Case No.: 48367-0-II

COURT OF APPEALS, DIVISION II

OF THE STATE OF WASHINGTON

DAVID K. BOWERS and KATHERYN E. BOWERS, a married couple; ROBERT COBB and DEBRA E. COBB, a married couple; and ANTHONY L. BELTRAME and MAGGIE BELTRAME, a married couple,

Respondents,

v.

JAMES W. DUNN, dealing in his separate property, and JANE DOE DUNN,

Appellants

BRIEF OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF CONTENTS V

TABLE OF AUTHORITIES VII

I. RESTATEMENT OF ISSUES ON APPEAL 1

A. Did the trial court lack legal authority to enter the no-contact order dated October 16, 2015? No. 1

B. Were the terms of the no-contact order "manifestly unreasonable or arbitrary" where its duration is unspecified, applies to "Plaintiffs" generally, and prohibits "verbal and non-verbal contact." No. 1

II. STATEMENT OF THE CASE 1

III. ARGUMENT 5

A. It is axiomatic that the Superior Court may grant interlocutory injunctive relief. 5

B. The Injunctive No Contact Order was a proper modification of the long line of injunctions ordered in this case. 7

1. Standard of Review of Injunctive Relief on Appeal is for Abuse of Discretion. 7

2. The Injunctive Order was well supported by the facts and conclusions below. 8

C. The Scope of the Injunction is Justified by Mr. Dunn's Behavior. 11

1. Chapter 10.14 RCW is not controlling, but sheds light on the propriety of the no contact order. 11

2. The appealed modification Order was issued 17 months after the initial injunction and the duration is justified by Appellants conduct during that time.12

3. This *is* a case to determine rights to property. 13

4. "Plaintiffs" are all parties to the lawsuit. 13

5. The restriction placed on Appellant is clear. 14

IV. CONCLUSION.....15

TABLE OF AUTHORITIES

Cases

Blanchard v. Golden Age Brewing Co., 188 Wash. 396 at 415(1936).. 6, 7, 11
Blanchard, 188 Wash. at 415 (1936) 11
Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 808, 828 P.2d 549 (1992) 9
Fisher v. Parkview Properties, Inc., 71 Wn.App. 468, 859 P.2d 77 (Div. 2 1993) 9
Kucera v. State of Washington, 140 Wn.2d 200 at 209-210, 995 P.2d 63 (2000) 8
Levine v. Jefferson Cy., 116 Wn.2d 575, 581, 807 P.2d 363 (1991) 9
Port of Seattle v. International Longshoremen's & Warehousemen's Union, 52 Wn.2d 317, 319, 324 P.2d 1099 (1958) 8
State v. Ralph Williams' N.W. Chrysler Plymouth, Inc., 87 Wn.2d 298, 312, 553 P.2d 423 (1976) 5
Trummel v. Mitchell, 156 Wn.2d 653, 131 P.3d 305 (Wash. 2006) 14
Tyler Pipe Indus., Inc. v. Department of Revenue, 96 Wn.2d 785, 792, 638 P.2d 1213 (1982) 8
Washington Fed'n of State Employees v. State, 99 Wn.2d 878, 887, 665 P.2d 1337 (1983) 7

Statutes

RCW 10.14.080 ..... 12, 13
RCW 10.14.080(4) 12
RCW 10.14.080(6) 14
RCW 10.14.080(8) 13
RCW 7.40.010 6
RCW 7.40.020 ..... 6, 8, 12

Constitutional Provisions

Wa. Const. Art. IV sec. 6 5
Washington Constitution, Art. 1 sec. 3 11

I. RESTATEMENT OF ISSUES ON APPEAL

A. Did the trial court lack legal authority to enter the no-contact order dated October 16, 2015? No.

B. Were the terms of the no-contact order "manifestly unreasonable or arbitrary" where its duration is unspecified, applies to "Plaintiffs" generally, and prohibits "verbal and non-verbal contact." No.

II. STATEMENT OF THE CASE

This appeal arises from the Superior Court's October 16, 2015 Order granting an interlocutory injunctive order restraining Appellant/Defendant Mr. Dunn from "verbal or non-verbal contact with the Plaintiffs either directly or through third parties" as part of its ongoing equitable oversight of this case. CP at 113. That Order was in a direct line of decisions enjoining Mr. Dunn from escalating harassing conduct toward Respondent/Plaintiffs dating back to the court's conclusions of law prohibiting "obstructing or unreasonably interfering with use" of the access road. Findings of Fact and Conclusions of Law entered March 19, 2014 at p. 4, CP at 67.

This case was filed on January 17, 2013 to resolve disputes about the use and maintenance of an access road and easement benefitting the Respondents/Plaintiffs. CP at 1. The easement is the sole access to the Respondent/Plaintiffs' homes while Appellant/Defendant accesses his property from adjacent public streets. CP at 3-4. The Complaint

specifically invokes the court's equitable jurisdiction and RCW 7.40 statutory authority "to grant injunctions to restrain the commission or continuance of certain acts." CP at 2. The Complaint cites specific conduct and threatening behavior by Appellant towards Respondents including physical and verbal intimidation. CP at 3-5.

Subsequently on March 14, 2013 Respondent/Plaintiffs amended their complaint again including specific allegations of abusive contact, unreasonable interference. CP at 31-33. The Amended Complaint specifically requests "an order granting Plaintiffs a Permanent Injunction against Defendant to prevent future obstruction or interference with the Plaintiffs' use of the easement..." CP at 34-35.

After a bench trial, the court below issued Findings of Fact and Conclusions of Law on March 19, 2014, which were unchallenged. Amongst the findings were specific references to Appellant/Defendant's behavior interfering with Respondents/Plaintiffs' use of the easement. CP at 66. The court's unchallenged legal conclusions included that Respondent/Plaintiffs "are entitled to relief enjoining Dunn from obstructing or otherwise unreasonably interfering with use by Plaintiffs or their guests, invitees, or licensees of the 30 foot easement." CP at 67. The court below specifically chose to retain jurisdiction over the matter. CP at 68.

Invoking that jurisdiction, on July 22, 2014 Respondents filed a Motion to Enforce Order specifically asking the court to "order Defendant James Dunn to cease and desist all harassing conduct towards Plaintiff." CP at 120. The motion was based on Declarations of the Plaintiffs outlining Appellant Dunn's increase in harassing behavior including racing on the easement, noise, destruction of the road surface and intimidating conduct. See Decl. of David Bowers, CP at 121-124; Decl. of Kathy Bowers, CP at 126-129, 135-40; Decl. of Maggie Betrame, CP at 149-151; Decl. of Anthony Beltrame, CP at 152-154; Decl. of Robert Cobb, CP at 155-159; Decl. of David Bowers in Strict Reply, 160-162.

Based on that Motion and the testimony cited, the court below on August 1, 2014 issued its first Order on Motion to Enforce including the following language,

> Defendant shall provide notice pursuant to the existing court order, such notice shall not violate the Court's Order that Defendant **shall not have contact with the Plaintiffs.**

CP at 69, emphasis added. That Order was not appealed.

Again in May of 2015, due to ongoing and escalating harassment by the Appellant/Defendant, Respondents petitioned the court below for an Order of Contempt and continuation of the No Contact Order issued in

August. CP at 70. A show cause hearing was scheduled for May 22, 2015. CP at 163.

In declarations supporting the motion, Respondents/Plaintiffs detailed additional harassing conduct by Appellant/Defendant. CP at 71-92.

Those declarations outline behavior including:

- Driving his vehicle to the private home of the Bowers and "flipping me off and yelling profanities." CP at 72.
- "Mr. Dunn has pulled down his pants and urinated outdoors on his property when I have driven by." CP at 73.
- "Mr. Dunn has tossed his beer cans and rotten food over the fence onto my property. I have been yelled at, called every disgusting name you can imagine, and flipped off so many times I've lost count. My car has been egged. Nails have been dropped on the easement road..." CP at 73.
- "Daily occurrence. [Mr. Dunn] Drives past front of house with window down and yells Stupid Bitch then turns around in Cobbs driveway, sits in front of our home and flips us off." CP at 82.

Entry of an order on that motion was delayed until the October ruling which is the basis of this appeal. Based on those Declarations and the continuing and escalating conduct, the court made the October 16, 2015 order clarifying the existing line of injunctions stating:

"James Dunn is hereby ordered not to have verbal or non-verbal contact with the Plaintiffs either directly or through third parties. James Dunn is authorized by this court to have written contact with Plaintiffs

only for the express purpose of giving notice of road repairs." CP at 113-114. This is the first of the court's orders which is appealed.

III. ARGUMENT

A. It is axiomatic that the Superior Court may grant interlocutory injunctive relief.

Appellant's initial argument is that, absent a finding of contempt or specific statutory authority[1], the superior courts lack authority to enter an interlocutory injunctive order. Appellant asserts that the court's jurisdiction is a question of law that is properly reviewed *de novo* on review. Regardless, it is well settled law the Superior Courts have jurisdiction in equity over injunctive relief.

1. Constitutional authority that Superior Court sits in Equity.

The Washington State Constitution Article 4 Section 6 vests equitable jurisdiction, including the issuance of injunctions solidly in the superior courts. Wa. Const. Art. IV sec. 6. "An injunction is distinctly an equitable remedy..." *State v. Ralph Williams' N.W. Chrysler Plymouth, Inc.*, 87 Wn.2d 298, 312, 553 P.2d 423 (1976).

> [T]he judicial power over cases in equity has been vested in the courts, and, in the absence of any constitutional provisions to the contrary, such power may not be abrogated or restricted by the legislative department. Any legislation, therefore, the purpose or effect of which is to divest, in

[1] Appellant specifically references RCW 7.21, 7.90, 7.92, 10.99 and 26.50 for the proposition that specific statutory authority is required for interlocutory injunctive relief. Appellant is misguided.

> whole or in part, a constitutional court of its constitutional powers, is void as being an encroachment by the legislative department upon the judicial department.

Blanchard v. Golden Age Brewing Co., 188 Wash. 396 at 415(1936).

2. Superior Courts also have Statutory Injunctive Authority.

Though the legislature may not limit equitable jurisdiction (*Id.*) Legislative enactments have added clarity to the question. "Restraining orders and injunctions may be granted by the superior court, or by any judge thereof." RCW 7.40.010. Specifically, interlocutory injunctions are proper;

> ...when during the litigation, it appears that the defendant is doing, or threatened, or is about to do, or is procuring, or is suffering some act to be done in violation of the plaintiff's rights respecting the subject of the action tending to render the judgment ineffectual; ... an injunction may be granted to restrain such act or proceedings until the further order of the court, which may afterwards be dissolved or modified upon motion.

RCW 7.40.020. It is well settled law that "the granting or withholding of an interlocutory injunction is addressed to the sound discretion of the court of law." *Blanchard*, 188 Wash. at 416 (1936).

In this case, the superior court modified its existing interlocutory injunction to restrain Appellant Mr. Dunn from "verbal or non-verbal contact with the Plaintiffs either directly or through third parties" as part of its ongoing equitable oversight of this case. CP at 113. Contrary to Appellant's argument, it is clear in this case that the court below had

authority and jurisdiction to make such an order and therefore the issuance of the order was proper and should be upheld as a matter of law.

B. The Injunctive No Contact Order was a proper modification of the long line of injunctions ordered in this case.

Appellant/Defendant Mr. Dunn has been subject to injunctive relief almost from the beginning of this case. Over and over the court below was presented evidence of Mr. Dunn's conduct and harassment, and over and over again the court drew gradually more restrictive injunctions to curtail his abuse. The facts and law of the case below clearly establish appropriate exercise of discretion by the Superior Court in this case and the October 16, 2015 Order should be upheld.

1. Standard of Review of Injunctive Relief on Appeal is for Abuse of Discretion.

It is well settled law that "the granting or withholding of an interlocutory injunction is addressed to the sound discretion of the court of law." *Blanchard*, 188 Wash. at 416 (1936). "A trial court's decision to grant an injunction and its decision regarding the terms of the injunction are reviewed for abuse of discretion." *Washington Fed'n of State Employees v. State*, 99 Wn.2d 878, 887, 665 P.2d 1337 (1983). "A trial court necessarily abuses its discretion if the decision is based upon untenable grounds, or the decision is manifestly unreasonable or arbitrary." *Id.*

Both questions presented on appeal challenge the Superior Court's issuance of an interlocutory injunction prohibiting contact of Respondents by Appellant. Appellants' assertion that this Court should review de novo is misplaced. The correct standard of review on appeal is for an abuse of discretion.

2. The Injunctive Order was well supported by the facts and conclusions below.

The applicable requirements for issuance of an injunction are well settled:

> [O]ne who seeks relief by temporary or permanent injunction must show (1) that he has a clear legal or equitable right, (2) that he has a well-grounded fear of immediate invasion of that right, and (3) that the acts complained of are either resulting in or will result in actual and substantial injury to him."
>
> ....
>
> [S]ince injunctions are addressed to the equitable powers of the court, the listed criteria must be examined in light of equity including balancing the relative interests of the parties and, if appropriate, the interests of the public.

Kucera v. State of Washington, 140 Wn.2d 200 at 209-210, 995 P.2d 63 (2000) citing *Tyler Pipe Indus., Inc. v. Department of Revenue*, 96 Wn.2d 785, 792, 638 P.2d 1213 (1982) (quoting *Port of Seattle v. International Longshoremen's & Warehousemen's Union*, 52 Wn.2d 317, 319, 324 P.2d 1099 (1958)); *see also* RCW 7.40.020 (grounds for issuance of preliminary injunction).

a) The unchallenged Findings of Fact at trial and subsequent no-contact orders established a clear right.

It is well established that the Respondents/Plaintiffs have a right to use and enjoy the easement and their own properties free from harassment by Mr. Dunn. This right was initially established at trial, and Mr. Dunn's actions and harassment are the basis of the court Findings of Fact and Conclusions of Law (CP at 66-67) and subsequent unchallenged no contact order and supporting briefing. CP at 69. Similarly, the briefing and facts supporting the underlying Order on Appeal are not challenged.

Unchallenged findings are a verity on appeal. *Fisher v. Parkview Properties, Inc.*, 71 Wn.App. 468, 859 P.2d 77 (Div. 2 1993) citing *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 808, 828 P.2d 549 (1992), *Levine v. Jefferson Cy.*, 116 Wn.2d 575, 581, 807 P.2d 363 (1991). The findings below clearly demonstrate the Respondent/Plaintiffs' rights regarding the easement and quiet enjoyment of their property free from harassment by Mr. Dunn and the Order should be upheld.

b) Respondents' established rights were being invaded.

Again, the lower court's previous orders clearly establish that Mr. Dunn had violated the Respondents' rights. Even absent such findings, the facts presented in the various subsequent hearings by declaration show an ongoing pattern of verbal, physical, and emotional abuse and

harassment being perpetuated by Mr. Dunn against the Plaintiffs. (CP at 66-67, 69, 70-92; Decl. of David Bowers, CP at 121-124; Decl. of Kathy Bowers, CP at 126-129, 135-40; Decl. of Maggie Betrame, CP at 149-151; Decl. of Anthony Beltrame, CP at 152-154; Decl. of Robert Cobb, CP at 155-159; Decl. of David Bowers in Strict Reply, 160-162.) The evidence below far surpasses that required to support the court's discretion in issuing the order and the order should be upheld.

c) Appellant's violations were damaging Plaintiffs.

Again, the lower court's previous orders clearly establish that Mr. Dunn's violations were damaging and inhibiting Plaintiffs' use and enjoyment of their property as well as causing emotional distress. Even absent such findings, the facts presented in the various subsequent hearings by declaration show an ongoing pattern of verbal, physical, and emotional abuse being perpetuated by Mr. Dunn that damaged Plaintiffs. (CP at 66-67, 69, 70-92; Decl. of David Bowers, CP at 121-124; Decl. of Kathy Bowers, CP at 126-129, 135-40; Decl. of Maggie Betrame, CP at 149-151; Decl. of Anthony Beltrame, CP at 152-154; Decl. of Robert Cobb, CP at 155-159; Decl. of David Bowers in Strict Reply, 160-162.)

From the filing of this suit through the March 19, 2014 findings of fact through the initial issuance of a no contact order on August 1, 2014 to

the October 16, 2015 Order which is appealed herein the Appellant Mr. Dunn has undertaken and escalated his verbal, physical and emotional assaults on Respondent/Plaintiffs rights to quiet enjoyment of the easement. The evidence below far surpasses that required to support the court's discretion in issuing the order and the order should be upheld.

C. The Scope of the Injunction is Justified by Mr. Dunn's Behavior.

Appellant Mr. Dunn argues that the injunctive no-contact order is improperly vague because 1) its duration is undefined 2) it restrains Mr. Dunn's contact with "Plaintiffs" including the Cobbs and 3) it restrains every kind of contact with the Plaintiffs except written notice of road repairs. Appellant relies primarily on the Due Process clause of the Washington Constitution, Art. 1 sec. 3 and on Chapter 10.14 RCW. Should this Court find the scope improper, then the appropriate remedy is to direct the court below to modify the scope of the no contact order.

1. Chapter 10.14 RCW is not controlling, but sheds light on the propriety of the no contact order.

As noted previously, statutory authority may supplement but cannot supersede the Constitutional authority of the courts. *Blanchard*, 188 Wash. at 415 (1936). This case is ultimately a land use case relating to the rights to use an access easement. The equitable injunctive authority of the superior court in this case is clearly described in Chapter 7.40 RCW. Chapter 10.14 RCW does not apply.

> 2. The appealed modification Order was issued 17 months after the initial injunction and the duration is justified by Appellants conduct during that time.

Under RCW 7.40, the court's authority is clear, "an injunction may be granted to restrain such act or proceedings until the further order of the court, which may afterwards be dissolved or modified upon motion." RCW 7.40.020. Thus the restraint may be modified or dissolved at any time and is limited in scope only by the court's equitable powers.

Appellant argues that the duration of the modification of the no contact order is not limited to a year and therefore is inappropriate. To support, Appellant relies on the criminal antiharassment statute, which has specific timeframes for enforcement and modification. RCW 10.14.080. While this statute does not apply to the underlying facts, it is illustrative of some considerations that the court might make.

Using Chapter 10.14 RCW as a reference, it is clear that an indefinite restraining order is appropriate:

> if the court finds that the respondent is likely to resume unlawful harassment of the petitioner when the [one year] order expires. If so, the court may enter an order for a fixed time exceeding one year **or may enter a permanent antiharassment protection order**.

RCW 10.14.080(4).

In this case, the initial order restraining Appellant Mr. Dunn from interfering with Respondents' use of the easement was issued in March of 2014. (CP at 63-68). Over the course of the following 17 months Appellant Mr. Dunn increased his harassment to the degree that the court

below issued the October 16, 2015 no contact order. (CP at 66-67, 69, 70-92; Decl. of David Bowers, CP at 121-124; Decl. of Kathy Bowers, CP at 126-129, 135-40; Decl. of Maggie Betrame, CP at 149-151; Decl. of Anthony Beltrame, CP at 152-154; Decl. of Robert Cobb, CP at 155-159; Decl. of David Bowers in Strict Reply, 160-162.) 17 months of continuous and escalating harassment surely justifies the court's discretion to issue the order.

3. This *is* a case to determine rights to property.

Appellant also invokes RCW 10.14.080 because it excludes orders affecting use of property by a person with interest in that property. However, it specifically *includes* cases where an order is issued "under a separate action commenced with a summons and complaint to determine title or possession of real property." RCW 10.14.080(8). That is the case here, so Appellant's argument is without merit. (CP at 1-17).

4. "Plaintiffs" are all parties to the lawsuit.

The no contact order protects all of the "plaintiffs." CP at 113. Appellant incorrectly asserts that Plaintiffs Cobb are not "parties" because they sold their property and so the no contact order is improper. The Cobbs remain named plaintiffs in the underlying action and so are "parties."

The equitable jurisdiction of the court is limited to the parties to the suit. *Trummel v. Mitchell*, 156 Wn.2d 653, 131 P.3d 305 (Wash. 2006). In that case, the Court found that an antiharassment order extending protection to people living in a housing complex but who were not parties to the underlying suit was improper. Here the Cobbs *are* parties to the suit and this issue is without basis.

5. The restriction placed on Appellant is clear.

Finally, Appellant Mr. Dunn claims that the scope and terms restricting contact are overbroad and vague. Again, though not controlling, the language of the antiharassment statute is illustrative of the permissible scope of a no contact order. Under that statute, a court has broad discretion to fashion relief including:

> (a) Restraining the respondent from **making any attempts to contact the petitioner**;
>
> (b) Restraining the respondent from making any attempts to keep the petitioner under surveillance;
>
> (c) Requiring the respondent to stay a stated distance from the petitioner's residence and workplace...

RCW 10.14.080(6) (emphasis added). In this case, the court has fashioned a clear remedy.

> James Dunn is hereby ordered not to have verbal or non-verbal contact with the Plaintiffs either directly or through third parties.

CP at 113.

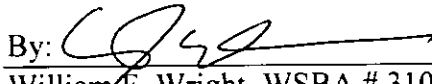
The prohibited conduct is specific, "verbal or non-verbal contact." The protected parties are specific, "Plaintiffs." The mechanism of the prohibited contact is specific, "either directly or through third parties." All of these component conditions are well within the scope contemplated by the antiharassment statute. All of the component conditions are clear and specific. The no contact order is not vague or overbroad and should be upheld.

IV. CONCLUSION

For the foregoing reasons, Respondents urge this Court to DENY this appeal and uphold the Order of the Superior Court below.

RESPECTFULLY SUBMITTED this 23rd day of February, 2016.

The Kraft Law Group PS

By: 

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COURT OF APPEALS, DIVISION II
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DAVID K. BOWERS, et. al., Respondent, v. JAMES W. DUNN, et. al., Appellant.	Court of Appeals No. 48367-0-II RESPONDENTS' DECLARATION OF SERVICE OF RESPONSE BRIEF

DECLARATION OF SERVICE

The undersigned declares that I am over the age of 18 years, not a party to this action, and competent to be a witness herein. I caused this Declaration and the following documents:

1. Respondents' Brief

to be served on February 24, 2016, on the following parties and in the manner indicated below:

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STATE OF WASHINGTON
BY DEPUTY

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

Signed this 23th day of February, 2016 at Bonney Lake, Washington.

William F. Wright, WSBA# 31063