) "sought to introduce entirely new claims into this litigation". Respondents' Brief p. 27. Roberts fail to address either of the Dunns' arguments, namely: (1) that the Roberts contributed to and/or effectively caused their own damage to the driveway in front of their house by removing the pre-existing asphalt and replacing it with stone pavers, and (2) the scope of injunctive relief awarded by the trial court in the present case will likely conflict with the ruling in the second case, if the Dunns obtain a declaration that Bliss Beach Road is in fact 20 feet wide. Based upon the argument and authorities presented in their opening brief, the court's refusal to try the causes together should be reversed as a manifest abuse of discretion.

F. Respondents Fail to Explain or Justify the Trial Court's Improper Characterization of Non-Taxable Costs as Attorney's Fees Under RCW 10.14.090(2).

Respondents contend that "when reasonable attorney's fees and costs are recoverable under a statute, the court is not limited to the RCW 4.84.010 costs." Respondents' Brief, p. 28. The Roberts base this argument upon an erroneous reading of *Panorama Village Condominium Owners Ass'n Bd. of Directors v. Allstate Ins. Co.*, 144 Wn.2d 130, 26

P.3d 910 (2001). *Panorama* did not involve an award of attorney's fees pursuant to a statute or contract. Rather, the trial court awarded reasonable attorney's fees, including expert witness fees to *Panorama* pursuant to *Olympic Steamship Co. v. Centennial Ins. Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991), on equitable grounds, stated by the Court as follows:

When an insured purchases a contract of insurance, it seeks protection from expenses arising from litigation, not 'vexatious, time-consuming, expensive litigation with his insurer.' ” *Olympic S.S. Co.*, 117 Wash.2d at 52, 811 P.2d 673 (quoting *Hayseeds, Inc. v. State Farm Fire & Cas.*, 177 W.Va. 323, 352 S.E.2d 73, 79 (1986)). In light of this verity we have held “when an insurer unsuccessfully contests coverage, it has placed its interests above the insured”; and “[o]ur decision in *Olympic Steamship* remedies this inequity by requiring that the insured be made whole.” *McGreevy*, 128 Wn.2d at 39-40, 904 P.2d 731.

It is the purpose of the *Olympic Steamship* exception to make an insured whole when he is forced to bring a lawsuit to obtain the benefit of his bargain with an insurer. To make such plaintiffs whole, “reasonable attorney fees” must, by necessity, contemplate expenses other than merely the hours billed by an attorney. The insured must therefore be compensated for all of the expenses necessary to establish coverage as part of those attorney fees which are reasonable.

Id., 102 Wn. App. at 143.

In summary, the respondents' reliance on *Panorama* is misplaced, and the trial court was in error for lumping together and awarding as “attorney's fees” numerous items of costs that were not properly taxable per RCW 4.84.010.

G. The Trial Court Erred in its Award of Damages.

Based upon the argument and authorities in Appellants' opening brief, the trial court erred in awarding \$5,000.00 against Robert Dunn to the extent general damages were awarded per RCW 10.14. Since the Court failed to differentiate between damages awarded for nuisance and damages improperly awarded for harassment, the award must be set aside.

The Roberts do not dispute that the judgment, which awards all damage jointly and severally against Shirley Dunn and Robert Dunn contradicts Finding 20, which awards \$5,000.00 "against Robert Dunn only" and Finding 3, which solely implicated the conduct of Robert Dunn as to the mailing of magazine subscriptions. Disingenuously, Respondents claim that Dunn waived this defect in the judgment. No substantial evidence supports any judgment against Shirley Dunn relative to the magazine subscriptions which she testified she knew nothing about. Through oversight, this error – which is in the nature of a clerical mistake – was not objected to at the time of presentation of the judgment, however the Findings and Conclusions speak for themselves. The \$5,000.00 award against Shirley Dunn should be reversed as clearly erroneous in light of Finding 20, and the \$10,500.00 award pursuant to Conclusion 3 should be reversed as unsupported by the evidence.

III. CONCLUSION AND REQUEST FOR ATTORNEY'S FEES

Based upon the above argument and authority, the Appellants respectfully urge this Court to reverse the decision and judgment of the trial court. First, there is insufficient evidence to support the Court's interpretation of the 2002 Settlement Agreement to only require the "exploration of alternatives" for removing their sand filter from the Dunn property, as opposed to the plain language of the contract, which required the Roberts to make actual permit applications to Thurston County.

Second, The Court's order requiring the Dunns to cut the vertical log wall down to an 8-foot height was erroneous, because they had no legal or factual basis on which to order the wall to be modified. The Court's finding of nuisance relating to other stacked firewood wall was also error, because it was located entirely on the Dunn property, did not affect any property rights of the Roberts, and there was no evidence that it prevented them from accessing the sand filter.

Third, the Court erred in awarding general damages under RCW 10.14, as the statute does not provide for them and does not create a general civil cause of action for "harassment" outside of the statutory protection order procedure. The court also erred in awarding attorney's fees and costs pursuant to RCW 10.14, and also erred in awarding injunctive relief in excess of one year duration without making the mandatory findings required by RCW 10.14.080(4).

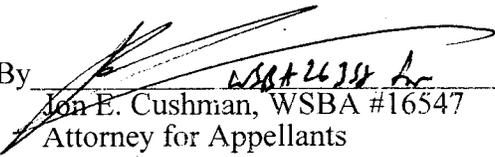
Fourth, the trial court erred in refusing to try issues relating to the Dunns' easement over the Roberts' driveway, while nevertheless awarding permanent injunctive relief restricting the types of vehicles with which the Dunns may traverse the driveway. The Court manifestly abused its discretion in denying joinder of the present lawsuit with the related lawsuit involving the Dunns' easement rights over the driveway. Failure to try both causes together created a high likelihood of inconsistent adjudications, and was clearly erroneous.

Finally, the May 26, 2006 Judgment is completely erroneous. In derogation of Conclusion 20, which awarded \$5,000.00 against Robert Dunn only, and Finding 5 which specified that only Robert Dunn mailed the offending magazine subscriptions, the trial court nevertheless awarded the full amount of damages – including \$10,850.00 for the magazine subscriptions – jointly and severally against Robert Dunn and Shirley Dunn. This was clearly erroneous and should be reversed.

Pursuant to RAP 18.1, Dunns request fees based upon their contract with the Roberts and based upon the law.

DATED this 22 day of December, 2006.

CUSHMAN LAW OFFICES, P.S.

By 
Jon E. Cushman, WSBA #16547
Attorney for Appellants

Nate J Cushman certifies and declares as follows:

1. I am an attorney at Cushman Law Offices, P.S. I am over the age of 18, not a party to this action and competent to testify to the facts set forth herein.
2. On December ²¹21, 2006, I personally filed an original and two copies of Appellants' Reply Brief for filing with the Court of Appeals, Division II.
3. On December ²²21, 2006, I personally delivered a true and correct copy of the document identified above to Respondents' attorney at the following address:

Timothy L. Ashcraft
Williams, Kastner & Gibbs
1301 A Street Suite 900
Tacoma, WA. 98402-4299

DATED at Olympia, Washington this 22 day of December, 2006.



Nate J Cushman

FILED
COURT OF APPEALS
DIVISION II
06 DEC 22 AM 11:46
STATE OF WASHINGTON
BY SP
DEPUTY