

FILED
COURT OF APPEALS
DIVISION II
08 NOV 24 AM 9:50
STATE OF WASHINGTON
BY W
DEPUTY

No. 37251-7-II

COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

EVELYNE GRUNDY,

Respondent/Cross Appellant,

v.

The BRACK FAMILY TRUST,
CALVIN BRACK and JOYCE M. BRACK, Trustees,

Appellants/Cross Respondents.

REPLY BRIEF OF CROSS APPELLANT

Allen T. Miller, WSBA #12936
Law Offices of Allen T. Miller, PLLC
1801 West Bay Drive NW, Suite 205
Olympia, Washington 98502
(360) 754-9156

Attorney for
Respondent/Cross Appellant
Evelyne Grundy

PM 11/21/08

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. ARGUMENT	1
A. The trial court properly awarded attorney fees and damages to Grundy on the basis of unchallenged findings of fact.	1
B. Common sense requires reformation of the findings of fact and conclusions of law to make them consistent with the judgment entered in Grundy's favor.	3
III. CONCLUSION	4

TABLE OF AUTHORITIES

Cases

Bradley v. Am. Smelting & Refining Co., 104 Wn.2d 677,
709 P.2d 782 (1985) 1

Grundy v. Thurston County, 155 Wn.2d 1,
117 P.3d 1089 (2005) 2 n.1

Robel v. Roundup Corp., 148 Wn.2d 35,
59 P.3d 611 (2002) 3 n.2

Woldson v. Woodhead, 159 Wn.2d 215,
149 P.3d 361 (2006) 2 n.1

Statutes

RCW 4.24.630 2

RCW 4.24.630(1) 3 n.1

Rules

Rules of Appellate Procedure (RAP) 10.3(g) 3

Superior Court Civil Rules (CR) 52(b) 3

CR 59(g) 3

I. INTRODUCTION

The superior court properly awarded Evelyne Grundy damages for the Bracks' water trespass and her reasonable attorney fees at trial based on its unchallenged findings of fact.

In this brief, Grundy replies to the Bracks' response to her cross appeal.

II. ARGUMENT

A. **The trial court properly awarded attorney fees and damages to Grundy on the basis of unchallenged findings of fact.**

The trial court found that the Bracks had a duty "not to unlawfully or negligently cause water to enter [Grundy's] property" and that a water trespass attributable to water intrusion and sea spray resulted from the increase in their bulkhead. CP 887.

The Bracks raised their bulkhead "without considering consequences to [Grundy]." CP 887. Intent to trespass includes "an act that the actor undertakes realizing that there is a high probability of injury to others and yet the actor behaves with disregard of those likely consequences." *Bradley v. Am. Smelting & Refining Co.*, 104 Wn.2d 677, 684, 709 P.2d 782 (1985). When the Bracks initially sandbagged their bulkhead, water invaded

neighboring properties, and complaints began. CP 749. The Bracks should have known that a trespass would also result when they raised their bulkhead permanently.

“RCW 4.24.630 permits an award of attorneys’ fees and costs when a person intentionally and unreasonably injures personal property or improvements to real estate, knowing or having reason to know that he or she lacks authorization to act, inclusive of trespass by water.” CP 892. The court correctly found Grundy was entitled to an award of attorney fees pursuant to the statute and awarded her fees, following the parties’ post-trial requests and argument, on a lodestar basis. CP 825, 888.

Debris and yellowed and dead grass on Grundy’s property were caused by “high wind and waves amplified by the increase in height of [the Bracks’] bulkhead.” CP 883. Grundy sought to have the increased portion of the bulkhead removed, but the court found this equitable remedy inappropriate in light of the expense, inconvenience, and environmental damage that would result. CP 885, 886. Instead, the court determined the water trespass could be remedied by installing a “cap” or “lip” atop Grundy’s bulkhead, in

lieu of abatement, and properly awarded damages accordingly.¹

CP 887.

The trial court erred by striking the word “intentionally,” at the Bracks’ invitation, from the proposed findings and conclusions. RP (Dec. 18, 2007) at 17-21. But the unchallenged findings set out above fully support the court’s award of attorney fees and damages to Grundy.² “Unchallenged findings are verities on appeal.” *Robel v. Roundup Corp.*, 148 Wn.2d 35, 42, 59 P.3d 611 (2002).

B. Common sense requires reformation of the findings of fact and conclusions of law to make them consistent with the judgment entered in Grundy’s favor.

The Bracks characterize the superior court’s written findings of fact and conclusions of law as “clear and express.” Br. at 16. They neglect to address the findings and conclusions that were modified, in accordance with their own requests, to make them inconsistent with the judgment entered in favor of Grundy.

¹ The Bracks reliance on *Woldson v. Woodhead*, 159 Wn.2d 215 (2006), and *Grundy v. Thurston County*, 155 Wn.2d 1 (2005), is misplaced. *Woldson* is a continuing trespass case, and *Grundy* deals solely with private nuisance. The present appeal arises from a water trespass claim. CP 891. The controlling statute provides for recovery of damages for the value of the property injured and for injury to the land, including the costs of restoration. RCW 4.24.630(1).

² The appellate rules contain a special provision for assignments of error: “A separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number.” RAP 10.3(g). The Bracks present no such assignments of error.

The Bracks fault Grundy for not asking the trial court to revise its erroneous rulings. Br. at 17. Their complaint is without merit. As they point out, CR 52(b) allows the trial court to amend a judgment upon motion of a party, and CR 59(g) allows the trial court to direct entry of a new judgment. *Id.* But Grundy had no reason to seek amendment of the trial court's judgment. Why would she challenge a favorable outcome that awarded her both damages and attorney fees?

Grundy's cross appeal was necessitated solely by the Bracks' efforts to capitalize on the error they invited below, and the cross appeal is based on common sense. A reasonable court would not enter judgment in Grundy's favor only to enter findings and conclusions that could thwart the relief granted. The Bracks induced the trial court to take inconsistent actions that they now challenge for the first time. Having set up the error at trial, they should not be heard to complain of it on appeal.

III. CONCLUSION

The Court should affirm the judgment entered by the trial court and should reform the findings of fact and conclusions of law to conform to that judgment. In the alternative, the trial court itself should be directed to reform the findings and conclusions on

remand. And the Court should award costs and reasonable attorney fees on appeal to Evelyne Grundy.

DATED this 21st day of November, 2008.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Allen T. Miller". The signature is written in a cursive style and is positioned above a horizontal line.

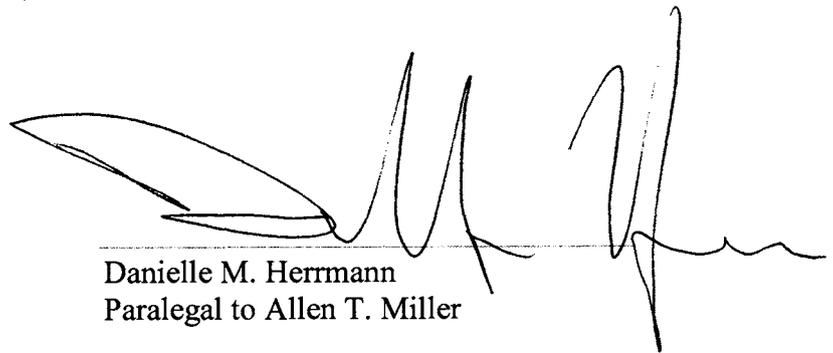
Allen T. Miller, WSBA #12936
Law Offices of Allen T. Miller, PLLC
1801 West Bay Drive NW, Suite 205
Olympia, Washington 98502
(360) 754-9156

Attorney for
Respondent/Cross Appellant
Evelyne Grundy

Ponzoha, 950 Broadway, Suite 300, Tacoma, WA 98402 via US Mail,
Postage Prepaid.

I declare under penalty of perjury under the laws of the State of
Washington that the foregoing is true and correct.

DATED this 21st day of November, 2008.



Danielle M. Herrmann
Paralegal to Allen T. Miller