

FILED

DEC 31 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 31059-1-III

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

KARLA EASH, an unmarried person, Appellant

v.

**ROBERT J. RUSSELL unmarried person and KATHERINE
BACHMAN a.k.a. KATHERINE RUSSELL, an unmarried person,
Respondents.**

BRIEF OF APPELLANT

**Attorneys for Appellant
WARRING LAW FIRM, P.S.
Carl N. Warring, WSBA #6312
1340 East Hunter Place
Moses Lake, WA 98837
509-765-9562**

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I. Introduction

This action came on before the trial court with the primary goal to protect the property interest of Ms. Eash in her real property from the incursions of Mr. and Mrs. Russell. During the pendency of the matter, Ms. Eash believed that Mr. and Mrs. Russell were continuing to interfere with her right to enjoy her property free and clear of their incursions. A Motion For Temporary Relief For A Preliminary Injunction was brought against Mr. and Mrs. Russell on an Order To Show Cause. Judge Knodell ordered that a Hearing be held on the merits and thereby in substance advanced the trial on the merits as the relief requested. *Rabon v. City of Seattle*, 84 Wn. App. 296, 300-301, 932 P.2d 646 (Wash. Ct. App. 1996) rev'd other grounds 135 Wn.2d 278, 957 P.2d 621 (Wash. 1998); *McLean v. Smith*, 4 Wn. App. 394, 482 P.2d 798 (Wash. Ct. App. 1971)/ CR 65(a). What had commenced as a motion for temporary relief was thereby converted into a trial on the merits on the primary issues of the case, which was the enjoining of Mr. and Mrs. Russell from trespassing onto and against the real property of Ms. Eash. The Court, in entering its order of July 11, 2012, permitted certain trespasses to continue without granting relief. CP 80-81.

II. Assignment of Errors

The court erred in not enjoining the Defendants from causing or allowing water to invade the Plaintiff's property, from not enjoining the Defendants from spraying water against the Plaintiff's fence and from not enjoining the Defendants from hanging their drip hose on Plaintiff's fence.

Issue:

Is Ms. Eash, an owner in fee simple of real property, entitled to enjoin Mr. and Mrs. Russell from trespassing by instrumentalities or in person on her real property?

III. Statement of the Case

A. Procedural Facts

1. The Summons and Complaint were filed on August 26, 2011. CP 1. They were served on the Defendants on August 23, 2011. CP 8.
2. The Plaintiff filed a Motion and Declaration For An Order To Show Cause For A Preliminary Injunction on June 8, 2012. CP 10-14. An Order to Show Cause was issued on June 8, 2012. The Order To Show Cause set a hearing date of June 22, 2012. CP 23-24. A Notice Of Hearing on the Show Cause was issued on June 22, 2012. CP 25-26. The Memorandum In Support Of Motion For Preliminary Injunction (CP 15-16) was filed on June 8, 2012. Exhibits 1-12, Submitted On Motion For

Temporary Injunction were filed on June 8, 2012. CP 17-22; Appx.1, pages 2-6.

3. Notice of the Hearing On Show Cause (CP 25-26), Motion and Declaration For Show Cause (CP 10-14), Order To Show Cause (CP 23-24), Memorandum In Support Of Motion For Preliminary Injunction (CP 15-16) and Exhibits 1-12 (CP 17-22; Appx.1, pages 2-6) were served on Defendants on June 8, 2012. CP 27

4. The hearing on the show cause was heard on June 22, 2012, CP 58-59. Further, the hearing on the show cause was continued by Judge Knodell to June 29, 2012. CP 58. A Fact Finding Hearing was then scheduled for June 27, 2012. CP 62, RP 1-115.

5. At the Fact Finding Hearing, Mr. and Mrs. Russell filed a document entitled Complaint For Ejectment For Quiet Title And For Trespass as their response to the Summons and Complaint of the Plaintiff. CP 66.

6. A hearing for oral argument was held on June 29, 2012 as set at the June 22, 2012 hearing. CP 58.

7. The Plaintiff filed an additional memorandum as requested by the court. CP 71-74.

8. The Court issued an order that substantially denied the relief sought by Ms. Eash by permitting the Defendants to cause some amount of water to flow onto the Plaintiffs property and by refusing to restrict Defendants from spraying water against Ms. Eash's fence and permitting the Russells to hang a drip line on Ms. Eash's fence. CP 80-81.

B. Factual Statement

Karla Eash is a resident of Grant County, the State of Washington. CP 3. Robert J. Russell and Katherine Bachman a.k.a. Katherine Russell are residents of Grant County, the State of Washington. CP 4. Karla Eash owns a fee simple interest in the following described real property (Hereinafter Lot 21).

Tract B and C, Replat of Lot 21 of Grant County Assessor Plat No. 2 of Crab Creek Estates a portion of the Northwest $\frac{1}{4}$ of Section 35, Township 20 North, Range 28 East, W.M. according to the Plat Thereof Recorded in Volume 12 of Plats, Page 8, Records of Grant County, Washington.

CP 4-5, CP 11.

Robert J. Russell owns the following described real property (Herein after Lot 22), which is adjacent to the real property owned by Karla Eash, to wit:

Lot 22, Grant County Assessor's plat of Crab Creek Estates, According to the plat thereof as recorded in Volume 12 of plats, page 8, records of Grant County, Washington in the Southeast Quarter

of the Northwest Quarter of Section 35, Township 20 North, Range 28 East, W.M., Grant County, Washington.

CP 5.

The East Boundary of Lot 21 and the West boundary of Lot 22 is a common boundary between the two lots. Exhibit 3. The plat of the lots provides a 5-foot utility easement around the perimeter of each lot. There are adjoining 5-foot utility easements on each of the two lots that run the length of the common boundary between the two lots. Exhibit 3. At the time this cause of action commenced, the Defendants believed they had a right to use the 5-foot easement on Ms. Eash's lot. CP 11, 63, 65-66, 98-100. The Defendants went upon the 5-foot utility easement located on Lot 21 and planted shrubs, flowers and vegetation, placed rocks and park equipment. CP 11, RP 62-66. To safeguard her property, Ms. Eash installed a metal panel fence four inches onto her property (Lot 21), along the common boundary with the Defendant's property. All parts of the metal fence are located fully on the Plaintiff's property (Lot 21). RP 51-54, RP 67-69, Ex P 8, Ex 9.

Prior to 2012, the Defendants' underground pop-up sprinklers had not ever watered any portion of the Plaintiff's property. RP 65. After the fence was installed, the Defendants have caused or allowed their sprinklers to strike the Plaintiff's fence. CP 12-13, Ex 7, 12; RP 78-79,

107-108. They have also permitted irrigation water from hoses and other watering devices to run from Defendant's Lot 22 on to Plaintiff's Lot 21 and erode some of the dirt. CP 12-13. Ex P11, P12, P13, RP 71-73, Appx. 1, pages 2-6. The Defendants have caused a hand-held sprayer to spray water upon the Plaintiff's fence. RP 73, 76-78, 103; Appx. 1, page 6. In addition, the Defendants have hung a drip line on the fence of Ms. Eash without permission. Ex D 14, D 15, RP 73.

IV. Argument

1. Standard of Review

This appeal is limited to questions of law. Did the Court, as a matter of law, have authority to authorize the Russells to commit trespasses upon Ms. Eash's property? The standard of review of an issue of law is de novo. *Barnhart v. Gold Run, Inc.*, 68 Wn. App. 418, 425, 843, P.2d 545 (1993).

2. Legal Argument

Ms. Eash owns lot 21 and the Russells own the adjoining lot 22. They share a common boundary. Ex 3. The lots owned by each have a 5-foot utility easement around the perimeter of each lot. The parties' lots therefore have parallel 5-foot easements running the length of their adjoining boundary. Ex 3.

The parties have been neighbors since the late 1990's. Sometime during 2010, they became disaffected with each other. In 2010, the Russells began using the 5-foot utility easement located on Ms. Eash's property claiming they had a right to do so because it was an easement. They planted flowers, bushes, and trees on the 5-foot easement and also placed large rocks and stones on the easement, and parked equipment on the easement. The Russell's also permitted their dog(s) to run-at-large on Ms. Eash's property and the Russells left the dog waste behind for Ms. Eash to remove. RP 59-66.

The Russells were requested to remove the flowers and rocks from the easement. They did not fully comply. RP 66, line 25 to RP 66, lines 1-2. Ms. Eash removed some flowers and rocks, had a survey completed to locate with precision the adjoining boundary line and built a fence entirely on her property. RP 45-55.

After the fence was built, the Russells planted flowers next to the fence, planted a tree next to the fence, placed rocks alongside the fence and installed drip lines next to the fence. The Russells then began spraying the fence daily, hung part of the drip lines on the fence and began depositing Excess water next to the fence and on the boundary line. They caused and permitted the water they used to flow upon or seep into the ground under and around the wood fence posts of Ms. Eash's fence and

property. RP 51-54, RP 67-69, Ex P 8, Ex 9. Ms. Eash rightly believes this Excess water can damage the wooden fence posts and that these acts are invasions of her property rights.

Ms. Eash brought a show cause proceeding to secure a preliminary injunction to enjoin the Russells from conducting these activities pending trial. The Trial Court converted the show cause for temporary relief into a trial on the merits by setting a one-day trial on the merits of enjoining the Russells, taking oral testimony and documentary and photographic evidence and rendering a decision on the merits of Ms. Eash's request for an injunction. *Rabon v. City of Seattle*, 84 Wn. App. 296, 300-301, 932 P.2d 646 (Wash. Ct. App. 1996) rev'd other grounds 135 Wn.2d 278, 957 P.2d 621 (Wash. 1998); *McLean v. Smith*, 4 Wn. App. 394, 482 P.2d 798 (Wash. Ct. App. 1971)/ CR 65(a).

The judge committed error in not enjoining the Russells from spraying the fence, in not requiring them to remove the drip lines from the fence and only enjoining them from "flooding Plaintiffs land to the extent water pools on that land." By the terms of the Order, the Trial Court has authorized the Russells to commit trespass against Ms. Eash. CP 80-81.

The Judge's decision is an error of law because Ms. Eash has the right to possess every inch of her property to the absolute Exclusion of her

neighbors and has a right to possess the entirety of her property without any interference by the Defendants.

"A key attribute of possession is that it carries with it the legally protected right to exclude other persons completely and with or without reason from the land possessed."... "With an estate in land, however, the owner may generally exclude others, who may not defend on the ground that they are causing no actual interference."

Washington Practice, Vol 1, page 3 Section 1.2. (1995).

The Defendants' intentional acts of causing or permitting their water to flow or seep on to the land of the Plaintiff, spraying water against the fence of Ms. Eash and hanging the drip lines on her fence are all done intentionally and are intentional torts. *Harkoff v. Whatcom County*, 40 Wn.2d 147, 153, 241 P.2d 932 (Wash. 1952); *Hedlund v. White*, 67 Wn. App. 409, 418, 836 P.2d 250 (Wash. Ct. App. 1992).

The Trial Courts decision authorizes the Russells to continue to commit these trespasses against the property of Ms. Eash and against her right to be let alone. Ms. Eash should not have to suffer the intrusions of the Russells and should be entitled to have the Russells' trespasses enjoined. *Kitsap County v. Allstate Ins. Co.*, 136 Wn.2d 567, 587-588 (Wash. 1998). Even deminimus invasion of the water diverted onto Ms. Eash's property, even if no damage is sustained, should be enjoined as requested by Ms. Eash because it constitutes a trespass. *Hedlund v. White*, 67 Wn. App. 409, 417-418 (Wash. Ct. App. 1992); *Bradley v. Am.*

Smelting and Ref. Co., 104 Wn.2d 677, 684-688, 709 P.2d 782 (Wash. 1985). The Trial Court committed an error of law when it did not enjoin the trespasses of the Russells against Ms. Eash's property and against Ms. Eash and instead authorized the trespasses to continue. Ms. Eash is entitled to the full possession and use of her property without any interference by her neighbors. Any invasion of her property, personally or by water is a trespass and a nuisance, which may be enjoined. *Bosteder v. City of Renton*, 155 Wn.2d 18, 50 (Wash. 2005). The actual damages of soil erosion, eventual damage to the fence and emotional distress are damages that further support the issuance of an injunction against the Defendants. *Benton City v. Adrian*, 50 Wn. App. 330, 338-339, 748 P.2d 679 (Wash. Ct. App. 1988).

V. Conclusion

Ms. Eash requests that she be granted the following relief:

An order be entered that vacates the Trial Court's Order of July 11, 2012 and that the Trial Court enter an order enjoining the Russells from:

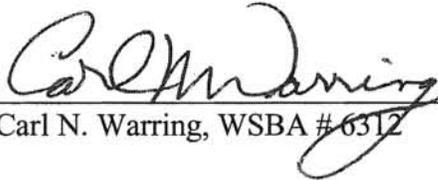
A. Causing or permitting any water from their property to flow on to or seep on to or intrude on to any portion of the property owned by Ms. Eash.

B. Remove all drip lines or other objects from the fence of Ms. Eash and not replace them with any thing else.

C. Causing or permitting any water-spraying or otherwise coming into contact with the fence of Ms. Eash by any irrigation, watering or other instrumentality controlled by them.

Respectfully submitted this 27th day of December 2012.

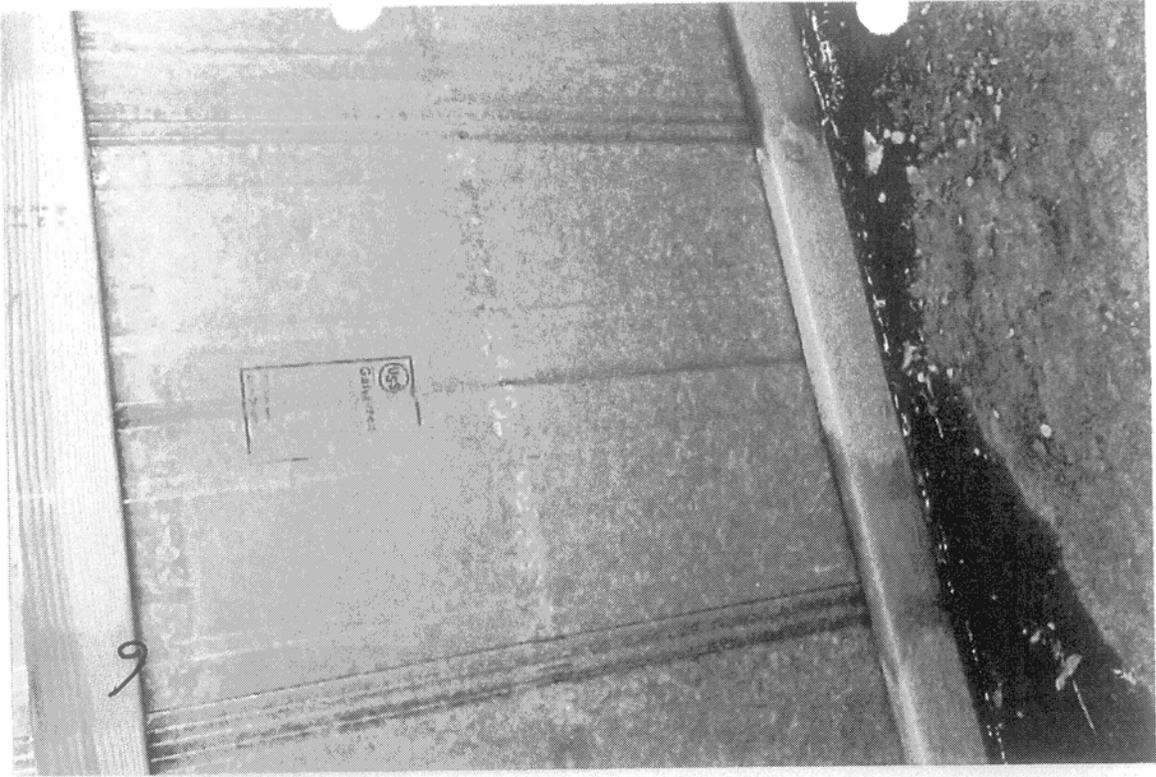
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Color photographs of Clerks Papers 18-22. These Exhibits were inadvertently filed in the court file by the Superior Court Clerk and transmitted to the Court of Appeals as black and white images.

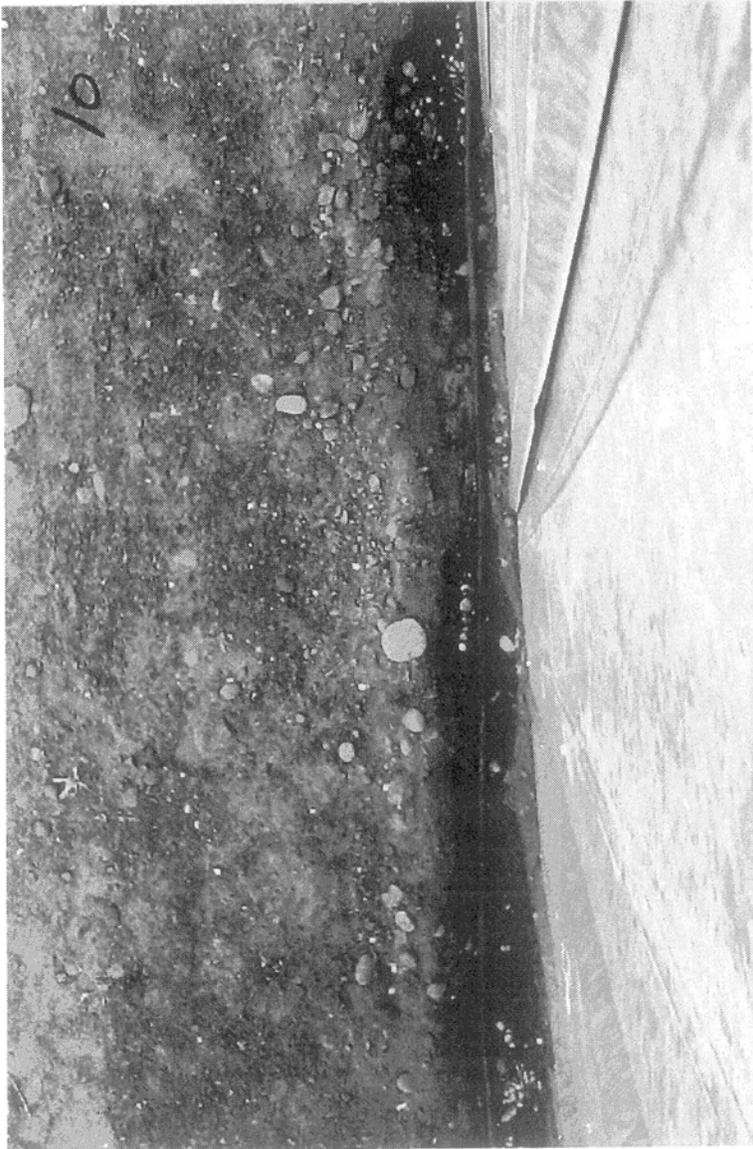
APPENDIX 1







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