

NO. 46966-9-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

2101 MILDRED, LLC and CONTAC 38, LLC,

Appellants,

v.

1921 MILDRED, LLC,

Respondent.

REPLY BRIEF OF APPELLANTS

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ARGUMENT

1. This is a De Novo Appeal. The Factual Findings of the Trial Court Should Not be Given Deference under the Substantial Evidence Standard.

Throughout its brief, Respondent asks this Court to give deference to the trial court's factual findings and determine that substantial evidence supported those findings.¹ The trial court's findings should not be given deference. The record in this case consists only of affidavits, memoranda of law, and other documentary evidence. The trial court did not see or hear testimony requiring it to assess the witnesses' credibility or competency. This Court is not bound by the trial court's factual findings and it reviews the record de novo. *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wash. 2d 398, 407, 259 P.3d 190, 194 (2011). Respondent cited to *Bainbridge Island Police Guild* for this very proposition in its brief, yet not a half page later completely ignored it and urged that this Court "should not substitute its judgment for that of the trial court." Brief of Respondent, page 15.

This is entirely a de novo appeal. As demonstrated in Appellant's opening brief, and as will be reiterated in this reply: (1) facts do not exist that support findings of fact that Contac 38, LLC trespassed on 1921

¹ Brief of Respondent, pages 15, 16, 19, 20, 23, 28, 29, 32, 34.

Mildred, LLC's property at all, much less that Contac 38, LLC did so intentionally; (2) the trial court made no finding of "actual and substantial damages," and there are no facts to make such a finding; (3) Respondent did not have exclusive right to possession of the easement area into which 2101 Mildred LLC's wall partially encroached; (4) There is no evidence 2101 Mildred, LLC had knowledge that "reasonably to be expected consequences" would follow the erection of the wall; (5) There are no findings that support the conclusion of law, mislabeled a finding of fact, that "the construction of the concrete retaining wall on the plaintiff's property and easement caused an unreasonable waste of plaintiff's property," and insubstantial evidence to make such a finding; (6) There is no evidence in support of Finding No. 10 that "Mr. Bodine knew he did not have authority to enter the plaintiff's property or to construct a retaining wall thereon"; and (7) The prevailing party is not entitled to attorney fees on appeal because CR 68 limits recovery to costs that accrue through the Offer of Judgment.

2. RCW 4.24.630 Does Not Apply To Recovery of Attorney Fees in Actions for Injunctive and Declaratory Relief.

Respondent attempts to bootstrap the attorney fee provision of RCW 4.24.630 onto its quiet title and ejectment claims, which resulted in the judgment for declaratory and injunctive relief pursuant to Appellants'

CR 68 Offer of Judgment. RCW 4.24.630 requires proof of actual and substantial damages before fees may be awarded, which requires a showing of “some dollar amount of damages.” *Colwell v. Etzell*, 119 Wash. App. 432, 442, 81 P.3d 895, 900 (Div. 3, 2003) (“In other words, without a showing of damages the claim has no value.”); *Standing Rock Homeowners Ass’n. v. Misich*, 106 Wash. App. 231, 244-45, 23 P.3d 520, 528 (Div. 3, 2001).

Respondent asserts that this “[a]rgument has no basis in fact or law”² and that “[n]othing in RCW 4.24.630(1) requires a claimant to show that it has sustained damages that are specifically quantified into ‘some dollar amount’ as asserted by Appellant.”³ It seeks to distinguish *Colwell v. Etzell*, which unequivocally requires establishment of “some dollar amount of damages” before fees may be awarded under RCW 4.24.630, by incorrectly construing *Colwell v. Etzell* as standing for the proposition that a wrongful waste or injury to land must be shown, and not a specific dollar amount of loss. Respondent’s assertion and its reading of *Colwell v. Etzell* are without merit whatsoever.

There is no question, as Respondent correctly states, that to recover under RCW 4.24.630, it must establish wrongful causation of waste or injury. A simple reading of the rest of the sentence, however, reveals that

² Brief of Respondent, page 20.

³ *Ibid*, page 21.

the statute is designed to award “treble the amount of the damages caused by the removal, waste, or injury.” Yes, proof of waste or injury is required. Proof of damages is also required.

Respondent would have this Court hold that injunctive and declaratory relief for the encroachment of the wall *a priori* entitles it to costs under RCW 4.24.630. That is incorrect. RCW 4.24.630 does not provide a cause of action for declaratory and injunctive relief because of an encroachment. Those remedies are found in Ch. 7.24 RCW and Ch. 7.40 RCW, respectively. RCW 4.24.630 creates a cause of action for treble the amount of damages cause by wrongful waste or injury to the land of another. Respondent’s injunctive and declaratory relief came as a result of its assertion of superior title and interference with its easement rights. Those remedies, and the assertion of those rights, come from other statutes, not RCW 4.24.630. As the Washington Court of Appeals held in *Colwell v. Ezzell*:

After summary judgment was granted quieting title of the easement in the Colwells, Mr. Ezzell removed the culverts he had placed in the road and reconstructed a new gravel road in that same location at his own expense. The Colwells claim no damages. Since no statutory authority awards attorney fees to prevailing parties in quiet title actions, and the Colwells were not entitled to attorney fees and costs under RCW 4.24.630, the award was in error.

Colwell v. Ezzell, 119 Wash. App. 432, 442.

3. No Facts Exist To Support A Finding of Fact That Contac 38, LLC Trespassed On 1921 Mildred, LLC's Property.

Respondent 1921 Mildred, LLC admits in its brief to this Court that Contac 38, LLC did not participate in the construction of the wall.⁴ Since RCW 4.24.630(1) requires wrongful, intentional conduct to impose damages and award fees and costs, one could reasonably expect this concession to end Respondent's attempt to recover fees against Contac 38, LLC. However, Respondent continues to assert the right to fees against Contac 38, LLC despite the explicit concession that the elements of RCW 4.24.630(1) are absent against this Appellant. Whether Contac 38, LLC now owns a parcel "that includes the wall" is immaterial. There is no premises liability standard for the imposition of fees under RCW 4.24.630(1). Whether Contac 38, LLC was "properly made a defendant" is irrelevant. Appellants have made no claim that Contac 38, LLC was not a proper party to the litigation. The Respondent's argument that the Offer of Judgment included a judgment against Contac 38, LLC for fees "if the trial court found that all of the required elements of RCW 4.24.630 had been shown" is fallacious. The use by Respondent of the past tense "had been shown" reveals the fallacy in this argument; *ex vi termini*, the fallacy of the excluded middle. It must be proved not only that the required

⁴ Brief of Respondent, page 17.

elements of RCW 4.24.630 “had been shown,” but also that those elements had been shown as against a particular defendant against whom fees are to be imposed.

Lastly, the Respondent argues that the trial court properly entered judgment against Contac 38, LLC pursuant to its offer of judgment, and that Contac 38, LLC “never objected to the trial court’s judgment on the basis that Contac 38 had not participated in the construction of the wall.”⁵ This is a straw man fallacy. Of course Appellants never objected to the trial court’s judgment, which was for injunctive and declaratory relief. They made an Offer of Judgment to allow that relief. The inclusion by the Appellants in the Offer of Judgment of taxable costs incurred to the date of the offer begs the question. What costs are taxable to each Appellant? The imposition by the trial court of fees as costs under RCW 4.24.630 was challenged by the Appellants in this appeal, which was the first opportunity to make that challenge.

4. The Trial Court Made No Finding Of “Actual and Substantial Damages,” and There Are No Facts To Make Such a Finding.

As discussed *infra*, RCW 4.24.630 requires proof of actual and substantial damages before fees may be awarded, which requires a showing of “some dollar amount of damages.” *Colwell v. Ezzell*, 119

⁵ Brief of Respondent, page 19.

Wash. App. 432, 442, 81 P.3d 895, 900 (Div. 3, 2003) (“In other words, without a showing of damages the claim has no value.”); *Standing Rock Homeowners Ass’n. v. Misich*, 106 Wash. App. 231, 244-45, 23 P.3d 520, 528 (Div. 3, 2001). Respondent implicitly concedes that there are no findings of actual damages, does not show facts quantifying damages, but argues that injury is different from an amount of damages, citing two cases *Panag v. Farmers Insurance Company of Washington*, 166 Wash.2d 27, 204 P.3d 885 (2009) and *Nordstrom, Inc. v. Tampourlos*, 107 Wash.2d 735, 733 P.2d 208 (1987). Both analyze Ch. 19.86 RCW, the Washington Consumer Protection Act, rather than RCW 4.24.630.⁶ Neither applies. Respondent goes through contortions to avoid conceding the unavoidable: RCW 4.24.630(1) requires a showing of actual damages for it to apply. At one point, Respondent seems to assert – incorrectly – that RCW 4.24.630(1) expressly authorizes injunctive and declaratory relief: “Attorney fees are to be awarded under the statute ‘in addition’ to any monetary damages or other relief awarded for the wrongful damage done (emphasis added).”⁷ Nothing in RCW 4.24.630(1) can be read to remotely allow for anything other than recovery for damages for wrongful and intentional waste of the claimant’s land. There are no facts in evidence about damages in this case.

⁶ Brief of Respondent, page 22.

⁷ Brief of Respondent, page 21.

5. Respondent Did Not Have Exclusive Right To Possession Of The Easement Area Into Which 2101 Mildred LLC's Wall Partially Encroached.

RCW 4.24.630 is premised upon a wrongful invasion or physical trespass upon *another's property*, a commission of intentional and unreasonable acts upon *another's property*, and subsequent destruction of physical or personal property by the invader to *another's property*. *Colwell v. Etzell*, 119 Wash. App. 432, 439-40, 81 P.3d 895, 898-99 (Div. 3, 2003).

Respondent argues that the wall encroached 1.5 feet onto its property along its length, and 7.75 feet at the “wing wall.” As to the former encroachment, it is the foundation of the wall under the surface of the ground on 1921 Mildred, LLC’s property north of the boundary. It is within the eight foot easement in favor of 2101 Mildred, LLC, and is thus a reasonable use of made by 2101 Mildred, LLC of its easement area, advancing its purpose of ingress and egress. *Littlefair v. Schulze*, 169 Wash. App. 659, 665, 278 P.3d 218, 221 (Div. 2, 2012), *as amended on denial of reconsideration* (Sept. 25, 2012). CP 059. As to the latter encroachment, the area had been unused and unusable before the wall’s construction. CP 165 – 166. The wall allows 2101 Mildred, LLC to access its east lot through its property, which its predecessors-in-title had been unable to do before the wall was built. CP 120 – 123. It is a

reasonable use made by 2101 Mildred, LLC of its easement area, advancing the purpose of ingress and egress. *Littlefair v. Schulze*, 169 Wash. App. 659, 665, 278 P.3d 218, 221 (Div. 2, 2012), *as amended on denial of reconsideration* (Sept. 25, 2012).

Respondent asserts that it has been “denied all use of the easement.”⁸ That assertion is unsupported by the record. The purpose of the easement is for egress and ingress to its property. Respondent has full enjoyment of over 215 feet of the easement - from Mildred Street to the beginning of the wall - for its intended purpose. The existence of 1.3 – 1.5 feet of the foundation under the surface, and 7.75 feet in the back corner of the property – which has historically been unused and unusable, does not change that fact.

6. There Is No Evidence 2101 Mildred, LLC Had Knowledge That “Reasonably To Be Expected Consequences” Would Follow The Erection Of The Wall.

Appellants pointed out in their opening brief that to find liability for an intentional tort, the court must find that: (1) there was a volitional act; (2) undertaken with the knowledge and substantial certainty that reasonably to be expected consequences would follow. *Hurley v. Port Blakely Tree Farms L.P.*, 182 Wn. App. 753, 772, 332 P.3d 469, 479 (Div. 1, 2014) (“Appellants argue that they satisfied the requirements for

⁸ Brief of Respondent, page 26.

intentional trespass based on Respondents' intentional act of cutting down trees. We disagree. The “intent element of trespass can be shown where the actor ‘knows that the consequences are certain, or substantially certain, to result from his act.’ (citation omitted)”).

Respondent offers no evidence of the second element of the dual requirement, reiterating in its brief that Appellant 2101 Mildred, LLC committed a volitional act by erecting the wall. Instead, Respondent simply asserts, without explanation or analysis, that “substantial evidence in the record support findings of . . . reasonable foreseeability that the invasion would disturb the Respondent’s property interests. . .”⁹ The assertion is not sufficient to carry its burden of proof, and runs contrary to the evidence. In 2004 - 2005 when the wall was constructed, 1921 Mildred, LLC did not own the property. It bought the property in 2011 – some 6 to 7 years later. The eastern 50 feet of the easement area – the area now in dispute – was never used by the owner of the 1921 Mildred property for egress and ingress. It was “unusable and unnecessary. . .” CP 165. The rest of the Alley has always been more than sufficient to allow Respondent’s predecessors-in-title to achieve the purpose of the easements; e.g., ingress to and egress from the property. There is no evidence 2101 Mildred, LLC had knowledge or substantial certainty that

⁹ Brief of Respondent, pp. 29 – 30.

“reasonably to be expected consequences” would follow the erection of the wall on the easternmost part of the easement.

Respondent argues that there is no evidence that the easement was abandoned. Appellants agree. They have not argued that the easement was abandoned. This argument is a straw man fallacy. The lack of use and usefulness of the area at the time of the construction of the wall is relevant to determine the state of mind of Mr. Bodine when the wall was constructed, and the reasonableness of his state of mind. He was not substantially certain that reasonably to be expected consequences would follow from his construction of the wall. It was an area of complete disuse.

The owner of the 1921 Mildred property was present during the construction of the wall, and gave his permission to use his property as the base for constructing the wall. Respondent argues that Mr. Lee, the prior owner of 1921 Mildred, never gave permission to construct the wall, only that he gave permission to “temporarily stage equipment on Mr. Lee’s 1921 property during the construction of the wall.”¹⁰ The semantic distinction is like arguing over the number of angels that can dance on the head of a pin. Mr. Lee gave permission to run the concrete truck and other

¹⁰ Brief of Respondent, page 33.

heavy equipment on his property, he was present during the construction of the wall, and the property line was clearly marked.

7. No Findings Support The Conclusion Of Law, Mislabeled A Finding Of Fact, That "The Construction Of The Concrete Retaining Wall On The Plaintiff's Property And Easement Caused An Unreasonable Waste Of Plaintiff's Property," And Insubstantial Evidence Exists To Make Such A Finding.

The trial court entered a conclusion of law, mislabeled as a finding of fact, that that "the construction of the concrete retaining wall on the plaintiff's property and easement caused an unreasonable waste of plaintiff's property."¹¹ There are no findings of fact entered to support that conclusion.

Respondent argues that there is evidence of injury to its land, and RCW 4.24.630(1) applies to the wrongful causing of waste or injury to the land of another. In its brief, Respondent cites *Panag v. Farmers Insurance Company of Washington*, 166 Wash.2d 27, 204 P.3d 885 (2009), a Washington Consumer Protection Act case¹², for the proposition that the injury to land requirement is satisfied by proof that the plaintiff's property interest is diminished, and that it is unnecessary to establish the

¹¹ A conclusion of law erroneously described as a finding of fact is reviewed as a conclusion of law and reviewed de novo. *Willener v. Sweeting*, 107 Wash. 2d 388, 394, 730 P.2d 45, 49 (1986); *Casterline v. Roberts*, 168 Wash. App. 376, 381, 284 P.3d 743, 745-46 (Div. 2, 2012).

¹² Ch. 19.86 RCW.

dollar value of the injury sustained when injunctive relief is the remedy sought.

Of course, this is not a case under Ch. 19.86 RCW. The question presented is whether Respondent is entitled to fees under RCW 4.24.630(1), which does require proof of monetary damages. Injunctive relief is not available under RCW 4.24.630(1). Respondent spends much time discussing the limitations on the size of trucks that can access the rear of its property. However, the express purpose of the easement has nothing to do with access to the area behind the building. The building did not exist when the easement was created. The express purpose of the easement is to be able to access the property. There is no allegation – nor could there be – that Respondent cannot access its property from the easement. It can.

Lastly, Respondent makes no effort to quantify the alleged loss in value due to the wall, even assuming, *arguendo*, that the existence of the wall was an unreasonable interference with the easement's express purpose. Loss in value due to reduction in four parking spaces has not been quantified. Loss in value due to reduction in the size of trucks is not quantified. Prospective tenants who, according to the owner of 1921 Mildred, LLC, expressed disinterest in the property due to the wall are not identified. His statement is entirely self-serving. There is no effort to

quantify the stated reduction in fair value because of the alleged unmarketability of the property because of the wall.

The burden to demonstrate unreasonable waste or injury, like all of the elements of RCW 4.24.630(1), lies with the Respondent. It has not met that burden. There is no evidence in the record of unreasonable waste or injury.

8. There Is No Evidence In Support Of Finding No. 10 That "Mr. Bodine Knew He Did Not Have Authority To Enter The Plaintiff's Property Or To Construct A Retaining Wall Thereon".

As discussed infra, Mr. Bodine requested from Mr. Lee, and Mr. Lee gave him, permission to run the concrete truck and other heavy equipment on his property. Mr. Lee was present during the construction of the wall. The property line was clearly marked.

The Respondent's position appears to be that anything short of an explicit agreement amending the easement cannot constitute authority for Mr. Bodine to proceed with construction of the wall.

There is no support for such a strained reading of the statute, or application of reasoning. The statute requires that Respondent - who has the burden of proof - to show that Mr. Bodine "commit[ted] the act or acts while knowing, or having reason to know, that he or she lack[ed] authorization to so act. . ." It is hard to make the case that he had reason to know that he lacked authorization to construct the wall where he did,

when the owner of the other property was present, the property line was marked, and the workers and machinery were building the wall from Mr. Lee's side of the line.

9. The Prevailing Party Is Not Entitled To Attorney Fees On Appeal Because CR 68 Limits Recovery To Costs That Accrue Through The Offer Of Judgment.

Respondent asserts Appellants incorrectly cited CR 68 as providing for recovery of costs, including attorney fees, incurred only through the date the offer of judgment is made, if accepted.¹³ Respondent is wrong. CR 68 states: "At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued (Emphasis added)."

An offer pursuant to CR 68 operates as a contract, in that the terms of the offer control the extent to which attorney fees and costs may be awarded. *Johnson v. State, Dep't of Transp.*, 177 Wash. App. 684, 694, 313 P.3d 1197, 1203 (Div. 1, 2013) *review denied*, 179 Wash. 2d 1025, 320 P.3d 718 (2014); *Washington Greensview Apartment Associates v. Travelers Property Cas. Co. of America* 173 Wash.App. 663, 295 P.3d 284 (Div. 1, 2013). General contract principles are applied to CR 68 offer

¹³ Brief of Respondent, page 36.

of judgment proceedings to the extent that such principles do not conflict with express provisions of rule. *Dussault v. Seattle Public Schools* 69 Wash.App. 728, 850 P.2d 581 (1993), *amended on denial of reconsideration, review denied* 123 Wash.2d 1004, 868 P.2d 872. The “ ‘usual rules of contract construction’ ” apply to offers of judgment. (internal citations omitted) *Lietz v. Hansen Law Offices, P.S.C.*, 166 Wash. App. 571, 585, 271 P.3d 899, 906-07 (2012).

Applying contract principles here, the Appellants’ offer of judgment included “taxable costs incurred to the date of this offer. . .” CP 038. RCW 4.24.630(1) includes attorney fees as taxable costs. The Appellants’ offer of judgment was accepted. A contract was formed between the parties. Therefore, the prevailing party is only entitled to fees through the date of the offer of judgment.

Respondent implicitly recognized this truth, when it only presented to the trial court fees incurred prior to the date of the offer of judgment (August 29, 2014, CP 030), and no fees incurred between that date and the date of entry of judgment (November 14, 2014, CP 215) CP 032, 061-088. The case Respondent cites as being inapposite, *O’Neil v. City of Shoreline*, 183 Wash.App. 15, 332 P.3d 1099 (2014) is not relevant because the Court of Appeals apparently was not called upon to decide the issue: e.g., that the contract between the parties limited fees to those incurred before

the CR 68 offer, and by virtue of that contract did not include fees on appeal. The question does not appear to have been before the Court. Rather, the decision appears to have assumed post-offer fees, including fees on appeal, were allowable. It is that assumption which Appellants are first challenging in this appeal.

To the extent that this Court finds that attorney fees and costs are allowed on appeal, and that the Appellants are the prevailing parties on appeal, Appellants request that this Court allow them recovery of their reasonable attorney fees and costs on appeal.

CONCLUSION

For the reasons set forth, Appellants respectfully ask this Court to reverse the judgment against each of them for Respondent's attorney fees and costs under RCW 4.24.630(1).

RESPECTFULLY SUBMITTED this 20th day April, 2015.

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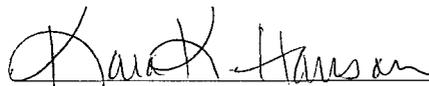
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CERTIFICATE OF SERVICE

I certify that on 20th day of April, 2015, I caused a true and correct copy of the Brief of Appellants to be served on the following by hand delivery:

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Dated this 20th day April, 2015.


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