

NO. 36626-6-II
COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON
TACOMA

COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY DEPUTY

THOMAS TROTZER

Appellant,

vs.

GARY VIG and SHERRIE VIG,
Respondents.

APPELLANTS REPLY BRIEF
AND CERTIFICATE OF SERVICE

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I. CLARIFICATION OF RESPONDENT'S STATEMENT OF CASE

The relevant facts are undisputed. Gary Vig had a subjective belief that he was on his property when he cleared a trail/road with his tractor on appellant's land in 2000 and again in 2003. He did not have a permit or survey. His deed stated his property was 4 chains wide which is 264 feet but for some reason he believed that he had 270 feet. Common sense dictates that you know what you own before you bulldoze it.

II. STANDARD OF REVIEW

Statutory interpretations and claimed errors of law are reviewed de novo. Department of Ecology v. Campbell & Gwinn, LLC, 146 Wn. 2d 1, 9, 43 P.3d 4, 2002. Where the relevant facts are undisputed and the parties dispute only the legal effect of those facts, the standard of review is also de novo. Hogan v. Sacred Heart Med. Ctr., 101 Wn. App. 43, 49, 2 P. 3d 968 (2002).

A. MEASURE OF DAMAGES

It is undisputed that Respondent Vig only owned 264 feet. However when he was measuring his property he measured out 270 feet when he was bulldozing. A mere subjective belief in the right to cut trees is not sufficient for mitigation pursuant to RCW 64.12.040. Happy Bunch v. Grandview N., 142 Wn. App. 81, 96, ___ P. 3d ___, 2007. Even during the second trespass in 2003, Respondent Vig admits that he lost sight of what he believed was the property line but he continued to bulldoze. (RP Vol. II, Page 286 Line 12 - Page 289 Line 11). The legislature has mandated that in such circumstances the court has no discretion to make an award other than treble damages. Happy Bunch, at 97. This Court should reverse the Trial Court and award treble damages.

B. OFFER OF JUDGMENT

The respondent opines in their brief that they offered several times to stipulate to the boundary line. However, there was no formal stipulation entered ever entered into. The Offer of Judgment did not contain language that the survey line would be the boundary line as the Trial Court eventually ordered. At trial the respondent maintained that the fence line

was the boundary line and actually argued at trial that the fence line should be the boundary line. The Offer of Judgment made by the respondent did not contain all of the relief granted by the Trial Court and therefore the respondent should not be awarded costs under CR 68.

C. STATUTE OF LIMITATIONS/EQUITABLE TOLLING

The respondent alleges that there was no contract between the parties after the 2000 trespass and even if there was the provision of: “[in] the future we will never do any work near the property line without first consulting you.” was satisfied when the parties bumped into each other at Walmart in the winter of 2002. But the record is clear that they did not tell Trotzer at Walmart, that they were going to do work near the property line in July of 2003. (RP Vol. III. Page 406 Line 19- Page 412 Line 14.). There is no factual dispute about the written document. Only its legal effect. This Court should reverse the trial court on the issue of the legal effect of settlement agreement. Hogan v. Sacred Heart Med. Ctr., 101 Wn. App. 43, 49, 2 P3d 986 (2000).

D. LEADING QUESTIONS

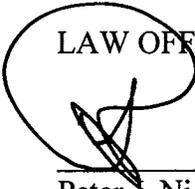
The Trial Court refused to allow the appellant's attorney to ask leading questions of the party opponent. The Court required counsel to demonstrate that the witness was hostile. ER 611 clearly allows leading questions for party opponent. A trial court abuses its discretion when its decision is manifestly unreasonable, or is exercised on untenable grounds or untenable reasons. State v. McDaniel, 83 Wn. App. 179, 920 P.2d 1218 (1996). Here, plaintiff's counsel was prevented from using his prepared questions and ordered to comply with a higher standard of demonstrating hostility than what is required by ER 611. Clearly, the Trial Court abused its discretion.

III. CONCLUSION

The Trial Court should be reversed, and the case remanded to the Superior Court awarding damages for trespasses in 2000 and 2003, and trebling the same. The Court should strike the CR 68 award and award the appellant his costs. Or the Court should remand to the Trial Court reinstating the claim for the 2000 trespass on an equitable tolling basis and allow the appellant to ask leading questions of the adverse party on direct examination.

Dated this 21 day of April, 2008.

LAW OFFICE OF PETER J. NICHOLS, P.S.



Peter J. Nichols, WSBA # 16633
Attorney for Appellant

DECLARATION OF SERVICE

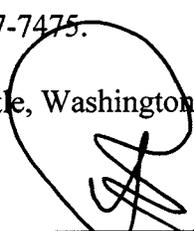
The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on April 21 2008 via facsimile and First Class mail a true and correct copy of the Appellant's Opening Brief addressed to:

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DATED AT Seattle, Washington on this 21 day of
April, 2008.



Peter J. Nichols