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No. 68526-1

King County Superior Court #10-2-44107-7  
IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

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DAVID ARMSTRONG, an unmarried man;  
GREG MOSLEY, a married man, and JANE DOE MOSLEY,  
and the marital community comprised therein;

Defendants/Appellants,

vs.

GAEL DURAN, a single woman,

Respondent.

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APPELLANTS GREG AND RITA MOSLEY'S  
OPENING BRIEF

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## I. NATURE OF THE CASE

This is a real property dispute arising from the alleged breach of easement (abandoned by the parties' predecessors in interest) and the conduct of the parties relative thereto. Respondent Gael Duran ("Duran") initiated this lawsuit against appellants David Armstrong ("Armstrong") and Greg and Jane Doe Mosley ("Mosley") seeking injunctive relief and monetary damages for removal of a fence and landscaping based on the alleged breach of easement, the construction of a spite fence, trespass, nuisance, intentional and negligent infliction of emotional distress, and property damage pursuant to RCW 4.24.630. *Clerks Papers ("CP") 1-20*. Appellants denied these claims. *CP 21-31*. Duran, Armstrong, and Mosley own adjoining property in Bothell, Washington.

Despite overwhelming genuine issues of material fact, the trial court granted Duran's motion for summary judgment relief, including expedited injunctive relief. This appeal challenges the relief granted to Duran as well as the subsequent orders issued by the trial court premised on the erroneous summary judgment order.

## II. ASSIGNMENTS OF ERROR

1. The Superior Court erred in failing to consider the facts in the light most favorable to the nonmoving party.

2. The Superior Court erred in granting Duran's summary judgment motion where the material undisputed facts established that the applicable recorded easement agreement authorized installation of (the "Fence").

3. The Superior Court erred in granting Duran's summary judgment motion where the material undisputed facts established that the easement rights claimed by Duran were abandoned and/or extinguished by a subsequent easement agreement that authorized installation of the Fence which effectively precludes access over the easement area by Duran.

4. The Superior Court erred in granting Duran's summary judgment motion where genuine material facts exist regarding abandonment and/or extinguishment due to Duran's and her predecessor's long period of alternative access.

5. The Superior Court erred in granting Duran's summary judgment motion against Mosley where the material undisputed facts established that Mosley had no involvement in installing, building, or constructing the Fence and improvements claimed by Duran to violate her alleged easement rights.

6. The Superior Court erred in granting Duran's summary judgment motion where genuine material facts exist regarding Duran's "spite fence" claim.

7. The Superior Court erred in granting Duran's summary judgment motion where genuine material facts exist regarding Duran's "nuisance" claim.

8. The Superior Court erred in granting Duran's summary judgment motion where genuine material facts exist regarding Duran's "trespass" claim.

9. The Superior Court erred in granting Duran's summary judgment motion where genuine material facts exist regarding Duran's "emotional distress" claims.

10. The Superior Court erred in granting Duran's summary judgment motion where genuine material facts exist regarding Duran's property damage claim pursuant to RCW 4.24.630.

11. The Superior Court erred in denying appellants' motion for reconsideration and/or clarification of the Superior Court order granting Duran's motion for summary judgment based on its failure to clarify the relief granted, the existence of material facts establishing the right of appellants to install the subject fences, and the existence of genuine issues of material fact precluding Duran's claims.

12. The Superior Court erred in granting Duran's motion for contempt and sanctions and appellants' motion for consideration thereof since it was based on its erroneous order granting Duran's motion for

summary judgment, failed to consider genuine issue of material fact precluding Duran's motion, and failed to conduct an evidentiary hearing regarding compliance with the order granting Duran's summary judgment motion.

13. The Superior Court erred in granting Duran's motion for entry of judgment since it was based on its erroneous order granting Duran's motion for summary judgment, based on its erroneous order granting Duran's motion for contempt and sanction, failed to consider genuine issue of material fact precluding Duran's motion, and failed to conduct an evidentiary hearing regarding compliance with the order granting Duran's summary judgment motion.

### **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Whether the Superior Court erroneously granted Duran's motion for summary judgment against appellants granting Duran injunctive relief requiring defendant to remove certain alleged encroachments from property.

2. Whether the Superior Court erroneously granted Duran's motion for summary judgment against appellants Greg and Rita Mosley granting Duran injunctive relief requiring defendant to remove certain alleged encroachments from property.

3. Whether the Superior Court erroneously granted Duran's motion for summary judgment on Duran's "spite fence" claim.

4. Whether the Superior Court erroneously granted Duran's motion for summary judgment on Duran's "nuisance" claim.

5. Whether the Superior Court erroneously granted Duran's motion for summary judgment on Duran's "trespass" claim.

6. Whether the Superior Court erroneously granted Duran's motion for summary judgment on Duran's "emotional distress" claims.

7. Whether the Superior Court erroneously granted Duran's motion for summary judgment on Duran's property damage claim pursuant to RCW 4.24.630.

8. Whether the Superior Court erroneously denied appellants' motion for reconsideration and/or clarification of the Superior Court order granting Duran's motion for summary judgment.

9. Whether the Superior Court erroneously granted Duran's motion for motion for contempt and sanctions.

10. Whether the Superior Court erroneously granted Duran's motion for entry of judgment.

#### **IV. STATEMENT OF THE CASE**

In 1980, Conrad Liptau ("Liptau") applied for and the City of Bothell approved a two-lot short plat known as Short Plat No. D-80-071

(the “Plat”) creating two lots identified as Lot A and Lot B. Lot B had a 30’ wide panhandle (the “Panhandle”), presumably to provide access to Waynita Drive NE. *CP 135-136, 137-140, 151*. As part of the Plat, Lot A was granted a 30’ ingress, egress, and utility easement over the Panhandle (the “Plat Easement”). *CP 138*.

Liptau retained Lot B and subsequently conveyed Lot A to Jonathon J. Ross (“Ross”). *CP 135-136, 141-144*. The easement conveyance language of the Plat Easement does not, in any respect, preclude the location of any structures or fences on the Plat Easement. In fact, the easement is completely silent in this regard and merely states “TOGETHER with an easement for ingress, egress, drainage, and utilities over, under, and across that portion of the subdivision described as follows: . . . .” *CP 135-136, 138*. Further, at some point a fence was actually installed by Liptau and/or Ross within the Plat Easement area. *CP 135-136, 141-144*.

Significantly, on March 12, 1992, Liptau and Ross then entered an Agreement Between Landowners (the “Amended Easement”) which acknowledged their respective ownership of Lots A and B and the Plat Easement and stated, in part, as follows:

An easement for ingress, egress, drainage and utilities for the benefit of Lot A exists on the Easement Property.

**At the time of the execution of this Agreement, no road exists on the Easement Property. A portion of the easement property contains a fence which appears to be utilized as identifying the northerly boundary of Lot A.**

Liptau and Ross agree that any utilization of the Easement area for any purpose other than for the easement uses discussed is done by the mutual acknowledgement of Liptau and Ross and any such use by Ross is not adverse nor open and notorious to the owners of Lot B, but is done by a revocable license between Liptau and Ross.

**Liptau reserves the right to remove the fence and any other structures, equipment, or material placed on the Easement Area, whose permission to remove such items is hereby granted.**

(Emphasis added.) *CP 135-136, 141-144.*

The Amended Easement further had an addendum which stated as follows:

**CONRAD LIPTAU AGREES TO MOVE THE EXISTING FENCE AND INSTALL SAID EXISTING FENCE ON THE BOUNDARY LINE OF EASEMENT PROPERTY AND JONOTHAN ROSS PROPERTY. HIS COST SHALL NOT EXCEED \$400.00 (FOUR HUNDRED AND 00/100 DOLLARS). ANY COST OUTSIDE OF \$400.00 (FOUR HUNDRED AND 00/100 DOLLARS) SHALL BE PAID BY JONOTHAN J. ROSS.**

CONRAD LIPTAU AGREES THAT JONOTHAN ROSS' PROPERTY SHALL NOT HAVE ITS

INGRESS AND EGRESS BLOCKED BY AT ANY  
TIME **DURING CONSTRUCTION.**

**(Emphasis added.)** *CP 135-136, 144.*

The Amended Easement therefore unequivocally mandated that Liptau install a fence on the boundary of the easement and Ross' property, i.e., the northern boundary of Lot A. *CP 135-136, 144.* The clear intent was that the Plat Easement was abandoned as Ross had no need for it due to alternative access precluding the need for the road. *CP 155-159, 158.* Placing a fence on the northern boundary of Lot A, which Ross expressly agreed to, effectively deprived Ross of any use of the Plat Easement. The fence would obviously serve to obstruct any and all easement or other access by Ross.

On February 1, 1996, Lot B was conveyed by Liptau to Greg Mosley by Statutory Warranty Deed, subject to the Easement Agreement, and subsequently quitclaimed to the marital community of Greg and Rita Mosley in 2008. *CP 153-154, 135-136, 145-148.* On June 13, 1996, Armstrong was conveyed by Statutory Warranty Deed the parcel lying to the north of the Panhandle. *CP 135-136, 147-148.* On September 27, 1996, Lot A was conveyed by Ross to Duran by Statutory Warranty Deed, subject to the Easement Agreement. *CP 135-136, 149-150.*

Accordingly, Liptau's property (Lot B) is now owned by Mosley; Ross' property (Lot A) is now owned by Duran; and Armstrong owns property to the north of the panhandle, i.e., property to the north of the Plat Easement. The location of their respective properties is depicted in an exhibit of an aerial map from King County iMap (King County's on-line interactive mapping service), that shows Duran's property outlined in purple, Armstrong's property outlined in blue and defendant Mosleys' property outlined in green. *CP 135-136, 151, 153-154*. The second page of this exhibit is the same aerial map but enlarged to show Duran's house and her existing driveway (highlighted in yellow) with the Panhandle outlined in blue. *CP 135-136, 152, 153-154*. This exhibit is also attached as **Appendix 1** for ease of reference. Duran has always had direct and unencumbered access to her residence by a separate driveway on the northeasterly side of Lot A alleviating the need to use the Plat Easement. *CP 135-136, 152, 153-154, 155-159, 158*.

Subsequently, in consideration of Armstrong's acquiescence to a boundary line adjustment, Mosley agreed to convey or otherwise grant Armstrong any right Mosley might have in the Panhandle Property. *CP 153-154, 155-159, 156*. Accordingly, Mosley has not objected to the construction of any improvement placed by Armstrong in the area of the Panhandle. *CP 153-154, 155-159, 156*. Mosley, however, has not been

involved with the construction or installation of any structures, the Fence, or other improvements constructed in the Panhandle area and has no ownership interest in any such improvements. *CP 153-154, 155-159, 156.*

In 2006, Armstrong installed the Fence as authorized and required by the Amended Easement along a portion of the north boundary line of Lot A. *CP 135-136, 144, 152, 153-154, 155-159, 157, 89-95, 91.* The installation of the Fence was not only authorized, but was built by Armstrong to keep his children safe. *CP 155-159, 157.* One neighbor on that side is a Level 3 sexual predator, and the Fence was also constructed to keep his children's toys from entering onto Duran's property as she has complained to Armstrong on more than one occasion. *CP 155-159, 157.*

Nor was the Fence installed for any improper purpose that would impact Duran. In fact, the Fence was installed by defendant Armstrong based on his reasonable belief of his right to do so, to protect his family, to enhance the value and enjoyment of the land, and for a useful and reasonable purpose and not done to spite, injure or annoy Duran. *CP 155-159, 157.*

## **V. PROCEDURAL STATUS**

On July 15, 2011, Duran filed a motion for summary judgment. *CP 35-51.* The specific "Relief Requested" was that the court "grant her motion for summary judgment for removal of a fence and landscaping in

an express easement area which prevents Duran from her legal right of ingress and egress.” *CP 35*. Although not specifically requested in her “Relief Requested,” her motion went on to request that the court grant summary judgment on all her other claims for a spite fence, nuisance, trespass, emotional distress, and property damage pursuant to RCW 4.24.630. *CP 35-51*. Despite opposition to the Duran’s motion, the trial court granted Duran’s motion on August 12, 2011, as follows:

Duran’s motion is GRANTED.

Appellants are hereby order to remove the fence, rockery, landscaping, and all their encroachments from the easement area as described in the easement previously recorded pertaining to the subject property within 30 days of this Order.

*CP 182-184*. The order, however, clearly did not address or dispose of the many monetary damage claims sought by Duran. *CP 182-184*. Nor could it have since Duran provided no evidence regarding the amount any such monetary claim. *CP 35-51*.

On August 22, 2011, appellants sought reconsideration and/or clarification of the court’s summary judgment order regarding what claims the order related to. *CP 191-204*. The trial summarily denied appellants’ motion. *CP 214*.

On October 28, 2011, Duran file a motion for contempt and sanctions alleging that appellants had failed to comply with the injunctive

relief provisions of the summary judgment order. *CP 216-224.* Appellants opposed on the basis that the order had been fully complied with raising genuine factual issues that could not be resolved by motion. *CP 246-253, 254.* The trial court, however, granted Duran's motion requiring appellants to pay Duran \$2,100 in attorney's fees and costs and sanctions of \$100 a day until all encroachments are removed. *CP 267-270.* Appellants then sought reconsideration and requested an evidentiary hearing on the contempt allegations. *CP 273-281.* This was also denied by the trial court. *CP 295-296.*

Despite the existence of remaining issues to be resolved on Duran's claims, such as the amount of monetary damages Duran may have been entitled to, on February 8, 2012, Duran filed a Motion for Entry of Judgment for entry of judgment on the trial court's summary judgment order and contempt order. *CP 299-306.* Duran apparently elected to forego proceeding against appellants on her remaining claims for monetary damages. Notwithstanding the appellants' opposition, the trial court entered judgment which had the continuing effect of appellants being assessed \$100 per day until the "Order of Summary Judgment is Complied With." *CP 328-329, 330-332.* This created the incongruous result that this penalty continues to accrue until Duran determines that

compliance has been met with absolutely no right of appellants to contest or have an evidentiary hearing on this issue.

This appeal then ensued.

## VI. ARGUMENT

### A. Standards of Review.

When reviewing a summary judgment, this Court stands in the same position as the trial court, and reviews the motion(s) *de novo*. *Ruff v. King County*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995); *Steury v. Johnson*, 90 Wn.App. 401, 404, 957 P.2d 772 (1998). The burden is on the moving party to demonstrate there is no issue of material fact. The moving party is held to a strict standard. *Scott v. Pacific West Mountain Resort*, 119 Wn.2d 484, 502-503, 834 P.2d 6 (1992).

The Court considers all the facts submitted and views all the facts in the light most favorable to the nonmoving party. *Ruff*, 125 Wn.2d at 703. Summary judgment is proper only where there are no genuine issues of material fact and the moving party is entitled to prevail as a matter of law. CR 56(c). *Public Employees Mutual Ins. Co. v. Fitzgerald*, 65 Wn. App. 307, 828, P.2d 63 (1992); *Weyerhaeuser Co. v. Aetna, et al.*, 123 Wn.2d 891, 874 P.2d 142 (1994). A material fact is a fact upon which the outcome of the litigation depends, in whole or in part. *Ruff*, at 703. Summary judgment may not be granted unless, based on all the evidence,

reasonable persons could reach but one conclusion. *Ruff*, 125 Wn.2d at 703-704.

**B. The Superior Court Erroneously Granted Duran’s Motion for Summary Judgment against Appellants Granting Duran Injunctive Relief on an Expedited Basis.**

**1. Consideration of the Facts in the Light Most Favorable to Appellants Precluded Entry of Summary Judgment.**

The facts, when considered in the light most favorable to appellants are as follows:

- a. In 1980, Liptau obtained approval for a 2-lot short plat (the “Plat”) in the City of Bothell identified as Lots A and B. *CP 135-136, 137-140, 151.*
- b. Liptau retained Lot B and subsequently conveyed Lot A to Ross. *CP 135-136, 137-140, 151.*
- c. The Plat granted Lot A a 30’ wide ingress, egress, and utility easement (the “Plat Easement”) over the 30’ wide panhandle portion of Lot A (the “Panhandle”), to provide access to Waynita Drive NE. *CP 135-136, 137-140, 151.*
- d. The easement conveyance language of the Plat did not have any restrictions or prohibitions on installing any fences or other structures within the Plat Easement. *CP 135-136, 138.*
- e. At some point, a fence was actually installed by Ross with the Plat Easement area. *CP 135-136, 141-144.*
- f. In 1992, Liptau and Ross, the property owners for Lots A and B at the time, amended the Plat Easement by execution and recording of the Amended Easement. *CP 135-136, 141-144.*
- g. The Amended Easement acknowledged that no road existed on the Plat Easement and that a fence (mistakenly marking the northern boundary of Lot A) had actually been constructed

within a portion of the easement. The parties therefore agreed that:

- i. Liptau, not Ross, had the right to remove the fence and any other structures, equipment or material placed within the Plat Easement and Ross granted Liptau permission to do so. Ross, however, was not provided similar rights.
- ii. Liptau agreed to move the existing fence to the north boundary line of Lot A, owned by Ross, with Ross to contribute any costs in excess of \$400.
- iii. Ross's property was not to have its ingress egress blocked **only** during construction of the fence.

*CP 135-136, 141-144.*

- h. The Amended Easement unequivocally mandates that Liptau install a fence on the boundary of the easement and Ross' property, i.e., the northern boundary of Lot A. *CP 135-136, 144.*
- i. Placing a fence on the northern boundary of Lot A, which Ross expressly agreed to, deprived Ross of any use of the Plat Easement. The fence would serve to obstruct any and all easement or other access by Ross in such area. *CP 135-136, 141-144.*
- j. The clear intent of the Amended Easement was to abandon the Plat Easement except for a small portion on the southeasterly end of the easement allowing Ross and his successor direct access to Waynita Way NE. *CP 135-136, 152, 153-154, 155-159.* Also, see yellow highlighted area of exhibit map (*CP 152; Appendix 1*, p. 2) which shows Duran's driveway as it crosses the Plat Easement.
- k. Ross and his successors, including Duran, have always had direct and unencumbered access to the residence on the Lot A by a separate driveway that crosses the southeasterly portion of the Plat Easement alleviating the need to use said easement except for this area. *CP 135-136, 152, 153-154, 155-159.*

- l. Lot A was subsequently conveyed to Duran in 1996 and Lot B was conveyed to defendant Greg Mosley in 1996 and then quitclaimed to the marital community of Greg and Rita Mosley in 2008. *CP 153-154, 135-136, 145-148, 149-150.* As successors in interest, Duran and Mosley are bound by the Amended Easement.
- m. The installation of the Fence in 2006 by defendant Armstrong was done with a reasonable belief of his right to do so, to protect his family, to enhance the value and enjoyment of the land, and for a useful and reasonable purpose. *CP 135-136, 144, 155-159, 157.*
- n. The installation of the Fence by defendant Armstrong was not done to spite, injure or annoy Duran. *CP 155-159, 157.*
- o. Duran's access is in no way detrimentally affected by the installation of the Fence and other improvements within the abandoned easement. *CP 155-159, 158.* She has full and complete access with the established driveway she has used and continues to use since the house was built. *CP 155-159, 158.* The installation of the Fence actually replaced a prior fence which created more of a restriction to access to her property. *CP 155-159, 157.*
- p. Photographs submitted by Duran reflects her complete and unfettered alternative access developed by the established driveway to her house, which is not obstructed in any respect by the Fence. *CP 89-95, 118, 121, 126.*
- q. The fence was not installed all the way to the southeasterly portion of the property line of Lot A to ensure that Duran's access was maintained and, in fact, Duran's driveway actually crosses Armstrong's property outside of the easement established by the Plat, which the fence does not obstruct. *CP 155-159, 158, 152; Appendix 1, p. 2.*
- r. The fence does not block Duran's utilities as Armstrong located the utilities prior to installation of the fence to ensure that this did not occur. *CP 155-159, 157.*

- s. The extra vehicles Duran claims are parked on the easement are actually on Armstrong's property. *CP 155-159, 158.*
- t. Any language painted on the Fence was removed by Armstrong at the end of 2010, well before filing of Duran's motion for summary judgment. *CP 89-134, 94-95.*

As will be discussed below, these facts precluded entry of summary judgment on Duran's claim for breach of easement and injunctive relief.

**2. The Undisputed Facts Established that the Amended Easement Authorized Installation of the Fence (the "Fence") with Duran to Pay All Costs for Such Installation that Exceeded \$400.**

As noted in *Littlefair v. Schulze*, 278 P.3d 218, 221 (2012):

We interpret an easement as a mixed question of law and fact. [*Sunnyside Valley Irr. Dist. v. Dickie*, 149 Wash.2d [873,] at 880, 73 P.3d 369. The intent of the party who created the easement is a question of fact, whereas "the legal consequence of that intent is a question of law." *Dickie*, 149 Wash.2d at 880, 73 P.3d 369.

Further,

The intent of the original parties to an easement is determined from the deed as a whole. *Zobrist v. Culp*, 95 Wash.2d 556, 560, 627 P.2d 1308 (1981). If the plain language is unambiguous, extrinsic evidence will not be considered. *City of Seattle v. Nazareus*, 60 Wash.2d 657, 665, 374 P.2d 1014 (1962). If ambiguity exists, extrinsic evidence is allowed to show the intentions of the original parties, the circumstances of the property when the easement was conveyed, and the practical interpretation given the parties' prior conduct or admissions. *Id.*

*Sunnyside Valley Irr. Dist. v. Dickie*, 149 Wash.2d 873, 880, 73 P.3d 369, 372 (2003).

Here, the language of the Amended Easement unequivocally authorized Liptau, not Ross, to remove the fence and any other structures, equipment or material placed within the easement and Ross granted Liptau permission to do so. *CP 135-136, 141-144*. Moreover, Liptau agreed to move the existing fence on the north boundary line of Lot A, owned by Ross, with Ross to contribute any costs in excess of \$400. *CP 135-136, 141-144*. As such, the parties agreed that a fence would be built on the north boundary line of Lot A (which was also the south boundary line of the Plat Easement) with Ross contributing to any expense over \$400. *CP 135-136, 141-144*. The only restriction was that Ross's property was not to have its ingress egress blocked **only** during construction of the fence. *CP 135-136, 141-144*.

Accordingly, the unambiguous language of the Amended Easement fully entitled defendant Armstrong to construct the fence on the location where it was constructed. The trial court therefore erred in requiring removal.

**3. The Plat Easement was Abandoned and/or Terminated by the Amended Easement.**

Easement rights can be extinguished by abandonment. As held in *Heg v. Alldredge*, 157 Wn.2d 154, 161, 137 P.3d 9, 13 (2006) (emphasis added):

**Extinguishing an easement through abandonment requires more than mere nonuse—the nonuse “must be accompanied with the express or implied intention of abandonment.”** *Netherlands Am. Mortgage Bank v. E. Ry. & Lumber Co.*, 142 Wash. 204, 210, 252 P. 916 (1927) (quoting Christopher G. Tiedeman, *An Elementary Treatise on the American Law of Real Property*, § 605, at 574 (2d ed. 1892)). . . **Acts evidencing abandonment of an easement must be unequivocal and decisive and inconsistent with the continued existence of the easement.** 28A C.J.S. *Easements* § 125 (1996).

In *Barnhart v. Gold Run, Inc.* 68 Wn.App. 417, 421, 843 P.2d 545, 547 (1993), the court addressed similar circumstances that are presented here. Barnhart and adjoining property owners sought to establish their right to use a strip of land platted, but never developed, as a private road. The court rejected this claim due to the long period of use of alternative access stating:

The undisputed evidence supports a finding the location of the platted road right of way shifted to the existing road, due to a long period of use which predated the parties' ownership. *Curtis v. Zuck*, 65 Wash.App. 377, 829 P.2d 187 (1992).

As also noted by the *Heg* court:

In *Curtis v. Zuck*, 65 Wash.App. 377, 829 P.2d 187 (1992)], a gravel road was built north of the platted street location. Plaintiffs bought property north of the platted street, defendants bought the property to the south. Defendants built a home encroaching on the platted street, having been advised the gravel road marked the northern boundary of their land. The trial court refused to eject the defendants from the platted street or to quiet the plaintiffs' title to the portion of their land encroached upon by the gravel road. The appellate court affirmed, accepting defendants' argument that **"the private easement they share[d] with the [plaintiffs] ha[d] simply shifted due to a period of long use which predate[d] both parties' ownership."** *Curtis*, 65 Wash.App. at 382, 829 P.2d 187.

(Emphasis added.) *Heg v. Alldredge*, 157 Wash.2d at 163-164.

Similarly, here, although the Plat established an easement, the road was never developed. *CP 135-136, 141-144*. This was expressly recognized in the Amended Easement which went on to mandate that Liptau construct a fence on the northern boundary of Lot A and that allowed Liptau to remove any structures that may have been placed in the Plat Easement area by Ross. *CP 135-136, 141-144*. Placing a fence on the northern boundary of Lot A, which Ross expressly agreed to, deprived Ross of any use of the Plat Easement. The fence would obstruct any and all easement or other access by Ross in such area.

Accordingly, the clear intent of the Amended Easement was to abandon the Plat Easement except for a small portion on the southeasterly end of the easement allowing Ross and his successor access direct access

to Waynita Way NE. Under these circumstances, the Plat Easement was abandoned/extinguished by the Amended Easement.

**4. The Plat Easement was Abandoned and/or Terminated by Virtue of Development of Alternative Access.**

As previously noted, the Plat Easement was never needed or used due to the use of alternative access by Ross and his successors, including Duran. *CP 135-136, 141-144.* Ross and his successors, including Duran, have always had direct and unencumbered access to the residence on Lot A by a separate driveway that was developed which crosses the southeasterly portion of the Plat Easement alleviating the need to use the Plat Easement except for this small area. *CP 135-136, 152, 153-154, 155-159.*

Nor is Duran's access detrimentally affected by the installation of the Fence and other improvements within the abandoned easement. *CP 155-159, 158.* She has full and complete access with the established driveway she has used and continues to use since the house was built. *CP 155-159, 158.* The installation of the Fence actually replaced a prior fence which created more of a restriction to access to her property. *CP 155-159, 157.*

Moreover, the Fence was not installed all the way to the southeasterly portion of the property line of Lot A to ensure that Duran's access was maintained and, in fact, Duran's driveway actually crosses

Mr. Armstrong's property outside of the easement established by the Plat which the fence does not obstruct. *CP 155-159, 158.*

Nor does the Fence block her utilities as complained by Duran, as Armstrong located the utilities prior to installation of the fence to ensure this did not occur. *CP 155-159, 157.* The extra vehicles Duran claims are parked on the Plat Easement are actually on Armstrong's property. *CP 155-159, 158.*

In conjunction with the Amended Easement which authorized construction of the Fence, these facts established the existence of significant genuine issues of material facts regarding abandonment of the Plat Easement precluding summary judgment.

**C. The Court's Summary Judgment Order was Erroneous due to Their Lack of Participation in Installing, Building, or Constructing the Fence and Improvements Challenged by Duran.**

Although Mosley's property (Lot B) includes the Panhandle, they had absolutely no involvement with the encroachments claimed by Duran. Armstrong is in complete agreement with this. The undisputed facts establish that in consideration of Armstrong's acquiescence to a boundary line adjustment, Mosley agreed to convey or otherwise grant Armstrong any right Mosley might have in the Panhandle Property. *CP 153-154, 155-159, 156.* Accordingly, Mosley has not objected to the construction of any improvement placed by Armstrong in the area of the Panhandle

since Mr. Armstrong has beneficial use of the property. *CP 153-154, 155-159, 156.* Nor has Mosley been involved in any respect with the construction or installation of any structures, fence, or other improvements constructed in the Panhandle area and has no ownership interest in any such improvements. *CP 153-154, 155-159, 156.*

The trial court therefore erred in granting summary judgment against appellants Mosley as well as all subsequent orders.

**D. Genuine Issues of Material Fact Existed Precluding Entry of Summary Judgment on Duran's Claims Premised on a Spite Fence, Nuisance, Trespass, Emotional Distress, and Duran's property damage claim pursuant to RCW 4.24.630.**

In regards to Duran's other claims, when considered in the light most favorable to Mosley and Armstrong, the salient facts are as follows:

- a. The Amended Easement unequivocally mandates that Liptau install a fence on the boundary of the easement and Ross' property, i.e., the northern boundary of Lot A. *CP 135-136, 144.*
- b. Placing a fence on the northern boundary of Lot A, which Ross expressly agreed to, deprived Ross of any use of the easement in that area of the easement. *CP 135-136, 141-144.* The fence would serve to obstruct any and all easement or other access by Ross in such area.
- c. The clear intent of the Amended Easement was to abandon the Plat Easement except for a small portion on the southeasterly end of the easement allowing Ross and his successor direct access to Waynita Way NE. *CP 135-136, 152, 153-154, 155-159.* Also, see yellow highlighted area of exhibit (*CP 152; Appendix 1, p.2*) which shows Duran's driveway as it crosses the Plat Easement.
- d. Ross and his successors, including Duran, have always had direct and unencumbered access to the residence on Lot A by a separate

driveway that crosses the southeasterly portion of the Plat Easement alleviating the need to use said easement except for this area. *CP 135-136, 152, 153-154, 155-159.*

- e. Lot A was subsequently conveyed to Duran in 1996 and Lot B was conveyed to defendant Greg Mosley in 1996 and then quitclaimed to the marital community of Greg and Rita Mosley in 2008. *CP 153-154, 135-136, 145-148, 149-150.* As successors in interest, Duran and appellants Mosley are bound by the Amended Easement.
- f. The installation of the fence in 2006 by defendant Armstrong was done with a reasonable belief of his right to do so, to protect his family, to enhance the value and enjoyment of the land, and for a useful and reasonable purpose. *CP 135-136, 144, 155-159, 157.*
- g. The installation of the fence by defendant Armstrong was not done to spite, injure or annoy Duran. *CP 155-159, 157.*
- h. Duran's access is in no way detrimentally affected by the installation of the fence and other improvements within the abandoned easement. *CP 155-159, 158.* She has full and complete access with the established driveway she has used and continues to use since the house was built. *CP 155-159, 158.* The installation of the fence actually replaced a prior fence which created more of a restriction to access to her property. *CP 155-159, 157.*
- i. Photographs submitted by Duran reflects her complete and unfettered alternative access developed by the established driveway to her house, which is not obstructed in any respect by the fence. *CP 89-95, 118, 121, 126.*
- j. The fence was not installed all the way to the southeasterly portion of the property line of Lot A to ensure that Duran's access was maintained and, in fact, Duran's driveway actually crosses Mr. Armstrong's property outside of the easement established by the Plat which the fence does not obstruct. *CP 155-159, 158.*
- k. The fence does not block Duran's utilities as Armstrong located the utilities prior to installation of the fence to ensure this did not occur. *CP 155-159, 157.*

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1. Although Armstrong did paint some unfortunate words on Duran's side of the Fence, this was prompted by a police call initiated by Duran regarding Armstrong. The police recommended that Armstrong obtain a restraining order against Duran to protect Armstrong and his children since Duran had threatened and made rude comments to his children when their playthings had landed in her yard or when they were playing outside. Armstrong therefore wrote a message on the fence stating "Stay away from us" as a reminder to Duran to stop harassing him and his children. *CP 155-159, 159*. This language, however, was removed by Armstrong at the end of 2010, well before filing of Duran's motion for summary judgment. *CP 89-134, 94-95*.

As will be discussed below, these facts precluded entry of summary judgment on Duran's other claims.

### **1. Genuine Issue of Material Facts Exist Regarding Duran's Claim of a Spite Fence.**

RCWA 7.40.030 provides:

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

As held in *Baillargeon v. Press* 11 Wash.App. 59, 66, 521 P.2d 746, 750 (1974):

[I]n order to apply the spite fence statute, RCW 7.40.030, to restrain the erection of a fence or other structure or to abate an existing structure, the court must find (1) that the structure **damages** the adjoining landowner's enjoyment of his property in some significant degree; (2) that the structure is designed as the result of **malice or spitefulness primarily or solely** to injure and annoy the adjoining landowner; and

(3) that the structure **serves no really useful or reasonable purpose.**

(Emphasis added.) Further, “the question of whether or not the appellants’ proposed fence would serve a really useful or reasonable purpose is a question of material fact.” *Baillargeon v. Press*, 11 Wash.App. 59, 67, 521 P.2d 746, 751 (1974).

The facts presented by Mosley and Armstrong as described above certainly raised genuine issues of material fact precluding summary judgment on this issue.

## **2. Genuine Issues of Material Facts Exist Regarding Duran’s Claim of Nuisance.**

Duran alleged that the installation of the fence constituted a nuisance pursuant to RCW 7.48.010; 120 since it was allegedly in violation of the Plat Easement. RCW 7.48.010 states, in part: The “obstruction to the free use of property, so as to essentially interfere with the comfortable enjoyment of the life and property, is a nuisance and the subject of an action for damages and other and further relief.” RCW 7.48.120 states:

Nuisance consists in **unlawfully** doing an act, or omitting to perform a duty, **which act or omission either annoys, injures or endangers the comfort, repose, health or safety of others, offends decency, or unlawfully interferes** with, obstructs or tends to obstruct, or render dangerous for passage, any lake or navigable river, bay, stream, canal or basin, or any public park, square, street or

highway; **or in any way renders other persons insecure in life, or in the use of property.**

This clearly requires an unlawful act that annoys, injures or endangers the comfort of others or unlawfully interferes or renders other insecure. The key element is that the act must be “unlawful.” As previously stated, the fence was authorized and therefore not unlawful. The language painted on the Fence was removed in 2010 and certainly did not justify removal of a reasonable and legitimate fence. Moreover, when the claimed harm is only speculative as it is here, or when the anticipated action is not imminent, the court should deny any injunctive relief. *Turner v. City of Spokane*, 39 Wn.2d 332, 335, 235 P.2d 300 (1951).

As described above, considerable factual evidence was further presented regarding the reasonable purposes for the Fence as well as the complete lack of impact on Duran and her property creating the existence of genuine issues of material fact precluding summary judgment on this issue.

### **3. Genuine Issues of Material Facts Exist Regarding Duran’s Claim of Trespass.**

Duran alleged that the installation of the Fence constituted trespass, although it is entirely unclear whether she claimed this was basis for abatement of the fence. Again, however, the claim of trespass was based entirely on the alleged breach of the Plat Easement.

An action for trespass exists when there is an intentional or negligent intrusion onto or into the property of another. Restatement (Second) of Torts, §§ 158, 165, 166 (1965). This includes the misuse, overburdening or deviation from an existing easement. See *Hughes v. King Cty.*, 42 Wash.App. 776, 714 P.2d 316, *review denied*, 106 Wash.2d 1006 (1986); *Tatum v. R & R Cable, Inc.*, 30 Wash.App. 580, 636 P.2d 508 (1981), *review denied*, 97 Wash.2d 1007 (1982).

*Mielke v. Yellowstone Pipeline Co.*, 73 Wn.App. 621, 624, 870 P.2d 1005, 1006 (1994). However, the determination of the scope of the easement and the “bounds of reasonable enjoyment” is an issue of material fact precluding summary judgment. *Mielke v. Yellowstone Pipeline Co.*, 73 Wn.App. 621, 625, 870 P.2d 1005, 1006 (1994).

Again, here, the fence was authorized by the Amended Easement and appellants presented considerable factual evidence regarding the reasonable purposes for the Fence and the complete lack of impact on Duran and her property creating the existence of genuine issues of material fact precluding summary judgment on this issue.

**4. Genuine Issue of Material Facts Exist Regarding Duran’s Claim of Emotional Distress.**

Duran alleged that she was entitled to a summary judgment on her claim for emotional damages. This is a purely factual issue that precludes summary judgment. “A claim for damages from emotional distress is not an alternate or cumulative remedy for timber trespass that

one may elect in lieu of a common law remedy or the statutory remedy, but merely another item of damages for a wrong committed as a result of the timber trespass.” *Birchler v. Castello Land Co., Inc.*, 133 Wn.2d 106, 112-113, 942 P.2d 968, 971 (1997). In other words, it is purely a damage claim potentially recoverable based on proof of an underlying intentional tort. *Birchler* involved a violation of the timber trespass statute (RCW 64.12.030) which allows for treble damages for intentional conduct and Duran is seeking no such relief.

Genuine issues of material fact existed regarding Duran’s claims for trespass which was the basis for Duran’s claim for emotional distress and, accordingly, the court in granting Duran summary judgment on this issue.

**5. Genuine Issues of Material Fact Exist Regarding Duran’s Property Damage Claim Pursuant To RCW 4.24.630.**

1) Every person who goes onto the land of another and who removes timber, crops, minerals, or other similar valuable property from the land, or wrongfully causes waste or injury to the land, or wrongfully injures personal property or improvements to real estate on the land, is liable to the injured party for treble the amount of the damages caused by the removal, waste, or injury. For purposes of this section, a person acts **“wrongfully”** if the person **intentionally and unreasonably commits the act or acts while knowing, or having reason to know, that he or she lacks authorization to so act.** Damages recoverable under this section include, but are not limited to, damages for the market value of the property removed or injured, and for

injury to the land, including the costs of restoration. In addition, the person is liable for reimbursing the injured party for the party's reasonable costs, including but not limited to investigative costs and reasonable attorneys' fees and other litigation-related costs.

(Emphasis added.) The Fence was authorized by the Amended Easement and therefore could not have been installed "wrongfully" as required by the statute. The Amended Easement created genuine issues of material fact regarding whether Armstrong "**intentionally and unreasonably**" **built the Fence "while knowing, or having reason to know" that he lacked "authorization to so act."** This precluded entry of summary judgment on this issue.

**E. The Superior Court Erred in Denying Appellants' Motion for Reconsideration and/or Clarification of the Superior Court's Order Granting Duran's Motion for Summary Judgment.**

On August 22, 2011, appellants sought reconsideration and/or clarification of the trial court's summary judgment order. *CP 191-204*. Clarification was sought due to the ambiguity in the trial court's order. Ambiguity existed due to the order stating:

Duran's motion is GRANTED.

Appellants are hereby order to remove the fence, rockery, landscaping, and all their encroachments from the easement area as described in the easement previously recorded pertaining to the subject property within 30 days of this Order.

*CP 182-184.* It was therefore completely unclear whether the trial court was granting all of Duran's claims, i.e., spite fence, nuisance, trespass, etc., or limiting it to injunctive relief based on the terms of the Plat Easement. In any event, the trial court summarily denied appellants' motion without explanation. *CP 214.*

For the reasons set forth above, i.e., the trial court's failure to clarify the relief granted, the existence of material facts establishing the right of Armstrong to install the subject fences, and the existence of genuine issues of material fact precluding Duran's claims, reconsideration should have been granted by the trial court which should have denied Duran's summary judgment motion.

**F. The Superior Court Erred in Granting Duran's Motion for Contempt and Sanctions.**

On October 28, 2011, Duran filed a motion for contempt and sanctions alleging that appellants had failed to comply with the injunctive relief provisions of the summary judgment order. *CP 216-224.* Appellants opposed on the basis that the order had been fully complied with that there were genuine factual issues that could not be resolved by motion. In this respect, it should be emphasized that the only evidence submitted in support of this motion were the declarations of her counsel, not Duran. *CP 227-230, 256-259.* In response, Armstrong submitted a declaration stating:

- a. All fencing, rock, and other encroaching improvements installed by Armstrong had been removed from the Plat Easement. *CP 233-245, 233, 234, 242, 244, 245.*
- b. Mosley never installed any improvements in the Plat Easement. *CP 233-245, 234.*
- c. The Plat Easement, other than Duran's driveway, is not drivable due to a steep ravine adjacent to Duran's house that drops over 25 feet at a slope of over 50% grade making it impossible for a vehicle to navigate. No grading or disruption of the Plat Easement in this area has ever occurred. *CP 233-245, 234.*
- d. Duran's access to and use of the Plat Easement has been returned to its pre-fence installation condition and no change or modification to said easement has occurred. *CP 233-245, 234.*
- e. Duran's driveway has never been blocked or access restricted. *CP 233-245, 234.*
- f. Aerial photographs show that Duran has direct access over her driveway to Waynita Way NE. *CP 233-245, 234.*

Despite obvious factual issues, i.e., whether the summary judgment order had been complied with, the trial court granted Duran's motion requiring appellants to pay Duran \$2,100 in attorneys' fees and costs and sanctions of \$100 per day until all encroachments were removed. Appellants then sought reconsideration submitting additional photographs demonstrating compliance with the court's order, *CP 282-294, 293, 294,* and requested an evidentiary hearing on the contempt allegations to address to factual issues. This was also denied by the trial court. *CP 267-269.*

For the reasons set forth above, the summary judgment order was erroneously granted by the trial court. Accordingly, the court's order granting Duran's motion for contempt and for sanctions, which was premised on the summary judgment order, is in error and should be reversed. Moreover, the court should not have entered the order without at least an evidentiary hearing regarding compliance with the order in light of the genuine issues of material fact raised by appellants establishing compliance.

**G. The Superior Court Erred In Granting Duran's Motion for Entry of Judgment.**

On February 8, 2012, Duran filed a Motion for Entry of Judgment on the trial court's summary judgment order and contempt order. At this point in time, Duran continued to have claims against appellants regarding alleged monetary damages based on spite fence, nuisance, trespass, emotional distress, and property damage pursuant to RCW 4.24.630. By seeking entry of judgment, Duran apparently chose at that time to abandon these claims. The trial court's final order granting entry of judgment essentially confirmed Duran's decision not to pursue these claims.

In any event, the trial court granted Duran's motion and entered judgment based on the contempt order amounting to \$12,800 and an additional "\$100 a day from February 17, 2012, until Order on Summary Judgment is Complied With." *CP 330-332*. Appellants believe that the

summary judgment order has been completely complied with, but are faced with this on-going penalty until such time as Duran unilaterally determines it has been complied with. This is manifestly unjust and flies in the face of equity, fairness, and due process.

Again, for the reasons set forth above, the summary judgment order was erroneously granted by the trial court. Accordingly, all orders that ensued from and were premised on this order, including the orders for contempt and for sanctions and the judgment were similarly defective and should be set aside.

## VII. CONCLUSION

Based on the foregoing analysis, Mosley respectfully requests this Court to reverse the Superior Court's decisions on Duran's motion for summary judgment, motion for contempt and sanctions, and entry of judgment and remand this matter to the Superior Court for trial on all issues.

DATED this 27<sup>th</sup> day of August, 2012.

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# IMAP



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# iMAP

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WAINIA WAY NE

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