

No. 43938-7-II

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

PHILIP BRENT PLATTNER, as Trustee of
the PHILIP BRENT PLATTNER TRUST,

Appellant,

v.

ROBERT K. BONNETT and JANET A. BONNETT,
husband and wife,

Respondents.

REPLY BRIEF OF APPELLANT

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A. INTRODUCTION

Robert and Janet Bonnetts' response brief is notable only for its argumentative and inflammatory introduction,¹ which they follow with an equally argumentative statement of the case. This Court should disregard both. More importantly, however, the Bonnetts offer nothing to dissuade this Court from reversing the trial court's judgment with respect to the issues that Dr. Philip Plattner raises on appeal and awarding him his attorney fees and costs.

B. RESPONSE TO THE BONNETTS' INTRODUCTION AND STATEMENT OF THE CASE²

The Bonnetts' introduction and statement of the case are filled with argument and unsubstantiated innuendo meant to distort and misrepresent what few relevant facts are presented and to avoid responsibility for their actions.³ Rather than respond to all of the

¹ An introduction should not take the place of the statement of the case and the argument section of a brief. It is meant to be a *concise* introduction to the issues presented. As stated in the *Washington Appellate Practice Deskbook* (WSBA 3d ed. 2005 & 2011 Supplement) at § 19.7(8):

The rule states that the introduction not need contain citations to the record or authority, but this is not a license to lard the introduction with facts that are outside the record. Every fact recited in the introduction should be supported later in the brief by a citation to the record.

² A number of the Bonnetts' citations to exhibits, purportedly to evidence supporting their case, are not helpful. *See, e.g.*, Br. of Resp'ts at 2 n.7, 4 n.15, 5 n.19, 9 n.46, 11 n.54. These exhibits were not designated as part of the record on appeal.

³ The Bonnetts are oblivious to RAP 10.3(a)(5), which requires their statement of the case to be a "fair statement of the facts and procedure relevant to the issues

Bonnetts' misstatements or mischaracterizations, Dr. Plattner responds only to the most egregious.

The Bonnetts make a number of highly inflammatory statements about Dr. Plattner that are not supported by the record. For example, the Bonnetts first state that Dr. Plattner accused them of "(usually imaginary) transgressions." Br. of Resp'ts at 1. Dr. Plattner's complaints were anything but imaginary and were properly reported to the police. That some of the acts of vandalism and trespassing he reported might be characterized as less than serious or trivial to some does not mean that they did not occur. *See, e.g.*, RP 209-13, 326-36. The Bonnetts continue to besmirch Dr. Plattner's character by describing his behavior as "irrational and disturbing." Br. of Resp'ts at 1. Their self-serving description of his behavior is offensive and not supported by the record. Taken as a whole, the amount of vandalism occurring on Dr. Plattner's property during his absences warranted a serious and measured response from him. The Bonnetts do not point to any evidence that suggests he

presented for review, *without argument*." (Emphasis added.) From the Bonnetts' inflammatory introduction to their recitation of the "facts," their statement of the case is replete with argument and thus makes this Court's review more difficult.

The Bonnetts do not get to make up the facts to suit their argument. Their counsel should know better. *Hurlbert v. Gordon*, 64 Wn. App. 386, 399-400, 824 P.2d 1238, *review denied*, 119 Wn.2d 1015 (1992) (experienced counsel sanctioned for improper brief). *See also, Litho Color, Inc. v. Pacific Employers Ins. Co.*, 98 Wn. App. 286, 305-06, 991 P.2d 638 (1999). At a minimum, this Court should disregard the Bonnetts' statement of the case and instead rely on the impartial statement provided in Dr. Plattner's opening brief.

acted less than reasonably when responding to the illicit activity that kept occurring on his property while he was absent from it.⁴ Their later description of Dr. Plattner's post-trial behavior as "bizarre," br. of resp'ts at 12 n.62, is likewise self-serving. Their insinuation that the signs Dr. Plattner placed on his property were directed at them is pure speculation without support in the record and entirely irrelevant. More importantly, it fails to recognize Dr. Plattner's fundamental right to freedom of speech. The Bonnetts make these spurious characterizations only for their prejudicial effect.⁵ The Court should disregard them.

One of the Bonnetts' most egregious mischaracterizations of Dr. Plattner's behavior is their claim that he admitted to a County employee that he was "having paranoid delusions because of all of this." Br. of Resp'ts at 6 n.24. Dr. Plattner did not admit anything of the sort. While the County employee testified at trial as the Bonnetts recite, Dr. Plattner testified that the employee misinterpreted what he said.

⁴ By contrast, the Bonnetts' responses to Dr. Plattner's complaints were anything but reasonable. They were retaliatory. For example, they purposely removed a survey pin from the easement that had been placed by a surveyor paid by Dr. Plattner to differentiate between the parties' lots. RP 73-74. They also removed a public notice sign that the County placed in a visible location on the easement to notify the public that they intended to build a pool and replaced it in a location not visible to anyone entering either lot from the other direction. RP 216, 226-27. This prevented Dr. Plattner from timely objecting to the proposal. CP 306. One would expect such petty responses from a petulant child rather than an adult.

⁵ The idiom of the pot calling the kettle black comes to mind with respect to the Bonnetts' complaints about Dr. Plattner's signs. The Bonnetts placed signs on their own property directed at Dr. Plattner. RP 78-79, 92-93, 222.

RP 688-89. The Court should disregard the Bonnetts' unprovoked, irrelevant, and ad hominem attacks on Dr. Plattner.

The Bonnetts state that they "cleared a portion of their property adjacent to the road to install their well, and later used this area to park a trailer and boat and occasional vehicles; at one point they also had a shed in the area." Br. of Resp'ts at 4. Their statement is disingenuous and misrepresents their activities on the easement. While they may have installed the well on a portion of their property, they tellingly neglect to mention that the well is located entirely within the easement and that their use of the easement for parking purposes interfered with Dr. Plattner's access to his property. CP 71; RP 68, Exs. 4, 14, 15, 19, 20; RP 133.

The Bonnetts complain that Dr. Plattner objected to their post-trial proposed site plan despite calling it a "masterful job." Br. of Resp'ts at 9. Dr. Plattner's sarcasm was apparently lost on them. Dr. Plattner's reference to a "masterful job" was to Robert's ability to mislead the trial court with respect to the actual parameters of his proposal. CP 116. As an architect, Robert knew exactly what he was proposing to the trial court: a restricted easement in front of Dr. Plattner's logging gate. Although he said that he was proposing a 22 ft. easement immediately in front of Dr. Plattner's logging gate, CP 156-58, what he proposed in that area actually measured only 15 ft. 3 in. CP 120-21.

The Bonnetts then invent or ignore evidence. First, they claim that Dr. Plattner's evidence showed that his video camera was redirected by "a pole or stick" so that it no longer pointed at their property. Br. of Resp'ts at 13. Not so. Dr. Plattner consistently testified, and the unrebutted documentary evidence confirms, that his video camera was redirected by a pruning tool. *See, e.g.*, RP 91, 108, 803; Exs. 33, 36, 197. Robert's use of a pruning tool to redirect a camera located on Dr. Plattner's property is highly suspect and smacks of premeditation. The Bonnetts then state that Dr. Plattner "claimed" that the video camera had been damaged by the pole or stick, implying that no damage had been done to it. Br. of Resp'ts at 13. The Bonnetts ignore the evidence presented. Dr. Plattner did more than simply "claim" that his camera had been damaged. He provided documentary and testimonial evidence that it had been damaged beyond repair less than 48-hours after it had been installed. Exs. 33, 36, 197; RP 89-91, 173.

Regardless of the irregularities in the Bonnetts' statement of the case, they make two important admissions that should not be overlooked. First, they *admit* that parking is not among the uses for which the easement was created. Br. of Resp'ts at 2. Second, they *admit* that they parked a trailer, a boat, and occasional vehicles on the easement despite its intended use for ingress and egress. *Id.* at 4.

C. ARGUMENT IN REPLY

(1) Standard of Review

The parties agree that this Court reviews findings of fact entered after a bench trial to determine if they are supported by substantial evidence, and, if so, whether those findings support the trial court's conclusions of law. Br. of Appellant at 15; Br. of Resp'ts at 16. Where the challenged findings and conclusions are insufficiently supported, as is the case here, this Court should reverse.

(2) The Challenged Findings of Fact Are Not Supported by Substantial Evidence and Do Not Support the Conclusions Reached⁶

The Bonnetts first argue that the trial court's relocation and modification of the road easement was valid. Br. of Resp'ts at 16. They are mistaken.

The parties agree on the contract principles that govern this Court's interpretation and construction of the Agreement. Br. of Appellant at 18; Br. of Resp'ts at 17. The intention of the parties controls, as determined from the language of the contract; and, if any ambiguity exists, the Court

⁶ Dr. Plattner argued in his opening brief that even if this Court does not ultimately correct the trial court's error of law, it should remedy an inconsistency in the trial court's ruling addressing the width of the implied easement he was granted over the Bonnetts' property in front of his logging gate. Br. of Appellant at 16 n.7. The Bonnetts do not respond to this argument and thus concede it. *See, e.g., American Legion Post No. 32 v. City of Walla Walla*, 116 Wn.2d 1, 7, 802 P.2d 784 (1991).

should consider the situation and circumstances of the parties at the time of the grant. *Id.*

Here, the Bonnetts do not dispute that Dr. Plattner was granted a 30-ft. wide easement for ingress, egress, drainage, and utility purposes over their property that was modified by the later Agreement. Nor do they dispute that the purpose of the Agreement was to improve sight distances for vehicles leaving the road easement and entering South Island Drive. Their quarrel with Dr. Plattner is with the width of the easement following its relocation. Br. of Resp'ts at 18. They understood that the language in the statutory warranty deeds stating "[t]he relocated easement shall equal the 'as built' dimensions and location of the road" applied to the entire easement and not just to the relocated portion. Br. of Resp'ts at 18. According to the Bonnetts, the Agreement thus reduced the width of the *entire easement* to the existing "as built" dimensions and not just the relocated portion. *Id.*

The Bonnetts' subjective intent is irrelevant. *Lynott v. Nat'l Union Fire Ins. Co.*, 123 Wn.2d 678, 684, 871 P.2d 146 (1994) (subjective intent does not constitute evidence of the parties' intent in interpreting the meaning of a writing). Washington follows an objective manifestation test for contracts, which looks to the objective acts or manifestations of the parties rather than the unexpressed subjective intent of any party. *Wilson*

Court Ltd. Partnership v. Tony Maroni's, Inc., 134 Wn.2d 692, 699, 952 P.2d 590 (1998); *see also, Hall v. Custom Craft Fixtures*, 87 Wn. App. 1, 937 P.2d 1143 (1997) (applying objective manifestations test to asserted guarantee agreement). John McCrory, the original property owner, testified that the sole purpose for the Agreement was to shift the section of the road easement where it intersected with South Island Drive to the northwest to improve sight distances and to reduce the danger for vehicles attempting to merge onto the county road. RP 394, 396-97. The Bonnetts did not rebut this testimony at trial and offer nothing objective to support their argument to the contrary.

But even if the Court were to accept the Bonnetts' theory that the Agreement pertains to the entire easement rather than the relocated portion, the "as built" road may or may not be defined as the paved portion. Although Robert testified that the paved portion defined the easement, he later admitted that a road typically consists of the paved portion and a shoulder of anywhere from a few inches to several feet on either side of the driving surface. RP 601.

The 1993 short plat specifically delineated a 30-ft. wide road easement subsequently modified by the 2004 Agreement; however, the Agreement did not alter the *entire* road easement. It altered *only* a 130 to 150-ft. section. That Dr. Plattner may have historically used only a

portion of the remaining unaltered 30-ft. easement to access his property or that the Bonnetts paved a roadway less than 30-ft. wide is immaterial. *As a matter of law*, Dr. Plattner has the right to an access easement of 30-ft. regardless of the width of the road surface. *See 810 Props. v. Jump*, 141 Wn. App. 688, 699, 170 P.3d 1209 (2007). Accordingly, this Court should reverse the trial court's judgment on this issue.

The Bonnetts mischaracterize the crux of Dr. Plattner's nuisance argument and thus fail to rebut it. Br. of Resp'ts at 20. While Dr. Plattner asserts that the easement remains 30-ft. wide in the area that was not relocated by the Agreement, he has never suggested that the Bonnetts cannot put or do anything within that 30-ft. as they now claim. He agrees that the Bonnetts, as the servient owners, retain the use of the easement *so long as their use does not materially interfere with his use as the dominant owner*. Br. of Appellant at 17. His argument is that the Bonnetts have used, and continue to use, the easement for purposes inconsistent with its intended use: ingress, egress, drainage, and utilities. *Id.* at 25. Their interference has been material. *Id.*

The Bonnetts correctly note that the area where their boat, trailer, and shed were located was not on the actual paved road. Br. of Resp'ts at 20. They run afoul of reality, however, by ignoring the manner in which they parked their vehicles in that area and the impediments they created.

The Bonnetts parked in such a way that they made ingress and egress to Dr. Plattner's property extremely difficult. RP 64; Exs. 26-27, 80. They removed the boat and the shed from the easement after Dr. Plattner complained; however, they continued to use it as a place to park their recreational vehicle. As a result, a truck driver attempting to enter Dr. Plattner's property struck and damaged Dr. Plattner's logging gate because the Bonnetts' parked recreational vehicle prevented him from being able to swing wide enough to enter the property. RP 45-46; Ex. 15.

Where Dr. Plattner succeeded on his nuisance claims by obtaining an order requiring the Bonnetts to remove their obstructions, the trial court erred by concluding that he was not entitled to attorney fees and costs under RCW 7.48.010. That the Bonnetts may have removed or abated some of their nuisances prior to trial does not prejudice Dr. Plattner's right to recover damages for their past existence. RCW 7.48.130; *Vance v. XXXL Dev., LLC*, 150 Wn. App. 39, 45, 206 P.3d 679 (2009).

The Bonnetts next argue that Dr. Plattner cannot sustain his trespass claim under RCW 4.24.630 because Robert did not set out to damage Dr. Plattner's video camera when he trespassed on Dr. Plattner's property. Br. of Resp'ts at 22-23. Their argument is unavailing. The trespass statute does not require that Robert have formed the intent to damage Dr. Plattner's camera *before* he entered Dr. Plattner's property:

Given the context of related statutes, legislative history, and the statute's interpretation by other courts, we hold that RCW 4.24.630 requires a showing that the defendant intentionally and unreasonably committed one or more acts *and* knew or had reason to know that he or she lacked authorization.

Bird v. Best Plumbing Group, LLC, 161 Wn. App. 510, 528-29, 260 P.3d 209 (2011). Here, Robert intentionally and unquestionably damaged the camera lens. RP 88-91; Exs. 36, 37, 197. Whether he entered the Plattner property with that intent in mind is irrelevant because the statute does not require intent to damage at the time the initial trespass occurred. The requisite intent may be formed at any time:

The Bonnetts do not deny that Robert trespassed onto Dr. Plattner's property and damaged Dr. Plattner's video camera. Instead, they argue that his misconduct is justifiable because he was frustrated at being videotaped. Br. of Resp'ts at 23. Robert was not justified in using such extreme self-help, no matter his level of frustration with Dr. Plattner. First, Robert damaged the camera less than 48-hours after it was installed. RP 89. Second, Dr. Plattner filed his lawsuit against the Bonnetts in 2008. CP 419-25. They had thus been represented by counsel for two years when Robert decided to take matters into his own hands and deal with the camera *in 2010*. Robert's actions, done after the camera was no longer pointed at the Bonnetts' property, were not designed to move the camera

but to damage it. The Bonnetts could have communicated their concerns about the video camera to their counsel to address their concerns in an appropriate matter. They chose not to do so and instead chose to pursue a self-help remedy. They had no right to act outside of the law, to trespass onto Dr. Plattner's property, or to damage his camera.

The Bonnetts' last argument is that the trial court properly ordered Dr. Plattner to remove the southern-most post supporting his farm gate because the post is part of the gate. Br. of Resp'ts at 23, 25. Not so. While the post is part of the gate, the Bonnetts neglect to mention that the gate was on *Dr. Plattner's property and did not block the easement*. RP 80. More to the point, neither Robert nor Janet testified that the post interfered with their access to the easement. They did not file any pleadings with the trial court arguing about the post or present any evidence at trial about the post. The first time the Bonnetts even mentioned the post was in post-trial proceedings, when they inserted a reference to the post in their proposed findings and conclusions. CP 226. The Bonnetts' argument that Dr. Plattner should have presented an argument to the trial court to be allowed to keep the posts in place while removing the farm gate is illogical. He had no reason to believe that the trial court would rule on an issue that had not been presented to it and for which no evidence had been produced by either party.

As Dr. Plattner noted in his opening brief, the trial court's decision to order him to remove the southern-most gate post deprived him of his right to due process of law under the Fourteenth Amendment to the United States Constitution and adversely and impermissibly impacts his property rights. Br. of Appellant at 32. The Bonnetts do not respond to this argument and thereby concede it. *American Legion*, 116 Wn.2d at 7. Accordingly, this Court should reverse that portion of the trial court's judgment requiring Dr. Plattner to remove the southern-most gate post located on his property.

(3) Dr. Plattner Is Entitled to Attorney Fees and Costs on Appeal

Dr. Plattner requests reasonable attorney fees and costs on appeal pursuant to RAP 18.1. He satisfied the requirements of RAP 18.1(b) by devoting a portion of his opening brief to that request. Br. of Appellant at 33. Where he prevails on appeal, he is therefore entitled to recover his attorney fees and costs.

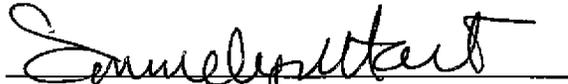
D. CONCLUSION

The Bonnetts offer no legitimate response to the arguments Dr. Plattner raised in his opening brief. The challenged factual findings and the conclusions that flow from them are not supported by substantial evidence. Accordingly, this Court should reverse the trial court's rulings.

Costs, including reasonable attorney fees, should be awarded to
Dr. Plattner.

DATED this 28th day of June, 2013.

Respectfully submitted,



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DECLARATION OF SERVICE

On said day below I emailed a courtesy copy and deposited with the U.S. Postal Service for service a true and accurate copy of the Reply Brief of Appellant in Court of Appeals Cause No. 43938-7-II to the following parties:

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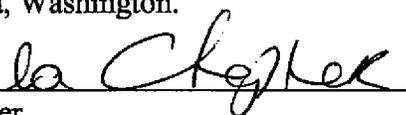
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED June 28, 2013, at Tukwila, Washington.



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