

Court of Appeals No. 41186-5-II

ROBERT TURK and DONNA TURK,
Husband and wife

Appellants

v.

VALERIE KTENAS, an individual

Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR PIERCE COUNTY
HONORABLE KATHERINE M. STOLZ

BRIEF OF THE APPELLANTS

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COURT OF APPEALS
DIVISION II
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I. ASSIGNMENTS OF ERROR

1. The trial court erred in not granting a continuance to Appellant, Mr. Turk.
2. The trial court erred when it failed to rule upon Appellant Mr. Turk's Counterclaim and Affirmative Defenses and again when it did not vacate the judgment pursuant to CR 60(b).
3. The trial court erred in granting an Anti-Harassment Order against Appellant Mr. Turk with No Evidence on the record supporting such an Anti-Harassment Order.
4. The trial court erred in entering Findings of Fact and Conclusions of Law not supported by the evidence presented at trial.
5. The trial court erred in failing to properly consider that Respondent made several material misrepresentations to the Court when it did not vacate the judgment pursuant to CR 60(b).

II. STATEMENT OF THE CASE

1. Easement Dispute.

At its core, this matter is an easement dispute. The easement's creation pre-dates the ownership of both respective parties. In 1957, the parties' predecessors in interest recorded an Easement of Driveway (CP 152). Each party granted the other a seven and one-half foot (7.5')

easement for use as a driveway, for a total of a fifteen foot (15') easement. (CP 152-153).

In 1995, Appellant (hereinafter “Mr. Turk”) purchased the property commonly known as 3519 East 112th Street, Tacoma, Washington (VR p.7 lns 2-3 Judge Stolz, May 12, 2010). His neighbor, Valerie Ktenas (hereinafter “Respondent”), is the owner in fee simple of the property to the south, commonly known as 3515 East 112th Street, Tacoma, Washington (CP 177).

Mr. Turk subsequently surveyed his property and set markers on his side of the property to delineate the boundaries of the easement. (CP generally 155-159). Respondent, in turn, constantly removed the markers. (CP 159). Respondent's encroachments have also consisted of Respondent parking vehicles on the easement, placing wood, and various other obstructions (CP 159, 165, 167).

In 2000, Mr. Turk retained attorney Douglas W. Hales (hereinafter “Mr. Hales”) regarding the encroachment issues. Upon advice of counsel, Mr. Turk granted Respondent permission for her building to encroach so that Respondent could avoid the costs of taking down the structures. (CP 155). Despite this agreement, Respondent continued to park vehicles on the easement and other obstructions thereby impeding Mr. Turk’s ingress and egress and quiet enjoyment of his property (CP 249-50).

Consequently, Mr. Turk, through Mr. Hales, revoked permission for Respondent to encroach on the easement. (CP 157).

Shortly after, Mr. Turk informed Respondent about this issue, disagreements over the easement ensued. In 2009, Mr. Turk, unable to use the easement for ingress or egress to his property, decided to erect a six foot (6') tall fence on his side of the easement to ensure his use of the property. (VR p. 15 lns. 22-23 Judge Stolz, May 12, 2010).

2. Valerie Ktenas v. Robert Turk Anti-Harassment Orders.

Although no proof of the Anti-Harassment Orders were provided at trial, Respondent's Complaint alleged that she obtained Anti-Harassment orders against Mr. Turk in 2002 and in 2008. (CP 5-6). In fact, the only evidence offered at trial regarding alleged harassment and prior orders was the testimony of Ms. Ktenas. This is limited to the following evidence:

Q. Well, how did you --did you ever seek any anti-harassment order from Pierce County?

A. Yes, I did.

Q. What were the circumstances around that?

A. He was saying very bad names to us, flipping us off every time we were out of the house, putting stuff on the easement in front of my gates of the fence, I have photos of that, and just being terrible.

Q. Was any of it threatening to you?

A. Yes.

Q. All right. How many times did you seek anti-harassment orders?

A. Two times.

Q. Why did you do it the second time?

A. Because he was calling my daughter names, my roommate names, flipping us off. I was afraid. My car--tires of car got punctured. My bird houses got stolen.

Q. Were you ever able to attribute that?

A. I couldn't prove it was him.

Q. All right. Were your anti-harassment orders granted by a court in Pierce County?

A. Yes.

Q. Do you still have an order in existence?

A. No, I don't, but I would like one.

Q. Why is that?

A. Because I'm afraid if he gets that fence -- if he has to take the fence down, that there is going to be serious problems.

(VR p. 27-28 Judge Stolz, May 12, 2010). Respondent presented no proof of the alleged "puncturing of tires" or "bird house stealing" nor did she not state when the alleged name calling took place.

In December 2008, Respondent brought suit against Mr. Turk. Mr. Turk, through his new attorney, Thomas L. Dickson, (hereinafter "Mr. Dickson") answered the Complaint, raised affirmative defenses and counterclaimed for Ejectment and Quiet Title. (CP 149). Mr. Turk raised several affirmative defenses which included Estoppel, Causation, Comparative Fault, and Unclean Hands. (CP 249-50).

3. Continuances and the Trial.

Eventually, Mr. Dickson withdrew from the case. However, due to a mailing error, Mr. Turk was not made aware that Mr. Dickson had withdrawn and did not represent him anymore. (VR p.10 lns 3-10 Judge Lee, Dec 17, 2009). Mr. Turk never actually received notice of the withdrawal. (VR p.2 lns 11-17 Judge Lee, Dec 17, 2009). Judge CJ Lee came to the same conclusion on the original trial date of December 17, 2009:

So I am going to have to reasonably interpret what happened here, and the reasonable interpretation is he never knew his attorneys withdrew in September. If he had

known it, that would be a whole other issue before me. But based on the information provided before me, **Mr. Turk had no idea his counsel had withdrawn, and he was under the impression that he had counsel all along.**

(emphasis added) (VR p. 10 lns 3-10 Judge Lee, Dec 17, 2009).

Mr. Turk moved for a continuance *pro se* and was granted a continuance to trial in order to have time to retain new counsel (VR p.2 lns 18-20 and p.10 lns 10-12 Judge Lee, December 17, 2009). His motion for a continuance was granted, but Judge CJ Lee stated to Mr. Turk that no more continuances would be given to obtain an attorney. Trial was therefore set for May 12, 2010. (VR p .172, lns 5-13 Judge Lee, December 17, 2009).

Subsequently, Mr. Turk met with attorney Terry Robinson (hereinafter “Mr. Robinson”). Mr. Robinson agreed to represent Mr. Turk, but unfortunately, Mr. Robinson had a scheduling issue which conflicted with the date of Mr. Turk’s trial. (VR p.4 lns 12-15, Judge Lee May 12, 2010). In this instance, Mr. Turk believed he retained Mr. Robinson to represent him. (VR p.4 lns 12-15 Judge Lee, May 12, 2010).

Mr. Robinson asked Mr. Turk to appear before Judge Lee’s court and ask for another continuance. (CP 139). However, when Mr. Turk did so, he was reprimanded by the court.

I do not take kindly to your continued excuses. I know it's tough finding a lawyer, but I also remember talking with you explicitly back in December that if you cannot find an attorney, you were going to be expected to show up for trial and have this case continue with or without an attorney.

(VR p. 6 lns. 11-16 Judge Lee, May 12, 2010).

Subsequently, Judge CJ Lee gave Mr. Turk two options: the first option would be to grant a short continuance so he can retain counsel. The second option would be to “trail” this matter to judicial administration until a new courtroom opened to hear the matter. (VR p.7 lns 1-12 Judge Lee, May 12, 2010). Mr. Turk, understandably intimidated after being reprimanded, left the decision to the court’s discretion. (VR p.7 lns 20-21 Judge Lee, May 12, 2010). As a result, Judge CJ Lee (hereinafter “Judge Lee”) sent the matter to administration where the case “trailed” and eventually was heard in Judge Katherine Stolz’s Court (hereinafter “Judge Stolz”).

Mr. Turk renewed his motion for continuance before Judge Stolz citing the same circumstances that he did before Judge Lee. (VR p.2 lns 15-25 Judge Stolz, May 12, 2010). Judge Stolz, upon reviewing Judge Lee’s decision on the previous continuance denied it indicating that if he was represented by counsel, Mr. Robinson should have filed a Notice of Appearance (VR p.4 lns 12-15 Judge Stolz, May 12, 2010).

Mr. Turk informed both Judge Lee and Judge Stolz that he had an attorney. In Judge Stolz's court, Mr. Turk stated:

So I talked to Mr. Robinson, Terry Robinson, an attorney, and he has a court trial this morning and **couldn't be here, but he will take the case for me.**

(VR p.4 lns 12-15 Judge Stolz, May 12, 2010). (emphasis added).

Unfortunately, the trial court denied Mr. Turk’s motion and the

circumstances of his new attorney since a Notice of Appearance had not been filed.

THE COURT: All right. And you're representing yourself, Mr. Turk?

MR. TURK: So far, yes.

THE COURT: What do you mean "so far"?

MR. TURK: Well, I talked to an attorney-- excuse me your Honor. I talked to an attorney. He had a court date today. His name is Terry Robinson. He asked me to check in to his office as soon as I left here, but I've been here all day, so--

THE COURT: He's not put a notice of appearance in.

MR. TURK: I know. He hasn't had a chance.

(VR p.3 Ins. 15-25 Judge Stolz, May 12, 2010)

THE COURT: That's were it is. So your're going to trial, since Mr. Robinson hasn't actually put a notice of appearance in.

(VR p.4 Ins. 13-15 Judge Stolz, May 12, 2010).

Consequently, Mr. Turk sat through this trial, unrepresented, while Respondent's attorney, Michael Riggio, questioned witnesses, presented his evidence, and entered his exhibits. Mr. Turk, unsure how to proceed without counsel, admitted no evidence and only offered a brief opening statement (VR p.7-8 Judge Stolz, May 12, 2010).

The trial court found for Respondent, and a judgment was entered against Mr. Turk, as well as another Anti-Harassment Order. (VR p.35-38 Judge Stolz, May 12, 2010). The trial court basis this on its belief that "there's no excuse to be erecting a fence down the middle of the easement, unless you're basically attempting to harass your neighbor." (VR p.36 Ins 12-14 Judge Stolz, May 12, 2010).

No mention of Mr. Turk's counterclaim, affirmative defenses or a discussion on their relative merits took place on the record. (VR p.35-38 Judge Stolz, May 12, 2010). Subsequently, Mr. Robinson entered a Notice of Appearance and then withdrew after Mr. Turk obtained new counsel. (CP 253). Mr. Turk's new counsel, Pierre E. Acebedo, filed a motion to Vacate the Judgment citing the above reasons, which was denied. (CP 231).

4. Misrepresentations by Respondent at trial

At the trial, Respondent testified before Judge Stolz that she had not obstructed the easement in any way. She stated as follows:

Q. Have you done anything to your property, any sort of building or placement of any items--

A. No.

Q. --that have encroached on the easement?

A. No.

(VR p.11 Lns. 20-22 and 25 Judge Stolz, May 12, 2010).

Q: Now, you just heard the opening statement from Mr. Turk where he talks about you did something to encroach on the easement. Have you done anything to your property, any sort of building or placement of any items--

A. No.

Q. You have to let me finish.

A. Sorry.

Q. --that have encroached on the easement?

A. No.

(VR p.11-12 lns. 18-25 and 1 Judge Stolz, May 12, 2010).

Respondent also testified:

Q. Did your roommate ever do anything to obstruct or your daughter do anything to obstruct the easement?

A. No. If I may say something.

(VR p.26 lns 18-20 Judge Stolz, May 12, 2010).

This is inconsistent with the letters sent by Mr. Turk's previous attorney. Mr. Hales had warned Respondent several times regarding her impeding of the easement. One of these letters, dated August 3, 2002, states as follows:

This is to inform you that Mr. Turk reports that his markers in the easement have once again been pulled from their places and thrown into the back lots. A friend of your client also blocked his movement across the easement. **His request that your client and her friends remove vehicles from blocking the easement have been met with profanities.**

It appears that this is your client's response to Mr. Turk's request for cooperation contained in my last letter.

(CP 159). (emphasis added).

This evidence was not presented at the trial. However, the restriction of Mr. Turk's use was the very reason that Mr. Turk raised affirmative defenses such as Estoppel, Causation, Comparative Fault and Unclean Hands and counterclaimed for Ejectment and Quiet Title. (CP 249-50).

5. Findings of Fact and Conclusions of Law.

The Trial Court subsequently entered Findings of Fact and Conclusions of Law even though no evidence was provided to support them. (CP 127-31). The Court stated as follows:

Findings of Fact

6. Following purchase of the property at 3519 East 112th Street, Defendant began to take steps to block Plaintiff's access to the Driveway Easement.

8. Thereafter, [in May 2002] Defendant began to harass Plaintiff and to obstruct Plaintiff's use of the Driveway Easement based upon the fact that Plaintiff did not remove the portion of the carport roof which minimally encroached upon the eastern 7-1/2 foot portion of the driveway between their two properties.

9. In August, 2002 Plaintiff obtained an anti-harassment order from the Pierce County court against the Defendant in an attempt to prevent Defendant's offensive and harassing actions.

10. In May, 2008, Defendant once again began committing acts of unlawful harassment against Plaintiff and a second anti-harassment order was issued specifically ordering Defendant to refrain from blocking Plaintiff's use of the Driveway Easement and further restraining him from entering upon Plaintiff's property

Conclusions of Law:

1. Defendant has routinely obstructed the Driveway Easement executed and recorded in 1957.

6. An Anti-Harassment Order citing Defendant, to expire one year from this date, is signed today.

No Findings of Fact and/or Conclusions of Law demonstrate why an Anti-Harassment Order was warranted under RCW 10.14. This appeal ensued.

III. ARGUMENT

The standard of review for 60(b) decisions is "abuse of discretion". In re Dependency of J.M.R., 249 P.3d 193 fn.4. (2011). "A decision is based 'on untenable grounds' or made 'for untenable reasons' if it rests on facts unsupported in the record or was reached by applying the wrong legal standard." Mitchell v. Washington State Institution of Public Policy,

153 Wn.App 803, 821-22, 225 P.3d 280 (2009). (internal citations omitted). “A decision is ‘manifestly unreasonable’ if the court, despite applying the correct legal standard to the supported facts, adopts a view ‘that no reasonable person would take,’ and arrives at a decision ‘outside the range of acceptable choices.’ ” *Id.* (internal citations omitted).

1. THE TRIAL COURT ERRED IN NOT GRANTING A CONTINUANCE TO MR. TURK.

Mr. Turk informed both Judge Lee and Judge Stolz that he was represented by attorney Robinson on the date of the trial, yet both Judges failed to give Mr. Turk a short continuance or even evaluate the civil rules and case law regulating continuances. Pursuant to PCLR 40(B):

If a motion to change the trial date is made after the Deadline to Adjust Trial Date, the motion will not be granted except under extraordinary circumstances where there is no alternative means of preventing a substantial injustice. A continuance may be granted subject to such conditions as justice requires.

(emphasis added).

In Balandzich v. Demeroto, 10 Wn.App. 718, 720, 519 P.2d 994

(1974), the Appellate Court provided the following guidance:

In exercising its discretion, the court may properly consider the necessity of reasonably prompt disposition of the litigation; the needs of the moving party; the possible prejudice to the adverse party; the prior history of the litigation, including prior continuances granted the moving party; any conditions imposed in the continuances previously granted; and any other matters that have a material bearing upon the exercise of the discretion vested in the court.

Judge Lee did not even acknowledge that Mr. Turk found an attorney, as she requested. Instead, Judge Lee reprimanded Mr. Turk by stating as follows:

I do not take kindly to your continued excuses. I know it's tough finding a lawyer, but I also remember talking with you explicitly back in December that if you cannot find an attorney, you were going to be expected to show up for trial and have this case continue with or without an attorney.

(VR p. 6 lns. 11-16 Judge Lee, May 12, 2010).

Both Judges disregarded the possibility that Mr. Turk did retain an attorney, even though the attorney did not appear due to a scheduling conflict.

THE COURT: All right. And you're representing yourself, Mr. Turk?

MR. TURK: So far, yes.

THE COURT: What do you mean "so far"?

MR. TURK: Well, I talked to an attorney-- excuse me your Honor. I talked to an attorney. He had a court date today. His name is Terry Robinson. He asked me to check in to his office as soon as I left here, but I've been here all day, so--

THE COURT: He's not put a notice of appearance in.

MR. TURK: I know. He hasn't had a chance.

(VR p.3 lns. 15-25 Judge Stolz, May 12, 2010)

THE COURT: That's where it is. So you're going to trial, since Mr. Robinson hasn't actually put a notice of appearance in.

(VR p.4 lns. 13-15 Judge Stolz, May 12, 2010).

A. The Needs Of The Moving Party.

In evaluating the guidance in Balandzich, it is necessary to look at the needs of the moving party, Mr. Turk. Here, Mr. Turk simply needed a

short continuance of the date of the trial so that his new attorney could file a Notice of Appearance and effectively represent him in court. He did not ask for a lengthy continuance. He just simply wanted it long enough so his attorney could appear for him.

CR 40(B) provides that "a continuance may be granted subject to such conditions as justice requires." Clearly, after evaluating the circumstances and substantial prejudice against Mr. Turk, a short continuance to allow Mr. Robinson to be present was warranted.

Despite that, Judge Stolz refused to grant Mr. Turk a continuance because a Notice of Appearance was not filed by Mr. Robinson. This fact is not dispositive in denying or granting a moving party's continuance. What Mr. Turk had raised, however, was a more important issue, that of whether or not an attorney-client relationship had been made.

In Bohn v. Cody, 119 Wn.2d 357, 363, 832 P.2d 71 (1992), the Washington Supreme Court provided the following guidance regarding attorney-client relationships.

The essence of the attorney/client relationship is whether the attorney's advice or assistance is sought and received on legal matters. (citations omitted). The relationship need not be formalized in a written contract, but rather may be implied from the parties' conduct. In re McGlothlen, 99 Wn.2d 515, 522, 663 P.2d 1330 (1983).

Whether a fee is paid is not dispositive. McGlothlen, at 522, 663 P.2d 1330. The existence of the relationship turns largely on the client's subjective belief that it exists. McGlothlen, at 522.

The client's subjective belief, however, does not control the issue unless it is reasonably formed based on the attending

circumstances, including the attorney's words or actions.
(citations omitted).

Mr. Turk believed that Mr. Terry Robinson was his attorney. In support of this, Mr. Turk stated in Judge Lee's court that Mr. Robinson "has a court trial this morning and he couldn't be here, but he will take the case for me." (VR p.4 lns 12-15 Judge Lee, May 12, 2010). Mr. Robinson told Mr. Turk to show up alone on the day of trial and request a continuance. (CP 144). Mr. Turk did so informing the court about his situation.

MR. TURK: Well, I talked to an attorney. He had a court date today. His name is Terry Robinson. He asked me to check in to his office as soon as I left here, but I've been here all day, so--

THE COURT: He's not put in a notice of appearance in.

MR. TURK: I know. He hasn't had a chance.

(VR p.3 lns 20-25 Judge Stolz, May 12, 2010). Mr. Robinson filed a Notice of Appearance on May 18, 2010. (CP 253).

B. Any Conditions Imposed In The Continuances Previously Granted; And Any Other Matters That Have A Material Bearing Upon The Exercise Of The Discretion Vested In The Court.

One other continuance was given to Mr. Turk. The basis of this continuance was clearly warranted based on the fact that Mr. Turk never received notice that his prior attorney withdrew.

Mr. Turk showed up for the original trial date believing that he was represented and was ready for trial. (VR p.9-10 lns 1-6 and lns 3-10 Judge Lee, December 17, 2009). Judge Lee stated: "But based on the information provided before me, **Mr. Turk had no idea his counsel had**

withdrawn, and he was under the impression that he had counsel all along." (VR p.10 lns 3-10 Judge Lee, Dec 17, 2009). (emphasis added).

Mr. Turk was granted a continuance to find an attorney and he did find one. This was a completely different circumstance than the one previously before the court. The only similarity is that Mr. Turk believed in the attorneys that represented him.

C. The Possible Prejudice To The Adverse Party; Reasonably Prompt Disposition Of The Litigation.

The trial court should have granted a small continuance such that Mr. Turk's attorney could appear. No real prejudice would have occurred to the adverse party for a short continuance. This litigation was originally filed December 10, 2008. (CP 3). A couple of extra weeks would not have been prejudicial.

D. The Prior History Of The Litigation, Including Prior Continuances Granted The Moving Party.

Respondents will likely argue that this is not Mr. Turk's first motion for a continuance, however; as previously discussed, only one other continuance was granted in this case. The Court was quick to decide that a Notice of Appearance should have been filed and Mr. Robinson should have been present to ask for a continuance. (VR p.4 lns 13-14 Judge Stolz, May 12, 2010). However, most lay people do not have this knowledge. Instead they would reasonably believe that the information provided by their attorney was correct. Mr. Turk's mistake was acting on the advice given him by the attorney who represented him. (CP 144).

The trial court's failure to grant a short continuance so that Mr. Robinson could appear was such a substantial injustice that it reaches the level of clear abuse of discretion. Failure to acknowledge that Mr. Turk had an attorney shows that a proper analysis under 40(B) and case law was not performed.

2. THE TRIAL COURT ERRED WHEN IT FAILED TO RULE UPON MR. TURK'S COUNTERCLAIM AND AFFIRMATIVE DEFENSES AND AGAIN WHEN IT DID NOT VACATE THE JUDGMENT PURSUANT TO CR 60(B).

On or about January 21, 2009, Mr. Turk filed a counterclaim for Quiet Title/Ejectment with his Answer to Respondent's Complaint. However, that Counterclaim was never ruled upon or addressed at trial or in the Judgment. In addition, Mr. Turk's affirmative defenses were never discussed or ruled upon.

Civil Rule 13(a) states:

Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against an opposing party, if it arises out of the same transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

"The objective of CR 13 and its counterpart federal rule is the same: 'to provide complete relief to the parties, to conserve judicial resources and to avoid the proliferation of lawsuits.' " Warren Little & Lund, Inc. v. Max J. Kuney Co., 115 Wn.2d 211, 216, 796 P.2d 1263 (1990) (internal citations omitted). In fact, "a party's failure to plead a

counterclaim, that party is barred from asserting that claim as an independent claim.” Id. Unasserted compulsory counterclaims are res judicata. Id. at 220.

Further, the affirmative defenses of Estoppel, Causation, Comparative Fault and Unclean Hands, filed properly under Civil Rule 12 (Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross claim, or third party claim, shall be asserted in the responsive pleading thereto if one is required....") were also not addressed or ruled upon by the court.

No ruling or dismissal of the counterclaim (or affirmative defenses), along with the fact that no basis was provided by the court for the inaction, results in an abuse of discretion. As a result, this case should be remanded back to the trial court for a full and fair trial on the merits of the counterclaim.

3. THE TRIAL COURT ABUSED ITS DISCRETION IN GRANTING AN ANTI-HARASSMENT ORDER WITH NO EVIDENCE ON THE RECORD SUPPORTING THE ISSUANCE OF AN ANTI-HARASSMENT ORDER.

An Anti-Harassment Order was improperly issued by the trial court since no evidence was provided to support ongoing harassment.

According to RCW 10.14.020(1) Unlawful Harassment:

means a knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, harasses, or is detrimental to such person, and which serves no legitimate or lawful purpose. **The course of conduct shall be such as would cause a reasonable person to suffer substantial emotional distress, and shall actually cause substantial emotional distress to the petitioner, or, when**

the course of conduct would cause a reasonable parent to fear for the well-being of their child.

(Emphasis added). Broken down further, the elements that must be met to obtain an anti-harassment order are: (1) a knowing and willful (2) course of conduct (3) directed at a specific person (4) which seriously alarms, annoys, harasses, or is detrimental to such person, and (5) which serves no legitimate or lawful purpose. *See* RCW 10.14.020.

The only evidence regarding harassment allegations provided at trial consists of the following testimony by Respondent from direct examination by her attorney.

Q. Well, how did you --did you ever seek any anti-harassment order from Pierce County?

A. Yes, I did.

Q. What were the circumstances around that?

A. He was saying very bad names to us, flipping us off every time we were out of the house, putting stuff on the easement in front of my gates of the fence, I have photos of that, and just being terrible.

Q. Was any of it threatening to you?

A. Yes.

Q. All right. How many times did you seek anti-harassment orders?

A. Two times.

Q. Why did you do it the second time?

A. Because he was calling my daughter names, my roommate names, flipping us off. I was afraid. My car--tires of car got punctured. My bird houses got stolen.

Q. Were you ever able to attribute that?

A. I couldn't prove it was him.

Q. All right. Were your anti-harassment orders granted by a court in Pierce County?

A. Yes.

Q. Do you still have an order in existence?

A. No, I don't, but I would like one.

Q. Why is that?

compulsory counterclaim will prevent that party from subsequently bringing a separate action on that claim." Chew v. Lord, 143 Wn.App. 807, 814, 181 P.3d 25 (2008).

Here, the basis for the counterclaim was that Respondent was herself impeding access to the easement by building further onto her structure, parking on the easement, and placing wood piles on the easement. These actions prevented Mr. Turk's use and quiet enjoyment of his property. (CP 251).

In Lewis County Savings and Loan Assoc. v. Black, 60 Wn.2d 362, 369, 374 P.2d 157 (1962), the Washington State Supreme Court reversed a decision that dismissing a counterclaim when "[t]he court did not state its reasons for dismissing appellants' counterclaim without prejudice, and the record contains no fact which would support such a judgment."

In the present case, Mr. Turk's counterclaim was not ruled upon, or even contemplated by the court. Nothing in the Verbatim Report even mentions the counterclaim. Further, the Findings of Fact, Conclusions of Law and Judgment do not dismiss the counterclaim. (CP 127-31).

No decision on the counterclaim places Mr. Turk in a precarious situation since a court could now determine that the counterclaim arose out of the same transaction or occurrence that is the subject matter of the opposing party's claim. See Krikava v. Webber, 43 Wn.App. 217, 219, 716 P.2d 916 (1986). "If a party does not assert a compulsory

A. Because I'm afraid if he gets that fence -- if he has to take the fence down, that there is going to be serious problems.

(VR p.27-28 Judge Stolz, May 12, 2010). This language does not describe any recent actions by Mr. Turk that would warrant an anti-harassment order. In addition, no prior Anti-Harassment Orders were presented as evidence in this case. (CP 121-23). This would have at least provided the court with information regarding what prior actions were ruled upon by the court.

In examining the elements, no evidence was provided supporting an ongoing "knowing and willful" "course of conduct" directed at Respondent, which "seriously alarms or harasses, or is detrimental to such person" and which "serves no legitimate purpose." RCW 10.14.020. The fence was placed in 2009, yet Respondent waited almost a year to seek an order. (VR p.27-28 Judge Stolz, May 12, 2010).

Nothing on the record supports that an Anti-Harassment Order should have been granted by the Court. No evidence was entered regarding any date of any alleged harassing actions. Moreover, no evidence suggests that Respondent was suffering from emotional distress and actually has suffered from "substantial emotional distress." RCW 10.14.020.

Interestingly, the first restraining order allegedly took place in this case took place in 2002, however; the only evidence even in the Clerk's papers of this is a "Motion to Reconsider Order for Protection and Notice

of Hearing." (CP 11-12). Since it is a motion for reconsideration, and no proof was provided at trial, it places serious doubt on whether an order was ever entered by any court in 2002. (CR 11-12).

The 2008 Anti-Harassment Order was obtained expired July 22, 2009, almost a year prior to the trial date in this case. Again, no proof of this order or the date of the order was ever entered with the court.

Nothing in Respondent's testimony indicates that actions have occurred since the prior order, or when the actions were alleged to have occurred. Respondent acknowledges that she cannot prove many of the allegations. "Because he was calling my daughter names, my roommate names, flipping us off. I was afraid. My car--tires of car got punctured. My bird houses got stolen." (VR p.27 lns 19-21 Judge Stolz, May 12, 2010). This was followed up with "I couldn't prove it was him." (VR p.27 ln 23 Judge Stolz, May 12, 2010).

No new evidence was provided by Respondent to support an Anti-Harassment order. As a result, the trial court granted the harassment order for possible future conduct. The trial court stated, "There's no excuse to be erecting a fence down the middle of the easement, unless you're basically attempting to harass your neighbor." (VR p.36 lns 12-14 Judge Stolz, May 12, 2010). The Judgment itself required the removal of the fence; any additional anti-harassment order was duplicative and unwarranted. (CP 132-34).

4. THE TRIAL COURT ERRED IN ENTERING FINDINGS OF FACT AND CONCLUSIONS OF LAW NOT SUPPORTED BY THE EVIDENCE PRESENTED AT TRIAL.

The Findings of Fact and Conclusions of Law hereinafter described have no evidence on the record to support them. “Questions of law and conclusions of law are reviewed de novo.” Sunnyside Valley Irrig. Dist. v. Dickie, 149 Wn.2d 873, 880, 73 P.3d 369 (2003). Further, “any conclusion of law erroneously denominated a finding of fact will be subject to de novo review.” Robel v. Roundup Corp., 148 Wn.2d 35,43, 59 P.3d 611 (2002).

“A finding of fact is the assertion that a phenomenon has happened or is or will be happening independent of or anterior to any assertion as to its legal effect.” Leschi Improvement Council v. Wash. State Highway Comm'n., 84 Wash.2d 271, 283, 525 P.2d 774 (1974) (internal citations omitted). In the end, “A trial court's findings of fact must justify its conclusions of law.” Mitchell, 153 Wn.App at fn7.

The following Findings of Fact and Conclusions of Law were not supported by any evidence provided by Respondents in this case.

Findings of Fact:

6. Following purchase of the property at 3519 East 112th Street, Defendant began to take steps to block Plaintiff's access to the Driveway Easement.

8. Thereafter, [in May 2002] Defendant began to harass Plaintiff and to obstruct Plaintiff's use of the Driveway Easement based upon the fact that Plaintiff did not remove the portion of the carport roof which minimally encroached upon the eastern 7-1/2 foot portion of the driveway between their two properties.

9. In August, 2002 Plaintiff obtained an anti-harassment order from the Pierce County court against the Defendant in an attempt to prevent Defendant's offensive and harassing actions.

10. In May, 2008, Defendant once again began committing acts of unlawful harassment against Plaintiff and a second anti-harassment order was issued specifically ordering Defendant to refrain from blocking Plaintiff's use of the Driveway Easement and further restraining him from entering upon Plaintiff's property

Conclusions of Law:

1. Defendant has routinely obstructed the Driveway Easement executed and recorded in 1957.

6. An Anti-Harassment Order citing Defendant, to expire one year from this date, is signed today.

Contrary to what is suggested in Findings of Fact #6, no evidence supports that Mr. Turk began blocking Respondent's access 15 years (approximately 1995) prior to trial, when Respondent acquired the property. (VR p.7 lns 2-3, Judge Stoltz, May 12, 2010).

Finding of Fact #9 suggests an anti-harassment order was obtained in 2002, but no evidence was submitted supporting this and no testimony of a 2002 order was discussed at trial.

Finding of Fact #10 states that in 2008 harassment took place, but no testimony of when the alleged actions took place occurred anywhere in the testimony. Once again, no order was provided to the court showing that an Anti-Harassment Order existed.

Conclusion of Law #1 seems to suggest that Mr. Turk has been infringing on the easement since 1957. Mr. Turk did not even own the

property until approximately 1995. (VR p.7 lns 2-3, Judge Stoltz, May 12, 2010). No evidence supports this conclusion and it is also so general and broad to suggest that Mr. Turk infringed upon the easement daily, as part of his routine.

Conclusion of Law #6 orders an Anti-Harassment Order with no basis. The trial court suggests that "there's no excuse to be erecting a fence down the middle of the easement, unless you're basically attempting to harass your neighbor." (VR p.36 lns 12-14 Judge Stolz, May 12, 2010). That is the only basis stated by the court. This conclusory statement does not meet the aforementioned requirements of RCW 10.14.020. Further, the court already required the fence to be removed making this order duplicative. The Findings of Fact and Conclusions of Law simply cannot be supported by the evidence provided at trial.

5. THE TRIAL COURT ERRED IN FAILING TO PROPERLY CONSIDER THAT RESPONDENT MADE SEVERAL MATERIAL MISREPRESENTATIONS TO THE COURT WHEN IT DID NOT VACATE THE JUDGMENT PURSUANT TO CR 60(B).

This case should be remanded for a new trial due to Respondents misrepresentations pursuant to CR 60(b)(4). CR 60(b)(4) requires that Mr. Turk provide evidence to support the contention that the judgment was obtained by misrepresentation or misconduct of the adverse party. See generally Bergren v. Adams County, 8 Wn.App 853, 856, 509 P.2d 661 (1973). The standard of review for 60(b) decisions is "abuse of discretion". In re Dependency of J.M.R., 249 P.3d at fn.4.

The rule itself, by its terms, applies to levels of misconduct that do not necessarily rise to the level of fraud. Suburban Janitorial Servs. v. Clarke American, 72 Wn.App. 302, 308 n.7, 863 P.2d 1377 (1993). In fact, CR 60(b)(4) “is aimed at judgments which were unfairly obtained.” Peoples State Bank v. Hickey, 55 Wn. App. 367, 372, 777 P.2d 1056 (1989).

Clear and convincing evidence of fraud, misrepresentation, or other misconduct of an adverse party serves as a basis for relief from a judgment if the moving party was “prevented from fully and fairly presenting its case or defense.” Id. Here, Respondent testified that she has never placed anything on the easement that may impede its use.

Q: Now, you just heard the opening statement from Mr. Turk where he talks about you did something to encroach on the easement. Have you done anything to your property, any sort of building or placement of any items--

A. No.

Q. You have to let me finish.

A. Sorry.

Q. --that have encroached on the easement?

A. No.

(VR p. 11-12 Ins. 18-25 and 1 Judge Stolz May 12, 2010).

Q. Have you done anything to your property, any sort of building or placement of any items--

A. No.

Q. --that have encroached on the easement?

A. No.

(VP p.11 Ins. 20-22 and 25 Judge Stolz, May 12, 2010). This is reconfirmed for a third time at:

Q. Did your roommate ever do anything to obstruct or your daughter do anything to obstruct the easement?

A. No. If I may say something.

(VR p. 26 lns 18-20, Judge Stolz, May 12, 2010.)

These repeated representations are patently false. In Petitioner's Motion to Vacate the Judgment, Mr. Turk provides photographs of Respondent and/or her roommate parking on the easement, as well as letters to Respondent, dated back through 2000 asking that she not park on the easement. (CP 165, 167, 157, 159). One of these letters, dated August 3, 2002, states as follows:

This is to inform you that Mr. Turk reports that his markers in the easement have once again been pulled from their places and thrown into the back lots. A friend of your client also blocked his movement across the easement. **His request that your client and her friends remove vehicles from blocking the easement have been met with profanities.**

It appears that this is your client's response to Mr. Turk's request for cooperation contained in my last letter.

(CP 159). (emphasis added).

This evidence is clearly contradictory to Respondent's answer. Respondent's answer at trial is a clear "no" several times. This implies that she has never, not once, impeded the easement during her ownership of the property, which is simply not true. If Respondent had testified truthfully, it is likely that it would have had an effect on the outcome of the trial.

It is probable that if Judge Stolz knew that Respondent herself was herself impeding the easement, she would either have denied the restraining order or would have made a different ruling, or at a minimum a mutual restriction on blocking the easement. Although the judge may have ruled differently, "[a] new trial based upon the prevailing party's misconduct does not require a showing the new evidence would have materially affected the outcome of the first trial." CR 60(b)(4). See also Taylor v. Cessna Aircraft Inc., 39 Wn.App 828, 836, 696 P.2d 28 (1985) (internal citations omitted).

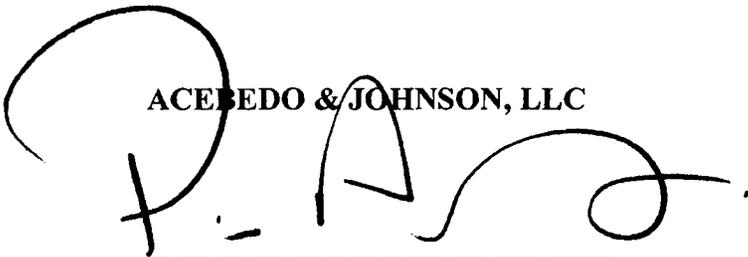
Mr. Turk's counterclaim for Ejectment/Quiet Title is also evidence that Respondent was impeding the easement. (CP 251). Unfortunately, Mr. Turk's counterclaim was not considered by the court. The simple fact is that Respondent's impeding of the easement was the very reason that Mr. Turk found it necessary to put up a fence, to protect his right to use the easement.

Respondent is guilty of misrepresenting that rose to the level of misconduct under 60(b)(4). Case law provides that "[i]t is immaterial whether the misrepresentation was innocent or willful. The effect is the same whether the misrepresentation was innocent, the result of carelessness, or deliberate." People's State Bank v. Hickey, 55 Wn.App at, 371. (citations omitted). Respondent's misrepresentations resulted in her obtaining a one-sided decision at trial. As a result, this case should be remanded for a new trial.

IV. CONCLUSION

Mr. Turk requests that this court REVERSE the trial court's decision and REMAND this case back to Superior court for a full and fair trial on its merits.

DATED this 9 day of May 2011.


ACEBEDO & JOHNSON, LLC

Pierre E. Acebedo, WSBA #30011
Attorney for Appellants

DECLARATION OF SERVICE

COURT OF APPEALS DIVISION II STATE OF WASHINGTON

APPEAL FROM THE SUPERIOR COURT FOR PIERCE COUNTY

Court of Appeals No. 41186-5-II

ROBERT TURK AND DONNA TURK Husband and Wife

Appellants

VALERIE K. TENAS, an Individual

Respondent.

COURT OF APPEALS
DIVISION II
MAY 11 PM 4:32
STATE OF WASHINGTON
BY [Signature] DEPUTY

Service Documents: BRIEF OF THE APPELLANTS.

Received by Eclipse Process Service on the 9th day of May 2011 to be served on Michael Riggio.

I, Darrin Sanford do hereby affirm that on the 9th day of May, 2011 at 10:45 AM at his place of business, Luce & Associates PS. 4505 Pacific Hwy E Suite A Tacoma WA 98424.

I Personally served at the time and place set forth above, a true and correct copy of the **BRIEF OF THE APPELLANTS** leaving same with Michael Riggio.

Description of Service: Documents served upon Candi Wennemar Legal Assistant to Michael Riggio at his place of business, Luce & Associates PS 4505 Pacific Hwy E Suite A Tacoma WA 98424.

Race: Caucasian, Sex: F, Age: Approximately 50, Height: 5' 5", Weight: 160. Hair: Light Gray.

I Declare under penalty of perjury under the laws of the State of Washington: That I am now and at all times herein mentioned a citizen of the United States and resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above entitled action and competent to be a witness herein.



Darrin Sanford # King 1015853 Eclipse Process Service LLC