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DIVISION II

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STATE OF WASHINGTON

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DEPUTY

No. 48145-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

DARLINGTON OFUASIA *et al*,
Appellant

v.

DANA WILLIAM SMURR,
Respondent.

BRIEF OF APPELLANT

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No. 48145-6-II; Ofuasia v Smurr;
APPELLANT'S BRIEF
Page 1 of 32

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TABLE OF CONTENTS

TABLE OF AUTHORITIES 4

INTRODUCTION 7

ASSIGNMENTS OF ERROR 9

 1) The trial court erred when it denied Plaintiffs’ motion for partial summary judgment on Plaintiffs’ statutory and common law trespass claims. 9

 2) The trial court erred when it granted Defendant’s motion for partial summary judgment dismissing all of Plaintiffs’ trespass claims. 10

Issues Related to Assignments of Error 10

STATEMENT OF THE CASE 10

ARGUMENT 18

Summary of Argument: No Material Issues of Fact Prevented Judgment for Plaintiffs as a Matter of Law; Trial Court Should Have Denied Defendant’s Motion for Summary Judgment as Matter of Law 18

Standard of Review of Grant and Denial of Summary Judgment 19

Elements of Common Law and Statutory Trespass 20

 A. RCW 4.24.630 20

 B. RCW 64.12.030 20

 C. Common Law Trespass 21

Undisputed Facts 22

Arbitration Decision Did Not Provide Lawful Authority For
Defendant’s Trespass 22

Defendant Was Not Authorized To Engage In Self Help
..... 27

Defendant’s Intentional Acts Constituted Common Law Trespass
..... 29

CONCLUSION 30

TABLE OF AUTHORITIES

Cases

Birchler v Castello Land Co., Inc, 133 Wn.2d 106, 110, 942 P.2d 968, 970 (1997) 29

Bradley v. Am. Smelting & Ref. Co., 104 Wn.2d 677, 683-84, 709 P.2d 782, 786 (1985) 30

Broughton Lumber Co. v BNSF Ry. Co., 174 Wn.2d 619, 638, 278 P.3d 173, 182 (2012) 29

Brown ex rel. Richards v. Brown, 157 Wn.App. 803, 817-818, 239 P.3d 602, 609-610 (Div 1, 2010) 27

Bryant v. Palmer Coking Coal Co., 86 Wn.App. 204, 210, 936 P.2d 1163, 1168 (Div. 1, 1997) 25

Clipse v. Michels Pipeline Const., Inc., 154 Wn. App. 573, 580, 225 P.3d 492, 496 (2010) 20, 23

Dunlap v Wild, 22 Wn.App. 583, 590, 591 P.2d 834, 837 (Div. 2, 1999) 25

Grundy v. Brack Family Trust, 151 Wn. App. 557, 567, 213 P.3d 619, 624 (Div. 2, 2009) 21, 30, 31, 32

Happy Bunch, LLC v Grandview North, LLC, 142 WnApp 81, 96;173 P.3d 959, 967 (Div 1, 2007) *rev. denied* 164 Wn.2d 1009 (2008) 26, 29

Jongeward v. BNSF R. Co., 174 Wn.2d 586, 604, 278 P.3d 157, 166 (2012) 21, 29

Kaiser Aluminum & Chem. Corp. v. Dep't of Labor & Indus., 57 Wn. App. 886, 889, 790 P.2d 1254, 1256 (Div. 3, 1990) 24

Keck v. Collins, 184 Wn.2d 358, 370, 357 P.3d 1080, 1086 (2015) 20

Kofmehl v. Baseline Lake, LLC, 177 Wn.2d 584, 594, 305 P.3d 230, 236 (2013) 19

Maier v. Giske, 154 Wn.App. 6, 21, 233 P.3d 1265, 1273 (Div. 1, 2010) 29

Mullally v. Parks, 29 Wn.2d 899, 911, 190 P.2d 107, 114 (1948) 21,
23, 29, 31

State v. Valentine, 132 Wn.2d 1, 17, 935 P.2d 1294, 1302 (1997) 28

Washburn v. City of Federal Way, 178 Wn.2d 732, 752, 310 P.3d 1275, 1286 (2013) 19

Welch v. Southland Corp., 134 Wn.2d 629, 632, 952 P.2d 162, 164 (1998) 19

Statutes

CR 56(c) 19

RCW 4.16.020 25

RCW 4.24.630 18, 20, 23

RCW 4.24.630(1) 10, 18

RCW 4.24.630(2) 20

RCW 64.12.030 10, 18, 20, 21, 26, 29

RCW 64.12.040 29
RCW 7.04A.200 16, 26
RCW 7.04A.220 28
RCW 7.04A.240 16, 26
RCW 9A.48.070, .080, .090 27

INTRODUCTION

Plaintiffs Alena and Darlington Ofuasia purchased a lot that was partly enclosed by a chain link fence. After building their home on the lot, they removed the chain link fence on the west side of their lot and partially replaced it with a wood fence. They replaced the remaining length of it with arborvitae trees. Both the wood fence and the arborvitae trees were on the line of the former fence.¹

More than ten years later, after first filing a small claims action which was dismissed for lack of jurisdiction, Defendant Smurr initiated an arbitration proceeding in which he demanded the plaintiffs remove the wood fence and landscaping, claiming they encroached on a private road. Neither party was represented by counsel at the arbitration. The arbitrators decided there was insufficient evidence to determine the actual boundaries. However, they stated that if a survey showed the fence and landscaping were outside the recorded boundary the fence and landscaping “should be removed”.

¹ Photos of the wood fence and arborvitae trees are at CP 29, 30, 99 and 102.

The defendant then sent a letter to the plaintiffs, saying he had a survey done which confirmed the fence and landscaping were outside their recorded lot line.² Defendant said that if the plaintiffs did not remove the fence and landscaping within 30 days, he would remove them himself.

Plaintiffs hired an attorney, who asked the arbitrators to revise their decision because it was based on no evidence regarding the location of the boundary lines and because the evidence showed the plaintiffs had established adverse possession over the disputed property. The arbitrators replied by letter that they did not rule on the adverse possession claim but they did not mean to preclude the Ofuasias from bringing such a claim in another forum.

Plaintiffs' attorney sent Mr. Smurr a copy of the arbitrators' letter and advised Mr. Smurr that if he proceeded with self help removal of the fence and landscaping he would be committing trespass. Nevertheless, on the 31st day after Mr. Smurr sent his letter to the Ofuasias, he used a chain saw to cut down the Ofuasias' mature arborvitae trees and used a cutting tool to cut the

² A surveyor's diagram is at CP 70. Plaintiffs' lot is shown as Lot 28. The private road designated "Tract A" is on the north and west sides of Lot 28. The Plaintiffs' fence and landscaping lay along the west side of Lot 28, which is the shortest side of the lot.

metal fence posts. He then removed and disposed of all of the fencing and trees which had been outside the Ofuasia's recorded west boundary line.

The Ofuasia's sued in Clark County Superior Court for quiet title and trespass. Superior Court Judge David Gregerson granted one of the plaintiffs' motions for partial summary judgment, holding they owned the disputed property (up to the line established by the metal posts of the previous chain link fence) by adverse possession. However, Judge Gregerson denied Plaintiffs' motions for summary judgment on their statutory and common law trespass claims against Mr. Smurr. Judge Gregerson subsequently granted Defendant's motion for partial summary judgment dismissing the plaintiffs' trespass claims.

Darlington and Alena Ofuasia appeal the denial of their motion for partial summary judgment on their trespass claims and the grant of Defendant's motion for summary judgment.

ASSIGNMENTS OF ERROR

1) The trial court erred when it denied Plaintiffs' motion for partial summary judgment on Plaintiffs' statutory and common law trespass claims.

2) The trial court erred when it granted Defendant's motion for partial summary judgment dismissing all of Plaintiffs' trespass claims.

Issues Related to Assignments of Error

The issues presented in this case are:

- What constitutes intent or "wrongful" interference with the plaintiff's property for purposes of finding trespass under RCW 4.24.630(1);
- What constitutes lack of lawful authority under RCW 64.12.030;
- Can Defendant rely on the arbitration decisions in this case to avoid liability for his admitted acts of cutting down and removing the plaintiffs' fence and trees;
- Should Plaintiffs' common law trespass claim have been dismissed although different elements apply?

(Each issue refers to both Assignments of Error 1 and 2 because of the common factual and legal issues.)

STATEMENT OF THE CASE

Robert Mason and Chuck Mason created a short plat in October, 1993 in a portion of lots 11 and 28 and all of lot 27 of the Fruitlawn subdivision. (Ex. 6, CP 71-75.) The plat divided a triangular parcel into 4 uneven lots in

a section north of Covington Road and west of NE 107th Ave. in Clark County. *Id.* (The southern tip of the triangle was not part of the short plat. It was the rest of lot 28 which eventually became Plaintiffs' property as described below.) In creating the short plat, the Masons reserved "Tract A" as a private road to serve the four lots. *Id.* This private road was named NE 65th Street. NE 65th Street extends west approximately 248 feet from the center line of NE 107th Avenue and dead-ends at Lot 4 of the short plat. (Short plat diagram, CP 71.) Because of the dead end, there is a wide turnaround at a 90 degree angle from NE 65th Street near the dead end, to allow for fire and ambulance vehicles. *Id.* The disputed fence and arborvitae extended along the east side of the turnaround. (Alena Ofuasia Dec., CP 18-21, ¶¶2,4-7,10.)

The short plat covenant dedication provides that the plat is to be "subject to the covenants, conditions and restrictions shown thereon and subject to easements for ingress, egress and utilities as set forth on the plat..." (Ex. 6, page 3, CP 73.) Attachment A-1 to the Short Plat was a "Declaration of Covenant for Private Maintenance of Short Plat Approved Private Road." (CP 74-75.) This road maintenance covenant stated that "the private road easements within this short plat are intended to be non-exclusive easements

except where so stipulated on the plat. All easements, unless otherwise noted, may be used to serve adjacent properties....”. (Ex. 6, p. 4 #4, CP 74 #4.) The portion of Lot 28 which became the plaintiffs’ property was adjacent to the short plat. (CP 71.)

David and Yong Harris purchased a portion of Lot 28, Fruitlawn Addition, from Clark County in June, 2002. (Exhibit 3, CP 59-62.) On July 3, 2002, they signed a “Road Maintenance Agreement” with Robert Mason. (Ex. 4, CP 63-67.) The Road Maintenance Agreement provides, among other things, that it pertains to a road which

“services the tracts of land above described and is described as follows:

Tract A of that certain Short Plat, according to the plat thereof, recorded in Book ‘2’ of Short Plats, page 816....” (CP 63.)

The Agreement went on to provide (1) the parties confirmed the existence of the pre-existing “road easement” described in the short plat; (2) each party agreed not to block the use of the other and that their use would be commensurate of the other’s and would not unreasonably interfere with the other’s use; (3) each party would share proportionately in the cost of maintenance; (4) (at ¶6) arbitration in the case of disputes, and (5) (at ¶7) the agreement was to be binding on the respective “heirs, assigns, and successor

in interest of the parties hereto and the road easement shall be deemed as a covenant running with the land...” (CP 64-65.)

On July 5, 2002, Robert Mason quit-claimed to David and Yong Harris “a non-exclusive easement for ingress, egress and utilities over the following described real property ...Tract A....” (Plaintiffs’ Ex. 5, CP 68-70.).

Mr. and Ms. Harris erected a chain link fence surrounding their property. They had the fence constructed by a fence contractor a short time before January 23, 2003. (Harris declaration, CP 53-54 ¶2.) The fence on the western side of the lot encroached on the east part of the paved “turn-around” portion of Tract A. (*Id.* ¶4.)

David and Yong Harris sold the lot to the plaintiffs, Alena and Darlington Ofuasia on July 25, 2005. (CP 57-58.) The Harrises conveyed two deeds to the Ofuasias, one transferring just the land and the second (apparently a correction deed) including a non-exclusive easement for ingress and egress over Tract A of the Mason short plat. (Plaintiffs’ Exhibits 1 and 2, CP 57-58.) The Harris fence remained in place continuously until some time after the Ofuasias purchased the property from the Harrises. (Harris Dec., CP 54 ¶5.)

After purchasing their lot from the Harrises, the Ofuasia had a house built. (CP 18 ¶3.) Mr. and Ms. Ofuasia landscaped the area between the west side of their garage and the fence erected by the Harrises. (CP 18 ¶4.) They planted arborvitae trees along the west side of their garage. (CP 19 ¶5.) They took down the chain link fence and installed a wooden fence slightly inside (i.e., east) of where the chain link fence had been south of their new landscaping. (Alena Ofuasia Dec., ¶6, CP 19 ¶6.) However, the metal fence posts erected by the Harrises remained. (*Id.*) The Ofuasia continuously and exclusively maintained the area west of their garage and property line to the line established by the metal fence poles placed for the Harris' chain link fence. (Alena Ofuasia Dec., Ex. 12, CP 20 ¶7.)³

The defendant, Mr. Smurr, purchased his property, Lot 2 of the Short Plat, from Robert Mason in May, 1994. The deed grants him all of Lot 2 and “an undivided quarter interest in Tract A.” (Ex. 7, CP 76.)

On November 5, 2012, Mr. Smurr filed a small claims action claiming “the Defendant, Darlington & Alena Ofuasia (sic) owes the Plaintiff the sum

³ On Plaintiffs' motion for partial summary judgment, the trial court granted Plaintiffs' quiet title claim to the area enclosed by the chain link fence. (CP 128-129.) Defendant has cross appealed that decision.

of \$2,000. The reason that this money is owed is removal of large rocks/boulders placed in ‘Tract A’, an easement, which restrict/block my use and access to my property.” (Alena Ofuasia Dec. ¶9, CP 19; CP 39-40.) The small claims case was dismissed for lack of jurisdiction. (CP 45.)

In April, 2013, Mr. Smurr submitted a claim to Arbitration Service of Portland. The ASP sent the Ofuasia a notice of arbitration with an attached “Statement of Claim”. (Alena Ofuasia Dec. Ex. 16, CP 46-48.) The statement of claim was the first time the Ofuasia became aware that Mr. Smurr was asserting their fence and shrubs were not on their property. (Alena Ofuasia Dec., ¶ 10, CP 19.)

The matter was submitted to arbitration before a panel consisting of James Ladley, John Skimas and Josephine Townsend. Neither party was represented by counsel at the arbitration hearing. On June 17, 2013, the arbitrators determined, in essential part:

The side yard requirement is five feet. According to Claimant’s measurements the fence is approximately eleven feet from the west side of Respondents’ house and encroaches into the “turn around” easement. The fence should be removed if encroachment is established by a proper survey to be paid for by Claimant. However, arbitrator Townsend dissents from this conclusion because adverse possession may have occurred based on the testimony of Charles Mason and Darlington Ofuasia who said the fence was built where a previous chain link fence existed. (Alena Ofuasia Dec. Ex. 8, CP 22-

23.)

The Ofuasia then submitted a letter, through counsel, to the arbitrators, asking for reconsideration pursuant to RCW 7.04A.200 and RCW 7.04A.240. The letter noted: (1) the Ofuasia had obtained adverse possession of the area to the west of their property, so that the road maintenance agreement did not apply and the arbitrators did not have jurisdiction to decide the issue, and (2) the decision was incomplete in that it referenced a survey which had not been completed and there was insufficient evidence on which to base a decision. (Alena Ofuasia Dec. Ex. 9, CP 24-26.) (Also filed by Defendant as Ex. C to his Answer, CP 14-16.)

The panel responded on July 11, 2013: "...the issue of adverse possession was not fully developed....We did not intend to foreclose the possibility that Mr. Ofuasia could in a proper forum plead and establish the necessary elements of adverse possession." (Emphasis in the original.) (Alena Ofuasia Dec. Ex. 10, ¶12, Skimas letter 7/11/2013, CP 27.) In addition, on June 18, 2013, arbitrator Townsend responded to an email from the Ofuasia, stating "The fence - we did not require its removal." She further said the arbitration decision "does not resolve the dispute at this time." (Alena Ofuasia Dec. Ex. 17, CP 150.)

Mr. Smurr wrote to the Ofuasia on June 24, 2013, stating he had obtained a survey which he attached. (CP 104, 105.) The survey report from surveyor David Denny stated he had located the west corners of the Ofuasia property (identified as Tax Lot 28) and the east side of Tract “A” of the short plat. (CP 104.) Mr. Denny did not state where the Ofuasia’s fence and landscaping were in relation to the corners or lot line, but did state the “property owners of Tax lot 28 were present at the time of my survey and shown the found monuments and notified of the house corner offsets.” (*Id.*)

In his June 24 letter, Mr. Smurr stated that if the Ofuasia did not remove encumbrances “as directed in the Arbitrators’ Decision” by July 24, 2013, he will remove them. (CP 104-105; Smurr Dec ¶22, CP 92.)

On July 18, 2013, The Ofuasia’s attorney wrote Mr. Smurr, forwarding a copy of the arbitrators’ July 11 response letter and stating the Ofuasia own the land in question through adverse possession. The letter further advised Mr. Smurr that if he were to damage or destroy the Ofuasia’s property, he would be committing trespass and subject to treble damages and attorney fees. (Ex. 18, Fels 7/18/2013 letter, CP 51-52.)

Mr. Smurr subsequently removed the fence, arborvitae, and landscaping within the subject area on or about July 25, 2013 and “disposed

of the materials within a day or two”. (Answer, ¶16; CP 5; Smurr Dec. CP 93 ¶27; Alena Ofuasia Dec., ¶ 13, CP 20.) This suit followed.

ARGUMENT

Summary of Argument: No Material Issues of Fact Prevented Judgment for Plaintiffs as a Matter of Law; Trial Court Should Have Denied Defendant’s Motion for Summary Judgment as Matter of Law

There were no material issues of fact precluding the trial court from finding Defendant trespassed as a matter of law under common law trespass, RCW 4.24.630 and RCW 64.12.030.

The undisputed evidence showed Defendant knew or should have known Plaintiffs claimed adverse possession over the area where their trees, fence and landscaping were. Because he knew the trees, fence and landscaping belonged to Plaintiffs and intentionally chose to ignore the bona fide boundary dispute when he removed and disposed of them, Defendant acted without lawful authority or a reasonable belief of authorization. Plaintiffs were entitled to summary judgment on each of their trespass claims as a matter of law.

The trial court erred when it failed to grant Plaintiffs’ motion for partial summary judgment on their trespass claims. Because the same facts

underlay Plaintiffs' and Defendant's motions, the court also erred when it granted summary judgment in Defendant's favor dismissing Plaintiffs' trespass claims.

Standard of Review of Grant and Denial of Summary Judgment

This court reviews appeals of decisions denying and granting summary judgment de novo under the same standard as the trial court. *Washburn v. City of Federal Way*, 178 Wn.2d 732, 752, 310 P.3d 1275, 1286 (2013).

For appeal of a decision denying summary judgment, the question on review is whether there were any material facts at issue which when viewed in the light favoring the non-moving party would support the non-moving party's case. *Kofmehl v. Baseline Lake, LLC*, 177 Wn.2d 584, 594, 305 P.3d 230, 236 (2013). If there were no genuine issues of material fact and the moving party was entitled to judgment as a matter of law, summary judgment should have been granted. CR 56(c); *Welch v. Southland Corp.*, 134 Wn.2d 629, 632, 952 P.2d 162, 164 (1998).

When reviewing the grant of summary judgment, this court must determine if there were material facts at issue which if proven would favor

the non-moving party and the moving party is entitled to judgment as a matter of law. *Keck v. Collins*, 184 Wn.2d 358, 370, 357 P.3d 1080, 1086 (2015).

Elements of Common Law and Statutory Trespass

The Ofuasia sued for trespass under RCW 4.24.630, RCW 64.12.030 and the common law of trespass. (Complaint, ¶12, CP 3.)

A. RCW 4.24.630

RCW 4.24.630 applies to trespass to property but not when the trespass is against property covered by RCW 64.12.030. [RCW 4.24.630(2).] Thus this statute applies to trespass and damage done by Defendant against Plaintiffs' fence and other landscaping besides their arborvitae.

To find a defendant trespassed under 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." *Clype v. Michels Pipeline Const., Inc.*, 154 Wn. App. 573, 580, 225 P.3d 492, 496 (2010)(emphasis in original).

B. RCW 64.12.030

Trespass under RCW 64.12.030 "applies only when a defendant commits a direct trespass causing immediate injury to a plaintiff's trees,

timber, or shrubs.” *Jongeward v. BNSF R. Co.*, 174 Wn.2d 586, 604, 278 P.3d 157, 166 (2012). To be liable, the defendant must act “without lawful authority.” RCW 64.12.030. However, if the defendant has “knowledge of a bona fide boundary dispute, and thereafter consciously, deliberately, and intentionally enters upon the disputed area for the purpose of destroying, and does destroy, trees or other property which cannot be replaced, such acts are neither casual nor involuntary, nor can they be justified upon the basis of probable cause for belief by the tortfeasor that he owned the land, but, on the contrary, are without lawful authority...” *Mullally v. Parks*, 29 Wn.2d 899, 911, 190 P.2d 107, 114 (1948).

C. Common Law Trespass

Common law intentional trespass occurs only where there is “(1) an invasion of property affecting an interest in exclusive possession, (2) an intentional act, (3) reasonable foreseeability that the act would disturb the plaintiff’s possessory interest, and (4) actual and substantial damages.” *Grundy v. Brack Family Trust*, 151 Wn. App. 557, 567, 213 P.3d 619, 624 (Div. 2, 2009).

Undisputed Facts

The undisputed facts in this case are: Mr. Smurr intentionally cut down a fence and arborvitae trees which he knew belonged to the plaintiffs. (Smurr Dec., ¶27; CP 93, Def's Answer, ¶16, CP5.) . He also knew or should have known that the Ofuasia claimed or had a potential claim to ownership of the land on which the trees and fence stood and that claim had not been decided by the arbitrators. (Def's Answer, Ex. B - Arbitration Decision, CP 12-13; Smurr Dec. ¶13, 16; CP 91; CP 92 ¶19).

Arbitration Decision Did Not Provide Lawful Authority For Defendant's Trespass

The defendant claimed his actions were not without lawful authority because the arbitrators' initial decision said that if a survey showed the trees and fence to be outside the recorded boundary, they "should be removed". He also argued that "at a minimum, the Court should rule that Plaintiffs are not entitled to treble damages because defendant could not have acted 'willfully' in light of the ruling of the arbitration panel. At worse, (sic) he was 'acting on a mistaken belief of ownership of the land'." (Def. Smurr's Motion for Partial Summary Judgment, p. 2, fn. 2; CP 139.)

The initial arbitration decision in this case, of which the defendant was clearly aware, stated there was testimony indicating the fence was in the same location as the pre-existing chain link fence, and one of the arbitrators believed the testimony showed adverse possession “may have occurred”. (CP 22-23.)

In addition, Plaintiffs wrote the arbitrators asking them to reconsider their decision, explaining the basis for their claim of ownership of the disputed property based on adverse possession. A copy of that letter was personally delivered to the defendant. (Def’s Answer, Ex. C, CP 24-25.) Defendant’s knowledge of Plaintiffs’ adverse possession claim defeats his argument he was acting under “lawful authority” as a defense to liability. *Mullally, supra*. Thus there is no question Mr. Smurr was or should have been aware of the Plaintiffs’ adverse possession claim before he cut down the fence and trees.⁴

The arbitrators letter of July 11, 2013, stated “the issue of adverse possession was not fully developed. We were unsure of the exact location of

⁴ RCW 4.24.630 provides a remedy if the person acted intentionally and knew or had reason to know that he or she lacked authorization to so act. *Clipse, supra*. Thus the reasoning of *Mullally* also applies to Plaintiffs’ RCW 4.24.630 claim.

the property line. ... We did not intend to foreclose the possibility that Mr. Ofuasia could in a proper forum plead and establish the necessary elements of adverse possession.” (Emphasis in original, CP 27.) The Ofuasia’s attorney sent a copy of this letter to the defendant on July 18, with a cover letter telling him the he would be committing trespass and the Ofuasia would sue him if he damaged their property. (CP 51.) This letter also put Mr. Smurr on notice that the ownership of the property was in dispute and not determined by the initial arbitrators’ decision.⁵

The July 11 letter from Arbitrator Skimas made it clear that the issue of adverse possession was not litigated in the arbitration proceeding. Therefore the arbitration was not final or binding on that issue, and it could

⁵ While in his trial court memorandum Mr. Smurr denied receiving the Fels July 18 letter, he did not introduce any evidence to that effect. It is therefore undisputed he received it. “Upon proof of mailing, it is presumed the mail proceeds in due course and the letter is received by the person or entity to whom it is addressed.” *Kaiser Aluminum & Chem. Corp. v. Dep’t of Labor & Indus.*, 57 Wn. App. 886, 889, 790 P.2d 1254, 1256 (Div. 3, 1990). For purposes of his own summary judgment motion, Mr. Smurr conceded that it had to be presumed he had received the Fels July 18 letter and the enclosed response from the arbitrators. (Def. Smurr’s Reply Memorandum RE Motion for Partial Summary Judgment, 2; CP 156. Lines 10-16.) Defendant also acknowledged receipt of the Fels letters and the Skimas July 11 letter in his Declaration in Opposition to Plaintiffs’ MSJ. (CP 93 ¶27.)

not be considered res judicata. *Dunlap v Wild*, 22 Wn.App. 583, 590, 591 P.2d 834, 837 (Div. 2, 1999).

Being aware ownership of the land was still at issue, Defendant had no reason to believe he was entitled to remove the fence. The ten year period (pursuant to RCW 4.16.020) expired ten years after the fence was installed, i.e., January 2013. This was before the arbitration proceeding. The trial court ruled that the Ofuasia's acquired the disputed parcel (defined by the line of the former chain link fence) by adverse possession. CP 128-130.⁶ Defendant could not divest the Plaintiffs of ownership except by an act required to divest an owner whose title was acquired by deed. *Bryant v. Palmer Coking Coal Co.*, 86 Wn.App. 204, 210, 936 P.2d 1163, 1168 (Div. 1, 1997).

Defendant argued below he was entitled to remove the fence and trees because the arbitrators authorized it.⁷ However, the arbitrators did not decide ownership of the underlying land. When he cut down the fence and trees, Mr.

⁶ Defendant has cross appealed that ruling.

⁷ Defendant did not submit a statement that he believed he owned the disputed property. In his trial court declaration he conceded he stepped onto Plaintiffs' property when cutting the trees and fence if they established adverse possession. (CP 93 ¶28.)

Smurr either knew or should have known the Ofuasia claimed ownership of the land where their fence and trees were located *and* that the arbitrators did not decide the adverse possession issue. His subjective belief in the right to cut the trees did not create a defense to RCW 64.12.030 trespass. *Happy Bunch, LLC v Grandview North, LLC*, 142 WnApp 81, 96;173 P.3d 959, 967 (Div 1, 2007) *rev. denied* 164 Wn.2d 1009 (2008).

In addition, whether or not the fence and trees were on disputed property, there is no dispute that they belonged to the plaintiffs. When Defendant damaged the fence and trees by cutting them down and removing them, he had to know he was damaging property belonging to the plaintiffs.

The initial arbitration letter decision only stated that “(t)he fence should be removed if encroachment is established by a proper survey to be paid for by Claimant.” (CP 22.) This was not a conclusive decision. It was tentative based on facts not before the arbitrators.⁸ Furthermore it did not specify who should remove the fence and trees or who was authorized to do

⁸ Plaintiffs asked the arbitrators to withdraw their opinion pursuant to RCW 7.04A.200 and RCW 7.04A.240 based on its speculative nature because it was based on evidence not before them but the arbitrators declined. (Fels 7/9/2013 letter, CP 24-25, and Skimas 7/11/2013 letter, CP 27.)

so. The letter did not say Mr. Smurr was authorized to remove the “encroachment” on his own without further authority or how it should be removed. The defendant decided on his own, taking the law into his own hands, to cut down and remove the plaintiffs’ fence and trees.

Defendant Was Not Authorized To Engage In Self Help

Even assuming the defendant could justifiably rely on the arbitration decision as a ruling that the Ofuasia were required to remove their fence and trees, when they did not do so voluntarily Defendant’s removal and destruction of them was a criminal act and civil conversion. A person who causes physical damage to the property of another is guilty of malicious mischief, which can be a class B or C felony or a gross misdemeanor, depending on the value of the damage. RCW 9A.48.070, .080, .090. It can also be conversion. *Brown ex rel. Richards v. Brown*, 157 Wn.App. 803, 817-818, 239 P.3d 602, 609-610 (Div 1, 2010).⁹ Mr. Smurr presented no evidence of a legal right to take and destroy the plaintiffs’ property. Thus his acts were without lawful authority.

⁹ “Wrongful intent is not an element of conversion, and good faith is not a defense.” *Brown, supra*, 157 Wn.App. 818.

The defendant argued before the trial court that “Apparently under plaintiffs’ view of the world, the arbitrators’ decision could remain meaningless so long as plaintiffs themselves do not take action to remove the materials that had been ordered to be removed.” (Def.’s Reply Memorandum RE MPSJ, CP 156. fn 1.) As the Washington Supreme Court said (in a case involving a defendant charged with resisting what he thought was an illegal arrest),

“The concept of self-help is in decline. It is antisocial in an urbanized society. It is potentially dangerous to all involved. It is no longer necessary because of the legal remedies available.’ (Citation omitted.) We agree.” *State v. Valentine*, 132 Wn.2d 1, 17, 935 P.2d 1294, 1302 (1997).

Mr. Smurr had available remedies that did not involve trespassing on the plaintiffs’ land. He could have filed a motion with the Superior Court to confirm the arbitration award and asked for an injunction under RCW 7.04A.220. He could have asked the arbitrators or the Superior Court to find the plaintiffs in contempt, or sought monetary damages. However, he did not choose these legal remedies. Instead he removed the fence and trees on his own.

There is evidence that the defendant knew the area claimed by the plaintiffs and its scope prior to removing the fence and vegetation, which he

deliberately destroyed. Knowing the fence and trees were in a disputed area, Defendant's actions were intentional and without lawful authority. *Mullaly v. Parks, supra*. Defendant did not have reason to believe the plants were on his property¹⁰ and thus is not entitled to mitigation under RCW 64.12.040 or to claim his acts were pursuant to lawful authority. *Maier v. Giske*, 154 Wn.App. 6, 21, 233 P.3d 1265, 1273 (Div. 1, 2010).

Defendant's Intentional Acts Constituted Common Law Trespass

Even assuming he had a mistaken belief as to the ownership of the land and his authority to remove the fence and trees, the undisputed facts show Defendant committed common law trespass. The element of intent in

¹⁰ To be liable for violation of RCW 64.12.030, the defendant does not have to be physically present on the plaintiff's property. *Jongeward v. BNSF R. Co.*, 174 Wn.2d 586, 605, 278 P.3d 157, 166 (2012); *Broughton Lumber Co. v BNSF Ry. Co.*, 174 Wn.2d 619, 638, 278 P.3d 173, 182 (2012). Defendant argued (CP 139) that he was not subject to statutory liability because he was under "mistaken belief of ownership of the land," citing *Birchler v Castello Land Co., Inc*, 133 Wn.2d 106, 110, 942 P.2d 968, 970 (1997). However, Defendant did not offer any facts to show a mistaken belief as to ownership. Further, *Mullaly, supra* and *Maier v Giske, infra*, explain that a defendant who acts with knowledge of an ownership dispute demonstrates the requisite intent for statutory trespass. *Maier* cites *Happy Bunch* for the holding that "A mere subjective belief in the right to cut trees is not sufficient for mitigation pursuant to RCW 64.12.040" *Maier*, 154 Wn.App.22, 223 P.3d 1273-74.

the common law only requires that the actor undertake an act realizing there is a high probability of damage and disregards the likely consequences. *Bradley v. Am. Smelting & Ref. Co.*, 104 Wn.2d 677, 683-84, 709 P.2d 782, 786 (1985). “(T)he defendant need not have intended the trespass; he need only have been substantially certain that the trespass would result from his intentional actions.” *Grundy v. Brack Family Trust, supra*, 151 Wn.App. 569, 213 P.3d 625, *rev. denied* 168 Wn.2d 1007 (2010). Because there is no question that Defendant intentionally cut down Plaintiffs’ trees and fence, summary judgment should have been granted Plaintiffs on their common law trespass claim. For the same reason, summary judgment should not have been granted Defendant dismissing this claim.

CONCLUSION

The trial court erred when it denied summary judgment on Plaintiffs’ trespass claims. There was nothing in the arbitration decision that granted the defendant “lawful authority” to take down the plaintiffs’ fence and trees, thereby damaging and converting them. The undisputed evidence in the record shows that when he did so, Defendant acted intentionally with full knowledge Plaintiffs owned the trees and fence and claimed adverse

possession of the land the fence and trees were on. (The trial court later confirmed Plaintiffs' land ownership by adverse possession.)

With regard to the defendant's motion for summary judgment on the plaintiffs' statutory trespass claims, the evidence showed Mr. Smurr received two letters from the plaintiffs' attorney before he removed the fence and trees. The first letter asked the arbitrators to revise their opinion and asserted an adverse possession claim. The second letter advised Defendant of the arbitrators' second letter decision (in which they said the adverse possession claim was still an open question) and that he would be sued for trespass if he engaged in self help removal of the Ofuasia's property. When Defendant deliberately cut down the trees and fence knowing ownership of the land was in dispute, he committed statutory trespass. *Mulally v. Parks, supra*.

If for some reason there might be evidence Defendant was unaware of the adverse possession claim, summary judgment in Defendant's favor was not appropriate because there was a question of fact as to his knowledge and intent.

With regard to the plaintiffs' common law trespass claim, there is no disputed issue of material fact. Defendant's intentional invasion of Plaintiffs' property caused substantial damage to their possessory interest. *Grundy v.*

Brack Family Trust, supra. There was no factual basis for the trial court to dismiss the common law claim.

There were no facts in the record which could support the defendant's "lawful authority" defense. Plaintiffs ask this court to reverse the trial court's order granting summary judgment to the defendant on the plaintiffs' trespass claims. Plaintiffs also ask for reversal of the trial court's denial of the plaintiffs' motion for summary judgment on their statutory and common law trespass claims for the same reasons.

Dated December 31, 2015.

Respectfully submitted



Peter Fels, WSBA #23708
Attorney for Appellants

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

DARLINGTON OFUASIA and ALENA
OFUASIA, husband and wife,

Appellants,

v.

DANA WILLIAM SMURR,

Respondent.

No. 48145-6-II

I, JUDY FRYER, state that I am the assistant to the attorney for Appellants, DARLINGTON OFUASIA and ALENA OFUASIA, in this action and that on the date signed below I caused true and complete copies of this Certificate of Service and the following document:

1. BRIEF OF APPELLANT

to be served on the Respondent, DANA SMURR, by causing a true copy of each to be mailed to his attorney at the following address:

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

Signed at Vancouver, Washington on this 31st day of December, 2015.



Judy Fryer, Paralegal