

FILED
COURT OF APPEALS
DIVISION II

11 MAR 17 AM 10:15

STATE OF WASHINGTON
BY S DEPUTY

No. 41187-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

RICHARD TAKACH AND KARI JONASSEN, Respondents,

v.

Benter A. Oriko, Appellant,

**Plaintiff-Respondent Richard Takach's
Response Brief**

J. Michael Mattingly, WSBA #33452
Allen E. Eraut, WSBA #30940
Attorneys for Plaintiff-Respondent Richard Takach

Rizzo Mattingly Bosworth PC
411 S.W. 2nd Avenue, Suite 200
Portland, OR 97204
(503) 229-1819

TABLE OF CONTENTS

INTRODUCTION 1

ASSIGNMENTS OF ERROR 1

STATEMENT OF THE CASE 1

ARGUMENT 5

I. The Defendant Failed to Preserve Error Regarding the Trial
Court’s Award of Damages to Plaintiffs 5

II. Defendant Failed to Preserve Her Second Assignment of Error
Regarding the Trial Court’s Award of Attorney Fees 8

III. The Trial Court Correctly Denied Defendant’s Second Motion to
Postpone the Trial 11

CONCLUSION 13

TABLE OF AUTHORITIES

Hanson v. Estell, 100 Wn.App. 281, 997 P.2d 426 (2000)..... 7, 9, 10

Harris v. Drake, 152 Wn.2d 480, 492-93, 99 P.3d 872 (2004)..... 11, 12

Keesling v. City of Seattle, 52 Wn.2d 247, 253,
324 P.2d 806 (1958)..... 7

Last Chance Riding Stable v. Stephens, 66 Wn.App. 710, 714-15,
832 P.2d 1353 (1992)..... 10

Lay v. Hass, 112 Wn.App. 818, 825, 51 P.3d 130 (2002)..... 10

Lay v. Hass, 112 Wn.App. 818, 823, 51 P.2d 130 (2002)..... 9

Public Utilities Dist. No. 1 v. Crea, 88 Wn.App. 390, 394-95,
945 P.2d 722 (1997)..... 10

Salas v. Hi-Tech Erectors, 168 Wn.2d 664, 671 n.2,
230 P.3d 583 (2010)..... 6

State v. O’Hara, 167 Wn.2d 91, 98,
217 P.3d 756 (2009)..... 6

State v. Scott, 110 Wn.2d 682, 685, 757 P.2d 492 (1988)..... 6

Trummel v. Mitchell, 156 Wn.2d 653, 670-71,
131 P.3d 305 (2006)..... 12

Weyerhaeuser Co. v. Commercial Union Ins. Co., 142 Wn.2d 654, 683,
15 P.3d 115 (2000)..... 12

Statutes and Court Rules

RAP 2.5(a) 6, 9

RCW 4.84.185 8

RCW 4.84.250 8, 9

INTRODUCTION

Plaintiffs-respondents Richard Takach and Kari Jonassen (“plaintiffs”) filed this lawsuit against defendant-respondent Benter A. Oriko (“defendant”) alleging trespass on June 20, 2006. Following a long delay caused by defendant’s bankruptcy, this matter came up for trial on June 9, 2010, almost four years after the lawsuit was filed. Defendant failed to appear at the trial, and after an evidentiary hearing, the trial court entered a judgment in favor of plaintiff. On August 4, 2010, plaintiffs set a hearing for their cost bill, which also sought an award of attorney fees, for August 13, 2010. Defendant did not object to the cost bill, nor did she appear for the hearing. The trial court award the costs and fees sought by plaintiffs. Defendant now appeals the trial court’s judgment and award of costs and attorney fees despite her failure to appear at either hearing.

RESPONSES TO ASSIGNMENTS OF ERROR

1. Defendant failed to preserve her first assignment of error regarding the trial court’s award of monetary damages.
2. Defendant failed to preserve her second assignment of error regarding the trial court’s award of attorney fees.
3. The trial court did not abuse its discretion when it denied defendant’s motion for a continuance of the trial date.

STATEMENT OF THE CASE

Plaintiffs filed this lawsuit on June 20, 2006. CP 3. They alleged that defendant, their neighbor, had built a decorative pond, fountain, and walking area made of stone pavers (collectively referred to as the “pond”)

that encroached upon plaintiffs' property. CP 3-4. Plaintiffs sought damages for trespass and injunctive relief requiring defendant to remove the portions of the pond that encroached upon their property. CP 4. An Amended Complaint was filed the next day with the same substantive allegations. CP 5-6.

Defendant filed a Notice of Appearance on July 18, 2006. CP 7. Unknown to plaintiffs, defendant had filed a bankruptcy petition prior to this lawsuit. CP 27-49. Because of the defendant's ongoing bankruptcy proceedings, plaintiffs were unable to actively litigate their claims against defendant. CP 20. On November 2, 2007, defendant's attorneys withdrew as counsel for defendant. CP 14-15.

Despite plaintiffs' inability to actively litigate their lawsuit due to defendant's ongoing bankruptcy proceedings, defendant filed a Motion to Dismiss for Want of Prosecution on December 31, 2007. CP 17-18. Plaintiffs opposed that motion on the ground that defendant's own bankruptcy was the cause of the delay in the proceedings. CP 20-22. On February 19, 2008, the trial court entered an order denying plaintiff's motion to dismiss. CP 54-55.

On May 11, 2009, defendant's bankruptcy proceeding was closed. CP 68-71. However, defendant had filed a second bankruptcy petition in 2008. CP 62-63. On June 5, 2009, plaintiffs moved the bankruptcy court for relief from the second bankruptcy stay so that this matter could proceed. CP 73-76. After a hearing on that motion, the bankruptcy court

dismissed defendant's second bankruptcy petition on August 4, 2009. CP 83.

With both of defendants' bankruptcy matters concluded, plaintiffs demanded that defendant file an answer in this matter. CP 85. On August 29, 2009 – more than three years after this lawsuit was filed – defendant filed her Answer, Defenses, and Affirmative Defenses to Plaintiffs' Amended Complaint. CP 120-22. Since her prior attorney had resigned in November 2007, she had not retained new counsel in this matter. Thus, her answer was filed pro se. Id.

The trial date was set for March 29, 2010. CP 266. However, on January 15, 2010, defendant filed a Motion for Continuance of Both (1) Trial Date and (2) Discovery Deadlines. CP 267-69. She argued that due to financial difficulties and unemployment, she was unable to complete discovery or retain an attorney. Id. Plaintiffs opposed that motion on the ground that the case had already suffered significant delay due to defendant's bankruptcy proceedings and because there was nothing preventing her from moving forward with discovery. CP 310-11.

The trial court granted defendant's motion for continuance and ordered that a new trial date be set within three months. CP 319-20. Shortly thereafter, the trial court issued an Amended Trial Setting Notice. CP 321. The new trial date was set for June 9, 2010. Id.

On May 25, 2010, defendant filed a Second Motion for Continuance of Both: (1) Trial Date and (2) Discovery Deadlines. CP 355-56. Defendant's second motion was almost a carbon-copy of her first

motion for continuance, with the primary difference being that she stated that she had recently obtained new employment. Id. Plaintiff represented that she still had not completed discovery and, as had been the case since November 2007, she still had not hired an attorney. Id.

Plaintiffs once again opposed defendant's second motion for continuance. CP 358-60. Plaintiffs noted that the lawsuit was nearly four years old and that defendant had already engaged in substantial discovery. CP 359. Moreover, plaintiffs noted that there was some question regarding the veracity of defendant's averment that she was unemployed. Id. The trial court denied plaintiff's second motion for continuance on the ground that it was not properly before the court. Tr. 28.

On June 9, 2010, plaintiffs appeared before the court prepared to proceed to trial. Tr. 4. Defendant failed to attend the trial. Id. Plaintiffs then proceeded to present, through witness testimony and documentary evidence, a prima facie case of trespass to the trial court. Tr. 6-23.

After this evidence was presented, the trial court considered potential outcomes that would be of benefit to the parties, including a proposal to leave the pond intact while entering a judgment in favor of plaintiffs quieting title to the land at issue. Tr. 24-27. The trial court further considered the need for some award of damages to allow plaintiffs to repair the property line. Tr. 27. While it was prepared to award the damages established by the plaintiffs (including an award for the cost of removing the offending portion of the pond), the trial court required the

plaintiffs to commit to removal of the offending portion of the pond before that element of damages would be allowed. Tr. 27-28.

On August 5, 2010, plaintiffs filed their Notice of Presentation of Judgment and Motion for Award of Attorney Fees. CP 459-463. The hearing date for this proceeding was set for August 13, 2010. CP 467. Plaintiff did not file an opposition or objection, or otherwise respond, to plaintiffs' motion for attorney fees. Absent any objection from defendant, plaintiffs' motion for award of attorney fees was entered by the court pursuant to RCW 4.84.250. CP 469-70. Moreover, absent any objection from defendant, the trial court entered the plaintiffs' proposed Money Judgment Quieting Title. CP 464-66.

Plaintiff filed a Notice of Appeal on August 31, 2010.

ARGUMENTS

I

The Defendant Failed to Preserve Error Regarding the Trial Court's Award of Damages to Plaintiffs.

Defendant's first assignment of error is that the trial court improperly awarded damages in favor of plaintiffs in a claim to quiet title on property. (Op. Br. 8) However, defendant failed to appear at trial and, therefore, failed to preserve any error regarding the trial court's award of damages. Moreover, on the merits, defendant's first assignment of error is incorrect because plaintiffs' complaint was for trespass.

This court well knows that issues that are not properly raised before the trial court generally will not be reviewed on appeal. RAP 2.5(a). “[T]he purpose of the error preservation requirement is to allow the trial court an opportunity to correct the error by bringing it to the court’s attention.” Salas v. Hi-Tech Erectors, 168 Wn.2d 664, 671 n.2, 230 P.3d 583 (2010). This serves to encourage the efficient use of judicial resources. State v. O’Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). “[A]ppellate courts will not sanction a party’s failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal and a consequent new trial.” Id. (quoting State v. Scott, 110 Wn.2d 682, 685, 757 P.2d 492 (1988)). The only three exceptions to this rule are: (1) lack of trial court jurisdiction; (2) failure to establish facts upon which relief can be granted; and (3) manifest error affecting a constitutional right. RAP 2.5(a). None of these exceptions apply.

Defendant failed to appear at trial. Tr. 4. She did not present any witnesses or evidence, nor did she make any arguments. Moreover, she did not file any pretrial objections to plaintiffs’ claim for monetary damages in this case. In short, defendant made no attempt to place the validity of an award of damages in this case before the trial court. Thus, defendant waived her first assignment of error regarding the trial court’s award of damages to plaintiffs. RAP 2.5(a).

Even if defendant had properly raised the validity of an award of damages, the trial court correctly awarded damages in favor of plaintiffs.

Defendant baldly asserts, with no authority, that a trial court may not award damages in an action to quiet title. (Op. Br. 8-9) Contrary to defendant's assertion, plaintiffs' first claim for relief was for trespass. CP 5-6, 370-71. It is well-established that damages may be awarded in an action for trespass. Keesling v. City of Seattle, 52 Wn.2d 247, 253, 324 P.2d 806 (1958). Moreover, an award of damages for trespass is permissible in conjunction with a judgment to quiet title. See Hanson v. Estell, 100 Wn.App. 281, 997 P.2d 426 (2000). That the trial court in this case quieted title on the area where defendant's pond encroached on plaintiffs' property does not alter the plaintiffs' right to recover damages as a remedy for their trespass claim.

Finally, defendant's argument in support of her first assignment of error vividly illustrates the reason that an issue must be raised before the trial court before it will be reviewed on appeal. The form of the judgment entered in this case was prepared at the suggestion of the judge as a practical solution to a real property dispute between neighbors. Had defendant questioned an award of damages that accompanied a judgment quieting title, then the judgment plaintiffs would have had an opportunity to address any concerns that defendant may have had. However, defendant did not raise the issue below, and she may not now request that this court review the unpreserved assignment of error.

II

Defendant Failed to Preserve Her Second Assignment of Error Regarding The Trial Court's Award of Attorney Fees.

As with her first assignment of error, defendant has failed to preserve her second assignment of error regarding the trial court's award of attorney fees under RCW 4.84.250.¹ As with her failure to appear at trial, plaintiff simply failed to oppose plaintiffs' motion for attorney fees.

Having prevailed at a trial in which defendant failed to appear, plaintiffs properly moved the court for an award of attorney fees pursuant to RCW 4.84.250 and 4.84.185.² CP 459-63. In support of their motion, plaintiffs established that they had placed defendant on notice of their intent to seek attorney fees in this matter. CP 417-18. Defendant did not file an objection or otherwise oppose this motion. Having heard from only the plaintiffs, and the defendant having failed to offer any opposition, the trial court granted the plaintiffs' motion for an award of attorney fees pursuant to RCW 4.84.250, but not under RCW 4.84.185. CP 469-70. Indeed, had defendant raised this issue below, plaintiffs would have had an opportunity to submit a more detailed record of the notice that was

¹ RCW 4.84.250 provides: "Notwithstanding any other provisions of chapter 4.84 RCW and RCW 12.20.060, in any action for damages where the amount pleaded by the prevailing party as hereinafter defined, exclusive of costs, is seven thousand five hundred dollars or less, there shall be taxed and allowed to the prevailing party as a part of the costs of the action a reasonable amount to be fixed by the court as attorneys' fees. After July 1, 1985, the maximum amount of the pleading under this section shall be ten thousand dollars."

² RCW 4.84.185 allows for the recovery of attorney fees for opposing a frivolous defense.

provided to defendant. Thus, defendant has waived any error regarding the trial court's award of attorney fees to plaintiffs. RAP 2.5(a).

Even if this court were to review the merits of that award, the trial court's award of attorney fees to plaintiff was correct. It is well-established that an award of attorney fees under RCW 4.84.250 will be reviewed only for "manifest abuse of discretion." Lay v. Hass, 112 Wn.App. 818, 823, 51 P.2d 130 (2002).

RCW 4.84.250 allows for the recovery of attorney fees in claims for less than \$10,000. The underlying purpose for this statute is "to enable a party to pursue a meritorious small claim without seeing his award diminished in whole or in part by attorney fees." Northside Auto Service, Inc. v. Consumers United Ins. Co., 25 Wn.App. 486, 492, 607 P.2d 890 (1980).

In arguing that the trial court erred by awarding attorneys fees to plaintiffs, defendant argues that RCW 4.84.250 does not apply to lawsuits that seek to quiet title to real property. (Op. Br. 9). However, as noted above, plaintiffs claim was for trespass. CP 5-6, 370-71. That the trial court also quieted title as part of plaintiffs' relief does not affect the nature of plaintiffs' claim.

This court has previously affirmed an award of attorney fees under similar facts. Hanson, 100 Wn.App. at 289. In Hanson, the defendant prevailed on a counterclaim for trespass, and the trial court awarded damages in the amount of \$100. The defendant had offered to settle the counterclaim for \$200 before trial. The trial court granted the defendant's

request for attorney fees, stating that awarding fees supports the statutory purpose of encouraging settlements, and that “parties are penalized when they unjustifiably bring or resist small claims.” Id. Before filing this lawsuit, plaintiffs had offered to keep the properties as they were, if defendant simply recognized plaintiffs’ ownership, paid for plaintiffs’ out-of-pocket costs for a survey, and attorney fees. CP 417-18. Defendant declined that offer, leading to this litigation. Defendant has unjustifiably resisted this small claim, and an award of attorney fees is appropriate.

Defendant’s second argument is that the trial court was not permitted to award attorney fees where they were not alleged in the complaint. (Op. Br. 10) To be sure, the defendant must be given notice in advance that the plaintiffs were going to seek attorney fees in this matter. Lay v. Hass, 112 Wn.App. 818, 825, 51 P.3d 130 (2002). However, the damages need not be alleged in the complaint; actual notice is sufficient. Id. at 824. Indeed, a settlement offer has been deemed sufficient to provide notice under the statute. Public Utilities Dist. No. 1 v. Crea, 88 Wn.App. 390, 394-95, 945 P.2d 722 (1997); see also Last Chance Riding Stable v. Stephens, 66 Wn.App. 710, 714-15, 832 P.2d 1353 (1992) (indicating that a settlement offer in which the party states an intent to seek attorney fees is sufficient notice under the statute). As noted above, plaintiffs alerted defendant of their intent to seek attorney fees through correspondence sent on July 25, 2006 in which plaintiffs offered to resolve this matter. CP 417-18. That is all that is required.

III

The Trial Court Correctly Denied Defendant's Second Motion to Postpone the Trial.

Defendant's third and final assignment of error is that the trial court erred by denying her Second Motion to Continue the Trial. Defendant's argument lacks merit for two key reasons: (1) defendant failed to properly place the motion before the trial court for a hearing; and (2) the trial court did not abuse its discretion.

Defendant filed her second motion to continue the trial date on May 25, 2010, just two weeks before the June 9 trial date. CP 355-56. However, defendant failed to properly cite the motion before the court. Tr. 28. Thus, the trial court found the motion to be procedurally improper and was not placed onto the trial court's docket. Id. Accordingly, defendant's second motion to continue the trial date was never properly before the trial court.

Moreover, even had defendant's motion been placed on the court's docket, denial of that motion was within the trial court's discretion. It is well-established that a trial court's denial of a motion to continue the trial date is reviewed for "abuse of discretion." Harris v. Drake, 152 Wn.2d 480, 492-93, 99 P.3d 872 (2004). When exercising its discretion, a trial court may consider several factors, including the necessity of reasonably prompt disposition of the litigation, the needs of the moving party, prejudice to the adverse party, prior history of the litigation (including prior continuances granted to the moving party), conditions imposed on

prior continuances, and any other matter having a material bearing on the exercise of discretion vested in the court. Trummel v. Mitchell, 156 Wn.2d 653, 670-71, 131 P.3d 305 (2006). A trial court abuses its discretion only if its decision is manifestly unreasonable, exercised on untenable grounds, or is arbitrary. Id. at 671; Harris, 152 Wn.2d at 493; Weyerhaeuser Co. v. Commercial Union Ins. Co., 142 Wn.2d 654, 683, 15 P.3d 115 (2000). Defendant's only substantive argument on appeal is that she needed additional time to retain an attorney. (Op. Br. 10-11)

Plaintiffs had filed their lawsuit four years before the June 9, 2010 trial date. CP 3-4. In November 2007, defendant's attorney withdrew as her counsel. CP 14-15. Over the next two-and-a-half years, defendant did not attempt to retain an attorney to represent her in this matter. Indeed, she had already sought, and obtained, a continuance of the first trial date in this case after she had asserted a need for time to retain an attorney. CP 267-69. Yet even with that continuance, defendant still did not retain an attorney to represent her in this matter. Rather, she sought another continuance of the trial date four months later, and only two weeks before trial, once again because she still had not retained an attorney. CP 355-56. After four years of waiting caused by defendant's bankruptcy proceedings and her own delays, plaintiffs were entitled to have their claims heard in court. The trial court did not abuse its discretion.

CONCLUSION

For the reasons set forth above, the trial court's Money Judgment Quieting Title should be affirmed.

DATED this 16th day of March, 2011.

Respectfully submitted,

RIZZO MATTINGLY BOSWORTH, P.C.



J. Michael Mattingly, WSBA #33452
Allen E. Eraut, WSBA #30940
Attorneys for Plaintiff-Respondent
Richard Takach

CERTIFICATE OF SERVICE
(Takach v. Oriko)

I HEREBY CERTIFY that on the 16 day of March, 2011 a true and correct copy of the foregoing **PLAINTIFF-RESPONDENT RICHARD TAKACH'S RESPONSE BRIEF** was served upon the following parties in the manner indicated:

I am employed by the law firm of Rizzo Mattingly Bosworth PC in Portland, Oregon. I am over the age of eighteen years and not a party to the subject cause. My business address is 411 S.W. Second Avenue, Suite 200, Portland, OR 97204.

VIA Overnight Delivery:

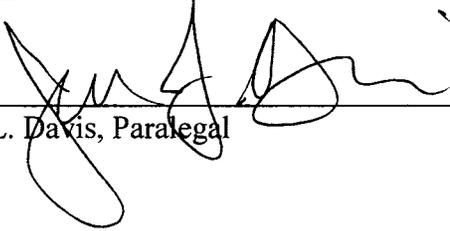
Benter A. Oriko
3901 SE 154th Court
Vancouver, WA 98683

Washington State Court of Appeals
Division Two
950 Broadway, Suite 300
Tacoma, WA 98402-4454

FILED
COURT OF APPEALS
DIVISION II
11 MAR 17 AM 10:15
STATE OF WASHINGTON
BY JL
DEPUTY

I declare under penalty of perjury and under the laws of the State of Washington (RCW 9A.72.085) that the foregoing is true and correct.

Executed at Portland, Oregon, this 16 day of March, 2011.



Jen L. Davis, Paralegal