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IN THE COURT OF APPEALS OF
THE STATE OF WASHINGTON
DIVISION I

No. 65261-3

EMMETT and MARY SOFFEY

Respondents,

v.

ANDREI and ANAMARIA DAN

Appellants.

APPEALED FROM KING COUNTY SUPERIOR COURT
CAUSE NO: 08-2-05375-0 SEA

RESPONDENT'S BRIEF

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A. INTRODUCTION

Plaintiffs Soffey brought this action against their adjoining property owner to abate a large “rubble” fill pile placed next to and trespassing onto the Soffey’s back yard. In addition, Soffeys sought to have the Court order the neighboring property owners, Defendants Dans, to restore a small area in the Soffey’s front yard that had been excavated away by the Dans.

After a two day trial, the Court denied Soffeys’ claim with respect to the front yard area, finding that the parties had agreed on an identified straight property line and as such the agreed line could be respected by simply adjusting the location of hand placed blocks. With respect to the back yard “construction debris” fill area, which at the time of trial had been filled to a level eight feet above the Soffey’s ground level within five feet of the property line, the Court found that the debris pile constituted an actionable private nuisance and trespass, and ordered abatement. The debris pile was to be removed by September 21, 2010.

The Soffeys accepted the Court’s ruling with respect to the front property line, and no dispute remains. The Dans appealed the entire decision, including the front yard determination in their favor,

and to date no work to abate the construction debris fill area has commenced.

At its heart, the Dans' appeal is factual, asking this Court to view the evidence differently than the Trial Court. The evidence supporting the Court's rulings is extensive, and detailed. All Findings are supported, and the Findings support the Conclusions of Law. Together, they support the Judgment.

B. STATEMENT OF THE CASE

The Findings of Fact entered in this matter are the most accurate description of the case. Appellants attempt to tell a new story, selecting and ignoring testimony and other evidence. The Soffeys simply adopt the Findings as their statement, as presented below.

Appellants assign error to Findings 1.9, 1.10, 1.11, 1.14, 1.15, 1.16, 1.17, 1.18, 1.20, and 1.21. Evidence supporting each challenged Finding is itemized below, following each Finding, and copies of the supporting evidence has been assembled and is presented in the Appendix. Consistent with the Appellants' Brief, reference to the Verbatim Report Of The Proceedings is by "TT 14"

(Trial Transcript September 14, 2009) and “TT 15” (Trial Transcript September 15, 2009).

The following is an exact reprint of the Findings and Conclusions, with the added references to supporting evidence where challenged:

THIS MATTER came on for trial before the Honorable Julie Spector on September 14 and 15, 2009, and the Court having presented it’s oral opinion on September 25, 2009, the Court enters it’s Findings of Fact and Conclusions of Law as follows:

1. FINDINGS OF FACT

1.1 The properties that are the subject of the above-numbered action are located in King County, Washington and within the City of Bellevue, Washington.

1.2 Plaintiff’s Emmett and Mary Soffey (“Soffeys”), husband and wife, are legal and record owners of certain real property situated in King County, Washington, which is identified as King County tax parcel 4037400630, and commonly identified as 411 158th Place Southeast, Bellevue, Washington.

1.3 The Soffeys purchased their lot and home, as an existing home, during September, 1991 and have resided there since that date.

1.4 Defendants Andrei and Anamaria Dan (“Dans”), husband and wife, are legal and record owners of certain real property situated in King County, Washington, which is identified as King County tax parcel 4037400625, and commonly identified as 417 158th Place Southeast, Bellevue, Washington.

1.5 The Dans first occupied the “417” property during 2000, and purchased their lot and home, as an existing home, during August, 2003. They have resided there since that date, except during periods of construction.

1.6 The Soffey and Dan lots adjoin each other, sharing the east/west boundary line. Both homes face east, with front yards located between 158th Place Southeast and the front of each respective home. Back yards are located west of the homes. The Soffey lot is located north of the Dan lot.

1.7 Commencing in 2004, and continuing thru 2006, the Dans remodeled and reconstructed their home so that they could provide and operate an adult family home. The enlarged home, with nine bedrooms, has been inspected and approved by the City of Bellevue.

1.8 Both Mary Soffey and Emmett Soffey are familiar with the conditions that existed on the “417” (Dan’s) property starting in 1991 and continuing thru the time of trial. In particular, Mrs. Soffey is a gardener and has engaged in gardening since the Soffey’s purchased their home in 1991, including along the fence line between the Soffey and Dan properties.

1.9 *In 1991 when the Soffey's purchased their lot and home, the boundary between the two lots was defined by landscaping features in the front yard, east of the home locations, and by a chain link fence between the homes that continued west between the back yards extending to the west boundary line.*

Supporting Evidence:

Mary Soffey TT 14 p 7-15, p 24 -27, p 50, p 58-59, p 62, p 65

Emmett Soffey TT 14 p 72 -76, p 92- 93, p 122-123, p 128;
TT 15 p 102, p 106.

1.10 *Since purchasing their lot in 1991, the Soffey's have treated the chain link fence between the properties as their own, including maintaining the fence, adding sight-obscuring slating to the fence, and clearing vegetation and weeds from around the fence.*

Supporting Evidence:

M. Soffey TT 14 p 11-14, p 24 -27, p 60, p 62, p 65

E. Soffey TT 14 p 76-77, p 83-84, p 91, p 102-103

Andrei Dan TT 14 p 154-155, p 167; TT 15 p16

1.11 *In 1991, and continuing until 2002 or 2003 when the Dan's started construction activities on their lot, the "grade" or ground level on the Dan side of the fence approximately matched the ground level on the Soffey side of the fence.*

Supporting Evidence:

M. Soffey TT 14 p13-14, p 18-19, p 38-39, p 47; TT 15 p 94-95

E. Soffey TT 14 p 76, p 86,

Andrei Dan TT15 p 32 lines 16-21

1.12 The natural grade west of the Soffey and Dan homes is such that the ground level slopes uphill to the south, or to the southeast.

1.13 After construction commenced on the Dan's lot and home in 2004, disputes arose between the Dan's and the Soffey's over the location of the "property line" between the properties.

1.14 *In 2006, an oral agreement was reached between the Soffeys and the Dans over the location of the boundary between their properties. Mr. Dan and Mrs. Soffey agreed that the boundary would run from an identified "notch" in the road curb, westerly in a straight line to the eastern end of the existing chain link fence, and then westerly alongside the chain link fence to the western edge of the properties.*

Supporting Evidence:

M. Soffey TT 14 p 23, p 53 – 59

E. Soffey TT 14 p 81

Andrei Dan TT 14 p 153-154, p 164-168;

TT 15 p 23-24, p 38-39, p 42

1.15 *Blocks stacked by the Dan's in their front yard form, in part, an above grade "fence" adjacent to the Soffey's front yard. The intrusion, if any, northerly of the agreed dividing line between the properties is minor, and can be remedied by moving any intruding blocks by hand.*

Supporting Evidence:

E. Soffey TT 14 p 91 - 94

1.16 *Starting on or about 2003, the Dan's have placed construction debris in the northwest corner of their lot, adjacent to the chain link fence and the Soffey lot. The debris includes broken patio materials, broken concrete blocks, and other dirt and fill material.*

Supporting Evidence:

M. Soffey TT 14 p 18-19, p 38-39, p 42, p 86; TT 15 p 96

E. Soffey TT 14 p 114

A. Dan TT 15 p 33-34, p 47, p 54

1.17 *The placing of construction debris in the northwest corner of the Dan lot, adjacent to the Soffey lot and the chain link fence, has created an additional six feet of fill which is bulging against the chain link fence, and is covered with vegetation that is growing thru and over the construction debris. A portion of the construction debris fill has "bulged" downhill toward the Soffey's lot, and now protrudes past the fence line and onto the Soffey property.*

Supporting Evidence:

M. Soffey TT 14 p 18-22, p 41-42, p 45-47, p 59

E. Soffey TT 15 p 84-86, p 108, p 113-114; TT 15 p 96-98

1.18 *After 2006, with knowledge that portions of the construction debris fill placed before 2006 was bulging against the chain link fence and protruding onto the Soffey property, the Dans continued to place additional construction debris and other fill material on top of then existing construction debris, increasing the risk of collapse onto the chain link fence and onto the Soffey property.*

Supporting Evidence:

M. Soffey TT 14 p 20-22, p 43-45

E. Soffey TT 14 p 86-67, p 97, p 100, p 113-114

A. Dan TT 15 p 55-56

1.19 During the summer of 2009, while this matter was pending, the Dan's placed additional fill on top of the construction debris fill, located approximately five feet south of the fence line, to create a new grass and yard area within a new fenced area. Up to an additional two feet of fill was placed, creating a total fill depth of approximately eight feet located five feet south from the Soffey property line.

1.20 *The downhill bulging of the construction debris fill, including the portion that protrudes onto the Soffey property and presses against the chain*

link fence, has the potential to cause the fence to collapse and to allow a significant volume of construction debris and other fill material to fall into the Soffey's backyard.

Supporting Evidence:

M. Soffey TT 14 p 39, p 43, p 59; TT 15 p 96-98

E. Soffey TT 14 p 85, p 107-108

1.21 *The placing or dumping of construction debris in the northwestern corner of the Dan's property, adjacent to the Soffey's backyard area, was not done unknowingly. The dumping was done intentionally by the Dan's to rid their property of patio materials and broken up concrete blocks without having to pay for the cost of off-site hauling and disposal.*

Supporting Evidence:

M. Soffey TT 14 p 43-45,

E. Soffey TT 14 p 86-87, p 97, p 100

A. Dan TT 15 p 47, p 55

2. CONCLUSIONS OF LAW

2.1 Jurisdiction and Venue are proper in King County Superior Court, State of Washington. FOF 1.1, 1.2, 1.4

2.2 By agreement between the parties, the location of the property or boundary line between the Plaintiffs' and Defendant's properties is described as follows: Starting at the notch in the concrete curb, where the

properties meet, respectively, north and south, and then running in an invisible line westerly to the beginning of the existing chain link fence, and then continuing westerly along the southern face of the existing chain link fence, back to the western boundary of the properties.

FOF 1.6, 1.9, 1.10, 1.13, 1.14

Front Yard

2.3 In the front yard area, the placement of some paver blocks by Defendants protrude by inches into the property of the Plaintiffs. This can be remedied by moving the pavers back by hand, without the need for surveyors or Bellevue Land Inspectors, as the property line can be determined by the parties as a straight line running between the curb notch and the eastern end of the existing chain link fence. FOF 1.15; COL 2.2

2.4 Consistent with the location of the property line established herein, each party, respectfully, may make use of their own front yard areas in any way consistent with applicable City codes, including the construction of fences, landscaping, and other allowable side and / or front yard features.

FOF 1.6, 1.9; COL 2.2, 2.3

Back Yard

2.5 The construction debris fill located in the northwest corner of the Defendants' lot creates a trespass as the construction debris bulges against

the chain link fence and protrudes onto the Plaintiff's property. FOF 1.10, 1.14, 1.16, 1.17, 1.18, 1.20; COL 2.2

2.6 The construction debris fill located in the northwest corner of the Defendants' lot has the potential to cause the chain link fence to collapse and to allow a significant volume of construction debris to fall into the Plaintiffs' back yard, creating an unreasonable interference with the Plaintiffs' use and enjoyment of their property.

FOF 1.10, 1.12, 1.14, 1.16, 1.17; COL 2.2, 2.5

2.7 Living with the current conditions created by the construction debris fill, with the possible imminent collapse of the chain link fence and potential for a collapse of the construction debris fill onto the Plaintiffs' property, constitutes a substantial interference with the Plaintiffs' use and enjoyment of their property.

FOF 1.3, 1.6, 1.11, 1.14, 1.16, 1.17, 1.18, 1.20; COL 2.5, 2.6

2.8 The construction debris fill located in the northwest corner of Defendants' lot constitutes an actionable trespass onto the Plaintiffs' property, and constitutes an actionable private nuisance that is currently damaging Plaintiffs' property and has the potential in the future to significantly damage Plaintiffs' property unless abated.

FOF 1.17, 1.18, 1.19, 1.20; COL 2.5, 2.6, 2.7

2.9 Based on the agreement between the Soffeys and Dans as to the location of the property line, as agreed to by Mrs. Soffey and Mr. Dan in 2006, the Defendants were aware or should have been aware as of 2006 that the construction debris fill with the bulge against the chain link fence was causing a trespass and a potential nuisance, and yet the Defendants continued to place additional construction debris and other fill material in the northwest corner of their property to the detriment of the Plaintiffs.

FOF 1.10, 1.13, 1.14, 1.17, 1.18, 1.19, 1.20, 1.21;

COL 2.2, 2.7, 2.8

2.10 The Court has the equitable power to order the Defendants to take action to abate the trespass, and to abate the nuisance.

RCW 7.48.010, 020, 150, 180, 260; RCW 4.24.630

2.11 It is not necessary, under the law, for the Plaintiffs to be required to wait until a more significant trespass or nuisance occurs before the Court will order that the Defendants must take action to abate the trespass and to abate the nuisance.

RCW 4.24.630; RCW 7.40.010, 020; RCW 7.28.260;

RCW 9A.48.090, 100.

2.12 The Court concludes that the Defendants must remove the offending construction debris fill located in the northwest corner of their property to eliminate the trespass and to abate the nuisance. The Defendants must

remove the construction debris and restore the northwest corner of Defendants' property to its pre-construction condition, that being with the grade level on the Defendants' side of the chain link fence on the same grade level as the Plaintiff's adjoining and existing grade level.

FOF 1.2, 1.3, 1.4, 1.9, 1.11, 1.12, 1.14, 1.17, 1.18, 1.19;

COL 2.5, 2.6, 2.7, 2.8, 2.10, 2.11;

RCW 7.48.010,150; RCW 4.24.630

2.13 The Court concludes that the Defendants must remove the offending materials at the Defendants' sole expense, and in compliance with the City of Bellevue Land Use Code.

FOF 1.3, 1.6, 1.11, 1.16, 1.18, 1.19, 1.20, 1.21;

COL 2.8, 2.10, 2.12,

2.14 The Court concludes that the Defendants must remedy the situation in the northwest corner of their property starting no later than the spring of 2010, giving consideration to the rain and winter weather that will occur between the time of the Court's ruling and spring 2010. The project must be completed before the end of summer 2010, or by September 21, 2010.

FOF 1.17, 1.18, 1.19, 1.20;

COL 2.12, 2.13; RCW 4.24.630

Damages

2.15 The Court concludes that the acts of the Defendants from 2006 thru trial, by continuing to add construction debris and other fill to the northwest corner of their property, to be an unreasonable use of Defendants' property which created and continues to create a substantial interference with Plaintiff's use and enjoyment of their property.

FOF 1.14, 1.17, 1.18, 1.19, 1.20, 1.21; COL 2.5, 2.6, 2.7, 2.8, 2.9;
RCW 7.48.180, RCW 4.24.630

2.16 The Court concludes that the acts of Defendants from 2006 thru trial were done with knowing disregard of the property interests of Plaintiffs, subjecting the Plaintiffs to trespass and the risk of imminent collapse of construction debris fill onto the plaintiff's property, which has harmed the Plaintiffs. FOF 1.14, 1.16, 1.17, 1.18, 1.19, 1.21; COL 2.2, 2.9;

RCW 4.24.630; RCW 9A.48.090,100

2.17 The court concludes that the acts of Defendants from 2006 thru trial, and the continuing existence of the offending construction debris fill until abated, has damaged Plaintiffs under the provisions of RCW 7.48.010, 7.48.180, and RCW 4.24.630, entitling Plaintiffs to recovery of damages.

FOF 1.19, 1.20, 1.21; COL 2.15, 2.16

2.18 The Court concludes that damages in the amount of \$ 2,500 are reasonable to reimburse Plaintiffs for the injuries suffered. (Revised in final judgment)

2.19 The Court concludes that Plaintiffs are an injured party under the provisions of RCW 4.24.630, and entitled to reimbursement of Plaintiffs' reasonable costs including expenses, reasonable attorney's fees, and other litigation-related costs.

Done in open Court this 17th day of November, 2009

J. Spector

The Honorable Julie Spector

The court incorporates its oral ruling of 9/25/09 as a further basis for this order.

C. ARGUMENT

1. Standard of Review

Appellate review of a trial court's findings of fact and conclusions of law is limited to determining whether a trial court's findings are supported by substantial evidence, and if so, whether those findings support the conclusions of law. Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth of the declared premise. *Landmark Dev., Inc. v. City of Roy*, 138 Wn.2d 561, 584, 980 P.2d 1234 (1999).

The findings of the trial court, who personally saw the witnesses, heard them testify, observed their conduct and demeanor while testifying, and weighed their interests and motives and the probabilities of the truthfulness of their testimony, will not be disturbed on appeal where this court is not able to say that such findings are clearly not supported by the weight of the evidence. *Bradley v. Donovan-Pattison Realty Co.*, 84 Wash. 654, 658, 147 P. 421 (1915)

Conclusions of law are reviewed de novo. *Happy Bunch v. Grandview N.*, 142 Wn. App. 81, 84, 173 P.3d 959 (2007)

As discussed and outlined below, and identified above, there is significant evidence in the record to support all findings of fact made by the trial court and the findings should be upheld.

2. Factual Issues

Although 10 of the 21 Findings are challenged, they narrow to the following four issues:

- i) Do the Soffey's own the fence? (FOF 1.10)
- ii) Did the parties agree on a property line? (FOF 1.9, 1.14, 1.15)
- iii) What was the grade in the Dan's northwest yard at the fence line before the fill? (FOF 1.11, 1.16)
- iv) Does the fill trespass? (FOF 1.17, 1.18, 1.20, 1.21)

i) Fence ownership: Notwithstanding counsel's attempt to create a disputed issue, it was undisputed at trial that Soffeys own the fence. Mr. Dan did not claim or assert ownership, while both Soffeys did. On two occasions, Mr. Dan irrefutably identifies the fence as belonging to the Soffeys:

TT 14, p167 line 2 (Appendix page 59)

Q: Do you know what she's referring to?

A: The string line from *their chain link fence*, ...

TT 15, p16 line 19 (Appendix page 60)

Q: And 30 inches up, and 30 inches up, is that ---

A: Yes. Of course it was never flat to the *neighbor's bottom of their fence*, ...

As identified above and highlighted in the Appendix, the Soffeys have asserted ownership of the fence since purchasing their property in 1991. The Dans' have never challenged that ownership, and in fact accented to Soffeys' ownership. Finding of Fact 1.10 is undisputed, and there is no good faith basis for the Appellants' challenge.

ii) Property Line Agreement: The Dans, and not the Soffeys, argued at trial that an agreement was reached between the parties as to the location of the property line. Mr. Dan testified as follows:

TT 14, p167 line 1 (Appendix page 89)

Q: Do you know what she's referring to?

A: The string line from their chain link fence, we're referring back then to that notch in the curb and the metal post from the chain link as being points of reference, and based on that, they put the string up,, and I said, that's okay, if that line is okay with you guys, that's fine with me, and I proceeded.

TT 15, p23, line 23 – p24, line 4 (Appendix page 92)

Q: And from this picture it appears they're to the left of the notch in the curb?

A: Correct

Q: Did you purposely do that?

A: Yes.

Q: Why?

A: Based on my agreement with Mary Soffey.

Even before reaching agreement with Mary Soffey, Mr. Dan testified that he had considered the fence line and curb notch as the property line, as follows:

TT 14, p154 line 14 (Appendix page 85)
Q: And what did you think, if at all; did you believe that fence had anything to do with where your property line was?
A: Yeah. I assumed that that's probably the property line. A fence generally will delineate the property line. I never thought about it with that light. We considered that being the property line.

With respect to the front yard, the Soffeys both testified that they considered their "property" to include some small landscaped area south of a straight line between the curb notch and the fence post. A portion of this area, on the Dans' side of the "straight line", had been removed by Mr. Dan during his construction work.

However, Mrs. Soffey testified to an agreement with Mr. Dan, as follows:

TT 14 p 54 line 3 (Appendix page 77)
Q: And did you talk in terms of where a property line was?
A: About where a property line was, where a cut was, those sorts of things, yes.
p 55 line 10 (Appendix page 78)
Q: Okay. What do you remember telling him?
A: I remember that we had agreed that if he didn't cut away any more dirt, any more soil, any more of our land, the two – that we would live with it.
Q: There was some agreement between the two of you that was reached in this conversation; is that your testimony?
A: My understanding was that if he didn't cut any more land away, that we could live with it.

The Courts finding that an agreement was reached between Mrs. Soffey and Mr. Dan to recognize the property line as being located along the west side of the fence line and continuing in a straight line to the notch in the curb is supported by the testimony of both.

Neither party introduced any survey information, expert testimony, recorded plat documentation, or any other extrinsic evidence to argue for any other property line location.

RCW 58.04.020 allows a suit in equity to establish a boundary between lands that is in dispute. The court is empowered to determine the boundary, and to order that the boundary be properly marked. As set forth in FOF 1.14, the boundary line in this matter is established by permanent physical features on the ground, and as described in COL 2.3 “(T)he property line can be determined by the parties as a straight line running between the curb notch and the eastern end of the existing chain link fence.”

FOF 1.09 is undisputed. FOF 1.14 is supported by the testimony of Appellant Mr. Dan, and not challenged by the Soffeys. FOF 1.15 is moot, as the Soffeys make no claim with respect to any

front yard issues. The record provides no good faith basis for the Appellants' challenge to these findings.

iii) What was the grade in the Dan's northwest yard at the fence before the fill? (FOF 1.11, 1.16)

Common sense argues that a permanent chain link fence is not constructed with three to four feet of loose fill piled next to and bulging against that fence.

Mrs. Soffey testified on nine different occasions that the grade at the fence line matched before the Dans' construction.

TT 14 p. 13-14, p. 18-19, p. 38-39, p 47; TT 15 p. 94-95

(Appendix pages 62-70)

Mr. Soffey testified twice to the same. TT 14 p. 76, p. 86

(Appendix, pages 71-72)

Mr. Dan provided conflicting testimony, but under examination by the Court finally admits to his work:

TT 15, p32 line12 (Appendix page 73)

Q: What was underneath it before you added the one foot of fill?

A: Looked like there was rockery.

Q: **Was it grass?**

A: **Yeah, grass and bushes.** I basically cleaned it up and –

Q: Was there any cement?

A: Well, I added that to that foot where is where cement blocks that I ---

Likewise, FOF 1.16 is undisputed. The Soffeys and Mr. Dan all testified that the fill pile includes “broken patio materials, broken concrete blocks, and other dirt and fill material.” TT 14 p. 18-19, p. 38-39, p. 42, p. 86, p. 114; TT 15 p. 33-34, p. 47, p. 54, p. 96 (Appendix, pages 102-113).

The testimony of the parties is not in disagreement. The record provides no good faith basis to challenge FOF 1.11 or 1.16. The bottom of the Dan’s fill pile started at grade matching the grade at the bottom of the Soffeys’ fence, and construction debris materials were used as fill material.

Finding of Fact 1.19 was not challenged, and states as follows:

1.19 During the summer of 2009, while this matter was pending, the Dan’s placed additional fill on top of the construction debris fill, located approximately five feet south of the fence line, to create a new grass and yard area within a new fenced area. Up to an additional two feet of fill was placed, creating a total fill depth of approximately eight feet located five feet south from the Soffey property line.

As such, it is undisputed that the Dan’s created an eight foot high fill pile adjacent to the Soffeys’ fence and back yard, using in part construction debris, and that the top two feet of fill was added just months before trial in 2009.

The record provides no good faith basis for the Appellants' challenge to Findings 1.11 and 1.16.

iv) Does the fill trespass? (FOF 1.17, 1.18, 1.20, 1.21)

The Soffeys testified on more than ten occasions that the fill pile is bulging against the Soffey fence, and pressing against the fence. TT 14 p. 18-22, p. 41-42, p 45-47, p. 59; TT 15 p. 84-86, p. 96-98, p. 108, p. 113-114. (Appendix pages 115,116,118, 120, 125, 127, 128, 130, 131,132) Both Mr. and Mrs. Soffey testified to their immediate concerns that their chain link fence is actually holding up the fill pile, and that the fill pile may collapse the fence and collapse into the Soffey yard. TT 14 p. 39, p. 108; TT 15 p. 85, p. 97, p. 108. (Appendix pages 127, 129, 133, 149, 154)

Mr. Dan does not deny adding fill during the summer of 2009, just before trial. TT 15 p. 55, 47. (Appendix pages 163, 164) The Dans do not dispute that with the additional fill added during June 2009 the fill pile raises eight feet above the Soffey yard, within five feet of the Soffey property line. (FOF 1.19, undisputed)

More telling, at no time during trial did Mr. Dan outright deny that portions of the fill he placed is currently "bulging" or pressing against the Soffeys fence. TT 15 p 14. He did testify that he had placed the materials away from the fence, which reinforces the

Soffeys' opinions and concerns – the fill pile is unstable, and collapsing against the fence.

As such, it is undisputed that the Dans' fill pile is currently occupying a portion of the Soffeys' property. The fill has bulged across the property line, and it is pressing against the Soffey fence. Under the undisputed facts, the fill pile constitutes a trespass.

The record provides no good faith basis for the Appellants' challenge to Findings 1.17, 1.18, 1.20, or 1.21.

3. LEGAL ARGUMENT

The Court's Findings of Fact are supported by substantial evidence. In fact, as set forth above, it is Respondents' opinion that when the record is viewed as the whole that challenged Findings 1.9, 1.10, 1.14, 1.16, 1.17, and 1.18 are undisputed. In addition, Finding 1.11 (grade level at fence line) is supported by overwhelming evidence; Finding 1.15 is supported by substantial evidence but moot; Finding 1.20 (possible collapse of fence) is supported by substantial evidence *and not refuted by Appellants*; and Finding 1.21 (knowingly adding additional fill after 2006) is admitted to by Appellants. (FOF 1.19)

The Findings of Fact should not be disturbed on appeal.

In his argument, counsel for Appellants makes a number of unsupported claims. On page 27, counsel argues that the Court lacks jurisdiction to establish the property line, or boundary line, between the properties. As set forth from the record, the parties were in agreement that the separating chain link fence, in place since before 1991, was claimed as owned by the Soffeys, and accepted as the property line. Any dispute as to the front yard property line was decided in favor of the Dans, and is not now challenged by the Soffeys. The Court's Findings and Conclusions concerning the property boundary are authorized under RCW 58.04.020. The Dans presented no defense to the location, either by expert testimony or by conflicting testimony from the Dans.

Conclusions 2.2, 2.3, 2.4, 2.5, 2.8, 2.9, and 2.10, concerning the Court's determination of the property line location, are supported by the evidence, and should not be disturbed on appeal.

On page 36, counsel argues with respect to the Dans' fill activities that "They had a permit from the City of Bellevue, they had a survey conducted, and corrected all code violations made known to them." Each of these statements is false.

There was no permit for the fill activities. On cross examination, Mr. Dan finally admitted that the fill placed in the NW

yard was not shown on any plans submitted to the City of Bellevue, as follows:

TT 15 p 46 lines 3-9

Q: But nothing is shown on the site plans drawn in by an architect that would show your regrading, is it?

A: No, I don't think so.

Q: So, there is no new elevation lines, or anything of that sort?

A: I can't remember that.

The City of Bellevue did not, and has not, approved the fill activities. Ms. Lillie, called by defendants, from the City of Bellevue, testified that she was not testifying as to whether or not a code violation existed concerning the fill, and offered the opinion that no one at the City had made such a determination.

TT 15 p 82 lines 10-22.

Furthermore, Ms. Lillie testified that her understanding of the zoning regulations would limit the maximum height of fill placed in a side yard, within five feet of a property line, to be 30 inches – once.

TT 15 p 84 line 1 – p 85 line 12.

The Dans now admit that the total height of fill located at the five foot line is eight feet. FOF 1.19

There is no "Survey" for the Dans' property. Surveys, and surveying procedures, are strictly regulated in the State of Washington. RCW 58.09; WAC 332. No survey document, Survey

of Record, survey notes, or any other information was presented at trial. Mr. Dan testified to hiring a survey firm to perform some measurements, but produced no evidence of any legally recognizable survey document.

As to correcting “code violations”, Mr. Dan’s testimony is in conflict. He first correctly identifies the Bellevue City Code, with respect to excavation he performed during 2006, as follows:

TT 15 p25 lines 5-15

Q: And was there an issue that you had to deal with the City of Bellevue over how high these blocks could be?

A: Yes. I was a foot higher than I was supposed to. Basically the City of Bellevue’s rule is 30 inches in the setback, and I was a foot over that.

Q: So you made that change?

A: Yes.

Later, he attempts to defend the admitted eight foot high fill pile by claiming that three to four feet of fill existed before his project, and that in addition he was told that he could add 30 inches of fill on top of the “existing”, and then another 30 inches after stepping back 30 inches. As such, counsel argues that the admitted eight feet of depth was allowed.

The Court considered Mr. Dan’s admitted understanding of the Code, dating from 2006, in entering the Findings.

This matter was commenced during February 2008. The Complaint alleges that the fill pile violates Bellevue City Code. Mr.

Dan continued to add fill after February 2008. As such, it can not be argued in good faith that the Dans did not act “knowingly” in continuing to add fill materials after 2006, or 2008, or in June 2009. Mr. Dan’s admitted understanding of the 30 inch fill depth limitation leaves no defense to his continued activities resulting in eight feet of fill at the time of trial.

Conclusions 2.5, 2.6, 2.7, 2.8, and 2.9 are fully supported by the Findings and evidence presented at trial.

Having found trespass and nuisance, the Court is empowered to enter Conclusions 2.10 thru 2.14. It is a far stretch of credibility for Defendants to argue that their admitted eight foot high unrestrained construction debris fill pile bulging against the Soffeys’ fence constitutes no more than an “aesthetic nuisance”, allowed and fully permitted under the Bellevue City Code.

Appellants challenge the Court’s award of fees to Soffeys under RCW 4.24.630. The standard of review with respect to a fee award is abuse of discretion. The Court’s Findings support the Conclusions; the Findings and Conclusions support the fee award under RCW 4.24.630.

The Findings of trespass and substantial nuisance should be upheld on appeal.

A reasonable inquiry under RCW 4.24.630 should be “Was the Plaintiff’s litigation reasonably necessary to deter and abate the Dans’ trespass and substantial nuisance?” There is no clearer answer than the existence of this Appeal. After a review of the record as a whole, it can be seen that most of the challenged Findings are undisputed, and all Findings are supported by substantial evidence. In Defendants’ view, they believe that they are entitled to use their neighbor’s chain link fence as a (temporary) retaining structure to hold up their eight foot deep construction debris fill pile, and to add to the fill pile even while admitting to knowledge of the applicable Codes and after being joined in litigation to abate the trespass and nuisance. Plaintiffs are left no choice but to incur significant fees to defend their property. The award was proper, and justified.

4. FEES ON APPEAL

Respondents request attorney’s fees pursuant to RAP 18.1 and RCW 4.24.630 on appeal. As the prevailing party at trial, the Soffeys were entitled to and awarded attorneys fees by the Trial Court. Where a statute allows for the award of attorney fees to the prevailing party at trial it is interpreted to allow for the award of

attorney fees to the prevailing party on review. *Puget Sound Plywood, Inc. v. Master*, 86 Wn.2d 135, 542 P.2d 756 (1975).

Notwithstanding Mr. Dan's testimony at trial that he is knowledgeable of the Zoning Codes limiting the depth of fill placed within side yard setbacks to 30 inches, and after hearing the City of Bellevue's representative testify to the same, the Appellants choose to pursue this appeal and refuse to abate the construction debris fill pile. The Soffeys are forced to respond, and to incur significant fees, to defend the Court's ruling requiring abatement of the trespass and nuisance.

Although Plaintiffs are not prepared to argue at this time that the appeal is strictly frivolous, under RCW 4.84.185, we do fail to see any good faith basis for the challenges to the Findings of Fact. Plaintiffs reserve a claim for appeal fees under RCW 4.84.185.

D. CONCLUSION

In conclusion, Plaintiffs request that this Court uphold the Trial Court, deny the appeal in its entirety, and award fees on appeal to Plaintiffs.

Respectfully Submitted this 15th day of November, 2010

By Craig D. Magnusson

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