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DIVISION II

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STATE OF WASHINGTON

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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

W. BRANDT BEDE and LESLIE K. McLAUGHLIN BEDE,
husband and wife, Appellants

v.

DARYL W. YOREK and KELLY M. YOREK,
husband and wife, Respondents

APPELLANTS' REPLY BRIEF

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ORIGINAL

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The Appellants, Brandt and Leslie Bede (the “Bedes”), provide the following reply to Respondents Daryl and Kelly Yorek (“Yorek”) Brief and in further support of their appeal.

ARGUMENT

1. The Yoreks Fail to Identify any Evidence to Support the Trial Court’s Finding That the Yoreks had a Prescriptive Easement Over the Bedes’ Boxwood Hedge.

At the beginning of trial, the parties agreed that they both have a prescriptive easement for access to their properties over the existing paved driveway to the extent it traverses the others’ property.¹ RP 4/14/15 at 11-12, 14, 16. The Trial Court subsequently granted to both parties a prescriptive easement over the existing driveway for access.² The Trial Court then, *sua sponte*, extended the Yoreks’ prescriptive easement an additional thirty (30) feet over the Bedes’ property so that it includes the Bedes’ planting bed and the area where the Bedes’ boxwood hedge previously existed. RP 4/16/15 at 17-19, 24-26; Appellants’ Brief - Appendix B - Findings of Fact 1.9 – 1.15, CP 138-139. In reaching this conclusion, the Trial Court reasoned as follows:

¹ The Bede and Yorek properties, the driveway and the property lines are all depicted on Exhibit 20, which was admitted at trial.

² Appellants’ Brief - Appendix B - Findings of Fact 1.20 – 1.24 and Conclusions of Law 2.11-2.12. CP 139-140, 144.

Now, when they built that driveway, and I assume that the Wilkerson sandstone blocks were part of the original blocks, you know, they took that drive up, and they curved it, which made sense because we have the cedar tree sitting right smack-dab, you know, so if you want to do it straight up the property line, you're going to run into the cedar tree; so they curved it, so I'm ruling that the curve goes up to the cedar tree³ -- the easement portion of the sandstone blocks goes up to the cedar tree and to the end of where it runs -- so there was testimony that the blocks ended about six feet from the concrete pad that's on the [Bede's] property, so the easement runs up to the concrete pad. Everything on the one side, you know, [Bede's] side, belongs to them; everything on [Yoreks'] side belongs to them, which means those hedges were grandfathered in and are on [Yoreks'] side of the sandstone blocks. (Emphasis added).

I mean, my guess is when they built this -- I mean, you're basically talking about a triangle of land, not a significant amount; and nobody really cared so that the [Yoreks'] predecessors landscaped it⁴ with the hedge because it -- you know, I mean, it's a small amount of property. It doesn't make sense that they were going to -- they wouldn't incorporate it with the other side because they're taking part of the [Yoreks'] lot. Presumably, the [Yoreks'] lot, you know, [Bedes] have an easement over it. [Yoreks] have an easement over some of [Bedes'] lot which means that the [Bedes] should not have been removing those -- that boxwood hedge because it had been there for almost as long as the driveway.

³ Exhibit C to the Findings of Fact and Conclusions of Law clearly depicts the driveway curve more than thirty feet from the cedar tree. Appellants' Brief - Appendix B; CP 152.

⁴ The Trial Court asked Mrs. Yorek if she planted the hedge, to which Mrs. Yorek replied "No. My understanding is the boxwood hedge has been there, I mean, decades and decades." RP 4/15/15 at 30. There was no evidence presented that the Yoreks' predecessors planted the boxwood hedge.

Now, the property from the inside of each curb belongs to each adjacent landowner. (Emphasis added).

RP 4/16/15 at 17-19.

The Bedes appealed this extension of the easement arguing there was no evidence, let alone substantial evidence, to suggest the prescriptive easement for driveway access should be extended beyond the boundaries of the paved road and over the Bedes' planting bed and boxwood hedge.

The Yoreks argue the Trial Court properly extended their prescriptive easement to the cedar tree because (1) the Bedes knew where the property line was located prior to removing the boxwood hedge⁵; (2) the Yoreks "did a lot of the hedge maintenance at [their] home"⁶; and (3) "the driveway access should extend to its natural ending point just beyond the boundaries of the pavement."⁷ Respondents' Brief at 11. None of these arguments demonstrate there was evidence at trial to support the Trial Court's findings.

⁵ Respondents' Brief at 8-9.

⁶ Respondents Brief at 11.

⁷ Id.

A. The Boxwood Hedge was Located on the Bedes' Property.

There is no dispute that the Bedes removed the boxwood hedge because it had become an eyesore. RP 4/14/15 at 40-41. There is no dispute that the Bedes knew where the property line was prior to removing the boxwood hedge as the Bedes testified to that fact at length. RP 4/14/15 at 41-44. In that regard, the Bedes testified that the portion of the boxwood hedge they removed was entirely on their property, except one dead plant at the end. RP 4/14/15 at 48-51, 88-89; Exhibits 34 and 91. The Yoreks provided no evidence at trial, nor do they cite to any evidence in response to the Bedes' appeal, that the boxwood plants removed by the Bedes were anywhere other than on the Bedes' property. Consequently, if the Yoreks are arguing they owned the property upon which the boxwood hedge was planted, that argument must fail as there was no evidence (nor do they cite to any) to support such a claim.

B. The Yoreks Failed To Demonstrate All Of The Necessary Elements for a Prescriptive Easement Over the Bedes' Hedge.

The parties do not dispute the necessary elements for establishing a prescriptive easement: "In order to obtain a prescriptive easement [the Yoreks] would have to show (1) use

adverse to the title owner, (2) open, notorious, continuous and uninterrupted use for 10 years, and (3) the owner's knowledge of the adverse use when he was able to enforce his rights". *Bradley v. American Smelting and Refining Co.*, 104 Wn.2d 677, 694, 709 P.2d 782 (1985).

The Yoreks argue that they satisfied all of those elements, but fail to provide any evidence that they met the single most critical element for a prescriptive easement: use of the Bedes' property. Respondents' Brief 9-11. There is no dispute that the Yoreks used the paved driveway for access, but there was no evidence, nor do the Yoreks cite to any, that they used the property upon which the boxwood hedge existed.

The Yoreks state "they maintained the hedge" relying upon Mrs. Yorek's trial testimony. Respondents' Brief at 11 (citing to RP 4/15/15 at 23-24). However, Mrs. Yorek testified they maintained the Portuguese laurel hedge, which is on their property, not the boxwood hedge. RP 4/15/15 at 22, 24. In fact, Mrs. Yorek testified that the Portuguese laurel hedge is nowhere near the boxwood hedge nor part of the boxwood hedge, but rather was part of her circular driveway. RP 4/15/15 at 28.

The Yoreks also admitted that they never went onto the Bedes' property to work on the boxwood hedge nor did they even see the hedge from the Bedes' side.⁸ RP 4/15/15 at 39. Consequently, the Yoreks fail to provide any evidence they "used" the boxwood hedge, let alone substantial evidence of this necessary element. Consequently, the Trial Court erred in finding the Yoreks have a prescriptive easement over the Bedes' property where the boxwood hedge is located.

C. Extension of the Driveway Easement.

Lastly, the Yoreks argue "the driveway access should extend to its natural ending point just beyond the boundaries of the pavement". Respondents' Brief at 11. The cedar tree is 30 feet from the end of the driveway pavement. CP 152 (Exhibit C to the Findings of Fact and Conclusions of Law). There is no basis for extending the driveway access easement 30 feet from its historical termination point.

For all of the above reasons, the Trial Court's Findings of Fact (No. 1.17, 1.18 and 1.37) that the boxwood hedge belonged to the

⁸ On the other hand, the Bedes had maintained the hedge since 1978, when they purchased their property. RP 4/14/15 at 38. The Yoreks further admitted that the Bedes trimmed the hedge without talking to Yoreks. RP 4/15/15 at 34. Those facts suggest the Bedes had a prescriptive easement over the small part of the hedge located on the Yoreks' property (but which the Bedes did not remove).

Yoreks is not supported by substantial evidence and must be reversed.

2. The “Waste Statute” Specifically States It Is Inapplicable to This Case and Thus Cannot be the Basis for an Award of Attorney’s Fees.

After the Trial Court determined the Yoreks had a prescriptive easement over the boxwood hedge, the Trial Court determined the Yoreks were entitled to damages because the Bedes removed the hedge. See Findings of Fact 1.36 and 1.37. CP 142 (Appellants’ Brief Appendix B). The Trial Court then awarded to the Yoreks their attorney’s fees based on the “Waste Statute”, RCW 4.24.630. As the Bedes argued in their opening brief, the Trial Court erred in applying the Waste Statute because it expressly states that it is inapplicable when the “Timber Trespass Statute”, RCW 64.12.030, applies. See RCW 4.24.630 (2).

The Yoreks argue the Waste Statute applies because they “sought restoration costs as damages, not replacement value of the hedge.” Respondents’ Brief at 13. This supposed distinction completely ignores the actual language of the waste statute stating “[the Waste Statute] does not apply in any case where liability for damages is provided under [the Timber Trespass Statute]”. RCW 4.24.630 (2) (emphasis added). Based on the statute itself, the type

of damages a party seeks is completely irrelevant. “If damages are provided for under the timber trespass statute, then the waste statute, RCW 4.24.630, does not apply.” *Gunn v. Riely*, 185 Wash. App. 517, 524, 344 P.3d 1225, 1228 *review denied*, 183 Wash. 2d 1004, 349 P.3d 857 (2015).

The Yoreks further argue that the Timber Trespass Statute is inapplicable “because it applies to the cutting of merchantable shrubs or trees” and “does not apply to a removal of a neighbor’s residential shrubbery”. Respondents’ Brief at 14 (emphasis in the original). The Timber Trespass Statute, RCW 64.12.030, states in pertinent part as follows:

Whenever any person shall cut down, girdle, or otherwise injure, or carry off any tree, . . . timber, or shrub on the land of another person, . . . without lawful authority, in an action by the person . . . against the person committing the trespasses or any of them, any judgment for the plaintiff shall be for treble the amount of damages claimed or assessed.

Nothing in the Timber Trespass Statute suggests “merchantability” is a necessary element to a claim for removal of a shrub nor has any court ever required such an element. Moreover, there are no reported cases in which the Waste Statute has ever been applied to circumstances involving damage to shrubs (merchantable or otherwise). Rather, the Timber Trespass Statute

has always been applied, as it must. See *Maier v. Giske*, 154 Wn. App. 6, 21, 223 P.3d 1265, 1273 (2010) (awarding damages under the timber trespass statute for landscape plants including arborvitae plants, a Pacific wax myrtle tree, a shore pine tree, a camellia and an osmarea).

The Yoreks' arguments also run contrary to the legislative history associated with the 1994 adoption of the Waste Statute (RCW 4.24.630), in which Senator Owen explained that:

[T]he idea is to deal with the tremendous amount of damage that we are having with people coming in and shooting up signs, shooting up restrooms. In the case of forest lands, shooting up trees, taking four-wheel drives and running them all over [agricultural] land and ripping up the ground. You know a variety of things like that is really what we are getting after in this situation.

Gunn, 185 Wn. App. at 525.

Consequently and as a matter of law, the Waste Statute does not apply. Since the Timber Trespass Statute does not afford a party the right to attorney's fees, as recently confirmed by the Court in *Gunn*, the Yoreks are not entitled to recover their attorney's fees and the Trial Court's award of those fees must be reversed.

3. The Trial Court Improperly Dismissed the Bede's Spite Fence Claim.

Both parties rely upon *Baillargeon v. Press*, 11 Wash. App. 59, 66, 521 P.2d 746, 750 (1974) *rev. denied* 84 Wn.2d 1010 (1974) as the appropriate precedent for analyzing a spite fence claim. See Respondents' Brief at 17. *Baillargeon* articulated the elements for a spite fence claim under RCW 7.40.030⁹ as follows:

(1) that the structure damages the adjoining landowner's enjoyment of his property in some significant degree; (2) that the structure is designed as the result of malice or spitefulness primarily or solely to injure and annoy the adjoining landowner; and (3) that the structure serves no really useful or reasonable purpose."

Baillargeon, 11 Wash. App. at 66.

The Yoreks argue the Trial Court properly dismissed the Bedes' claim because they failed to establish the first and third elements. The Yoreks did not address or argue the Bedes failed to establish the second element. In any event, the Bedes established all of the above elements.

⁹ RCW 7.40.030 states "An injunction may be granted to restrain the malicious erection, by any owner or lessee of land, of any structure intended to spite, injure or annoy an adjoining proprietor. And where any owner or lessee of land has maliciously erected such a structure with such intent, a mandatory injunction will lie to compel its abatement and removal."

A. The Yoreks' Concrete Wall Damages the Bedes' Enjoyment of Their Property.

The Yoreks argue the Bedes “offered no evidence of actual property damage or actual dangerous condition created by the fence” and thus the concrete wall did not damage the Bedes enjoyment of their property. Respondents' Brief at 18. Although the Yoreks recognize the visual impairment the wall presents to drivers and pedestrians, they dismiss that as a damage by suggesting a convex mirror would mitigate that risk. *Id.* A mirror is only helpful if everyone uses it. Due to the visual obstruction, the risk of collisions and the danger to drivers and pedestrians still remains. Moreover, this argument ignores the actual damage suffered by the Bedes because the Yoreks' concrete wall projects into the Bedes' driveway. See Exhibits 4, 5, 6, 7, 8, 9 and 86.

The Yoreks also ignore the fact that their concrete wall is unsightly and completely out of character with the neighborhood and other properties and the first thing someone sees upon entering the Bedes' property. See Exhibits 4, 5, 6, 7, 8, 9 and 86. The “aesthetics” of the concrete wall does materially and significantly impact the Bedes enjoyment of their property, particularly in an upscale neighborhood.

All of these problems significantly damage the Bedes' ability to enjoy their property, thus fulfilling the first element.

B. The Concrete Wall Serves No Useful or Reasonable Purpose.

The Yoreks argue the concrete wall serves three useful and reasonable purposes: (1) it provides a screen from the Bedes' boat and blue tarp; (2) it restores and fills the space where the boxwood hedge previously existed; and (3) it "mitigated" the damage caused by the Bedes removal of the boxwood hedge. Respondents' Brief at 19. None of these examples demonstrate the concrete wall serves a useful or reasonable purpose.

First, the concrete wall does not screen the Bedes' boat because the boat is stored east of the wall and is screened by the Bedes' hedge. RP 4/15/15 at 28-29; Exhibits 59 and 91. Presently, the Bedes are required to park their boat near the mutual property line because the concrete wall prevents them from backing the boat into any other location. RP 4/14/15 at 32, 35-37. However, the view from the Yorek property into the Bede property (where the boxwood hedge was removed) is of the Bedes' beautiful landscaping. See Exhibit 47.

Second, if the excuse of "screening" is a justification for a spite

wall, then no plaintiff could ever establish the third element that a structure serves no really useful or reasonable purpose because all spite walls provide some form of screening. Third, the fact that the concrete wall replaces the prior boxwood hedge is to suggest that the two are similar, which they are not.

The boxwood hedge was approximately 4 feet tall where the concrete wall is over 6 feet tall. Exhibits 87 and 95. The boxwood hedge did not obscure visibility for drivers where the concrete wall does. The boxwood hedge was behind the curbing where the concrete wall penetrates through the curbing and extends into the Bedes' driveway. Exhibits 4-9, 86.

The concrete wall does not screen the Bedes' vehicles or boat because neither are parked (or were parked) adjacent to where the wall was constructed. For those reasons, the Bedes fulfilled the third element for a spite wall.

Because the Bedes satisfied all of the elements demonstrating the Yoreks' concrete wall is a spite wall, the Trial Court erred in dismissing the Bedes' claim and must be reversed.

CONCLUSION

There was no evidence to support the Trial Court's findings that the Yoreks had a prescriptive easement over the Bedes'

boxwood hedge and thus owned the hedge. Consequently, the Trial Court's extension of the prescriptive easement, *sua sponte*, must be reversed.

Because the Yoreks had no ownership interest in the boxwood hedge, the Yoreks cannot be damaged by its removal and thus there was no basis for an award of attorney's fees. Even if the Yoreks were somehow damaged, the Trial Court's award of attorney's fees must also be reversed because RCW 4.24.630, the Waste Statute, is by its own terms inapplicable.

The Bedes fulfilled all of the requirements for establishing the Yoreks' concrete wall was a spite fence and that claim should not have been dismissed. Moreover, dismissing the claim directly conflicts with the prescriptive easement over the driveway granted by the Trial Court because the wall extends into the Bedes' driveway.

Respectfully submitted this 19th day January, 2016.

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CERTIFICATE OF SERVICE

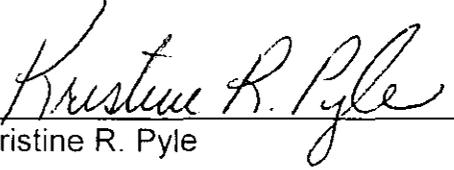
The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action,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

On the date given below I caused to be served the foregoing APPELLANTS' REPLY BRIEF on the following individuals in the manner indicated:

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SIGNED this 19th day of January, 2016 at Gig Harbor, Washington.



Kristine R. Pyle