IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

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| HELEN IMMELT and JUSTIN ELLWANGER,<br><br>Respondents,<br>and<br><br>JAY IMMELT,<br><br>Plaintiff,<br><br>v.<br><br>ROBERT BONNEVILLE, aka WILL ELLWANGER, AKA WILHELM VAN WANGER; and PATRICIA PROKOP,<br><br>Appellants,<br>and<br><br>THE ESTATE OF HANNA BONNEVILLE; JOHANNA ELLWANGER SARA NICHOLS; EVERGREEN MANAGEMENT SERVICES LLC, a Nevada Limited Liability Company, d/b/a APPRAISAL SERVICES; and WASHINGTON APPRAISAL SERVICES, INC., d/b/a APPRAISAL SERVICES,<br><br>Defendants. | No. 68803-1-I<br>Consolidated w/No. 69001-9-I<br><br>DIVISION ONE<br><br>UNPUBLISHED OPINION<br><br>FILED: June 30, 2014 |

SPEARMAN, C.J. — Appellants Robert Bonneville and Patricia Prokop challenge the trial court's conclusion that they infringed Justin Ellwanger and Helen Immelt's, Respondents, personality rights by inserting their digital signatures on real estate

appraisal reports without authorization.[1] They contend that Washington's personality rights statute, chapter 63.60 RCW, does not apply because real estate appraisal reports are not "products" within the meaning of that statute. Bonneville further contends that the trial court erred in denying his claim for damages arising from the recording of multiple lis pendens on the ground that he failed to produce evidence in support of the claim until after trial. We affirm.

## FACTS

Robert Bonneville is a licensed real estate appraiser based in Gig Harbor who operated or played a significant role in a number of appraisal companies. Bonneville's son Justin Ellwanger is a licensed real estate appraiser whose appraisal company was based in Kenmore and Shoreline. Jay and Helen Immelt are appraisers who worked with Ellwanger. Bonneville's appraisal business served Pierce County and south King County, while Ellwanger's group served Snohomish County and north King County.

Ellwanger and the Immelts met with Bonneville and agreed to an appraisal collaboration. When Bonneville received an order for an appraisal in Ellwanger's geographic convenience zone, he would refer the order to Ellwanger's company. Ellwanger, in turn, would do the same for Bonneville. When Ellwanger's group received a referral from Bonneville, Ellwanger or one of his associates would perform the appraisal services, prepare an electronic report, and either upload the report directly to the customer or transmit it to Bonneville's company for completion and submission to the ordering party. Bonneville would then pay a fee to the appraiser who had worked on the

[1] We refer to Bonneville and Prokup as appellants and to the Immelts and Ellwanger as respondents. Where necessary we refer to each party individually.

appraisal report. Electronic transmission of finished appraisal reports required a digital signature.

Eventually, Ellwanger discovered evidence that Bonneville and his associates had applied Ellwanger's and Helen Immelt's digital signatures to numerous appraisal reports without obtaining their authorization or providing compensation. Ellwanger and the Immelts filed a lawsuit against Bonneville and a number of his associates and companies, asserting six claims for relief: infringement of personality rights pursuant to RCW 63.60.060, conversion, criminal profiteering, fraudulent transfer, civil conspiracy, and constructive trust or equitable lien. Shortly after the lawsuit was filed, in July 2008, respondents recorded numerous lis pendens against property owned by Bonneville and other defendants. Appellants asserted "counterclaims" without specifying the causes of action or claims for relief, other than to seek dismissal of the complaint, joint and several damages of $175,000, release of lis pendens, and attorney fees. At the beginning of trial, the court granted respondents' motion in limine to dismiss the "loosely defined" counterclaims, finding that the Pierce County Superior Court had previously dismissed appellants' substantially identical claims in a previous lawsuit. Clerk's Papers (CP) at 12.

A bench trial was held beginning on March 1, 2011. Ellwanger and Helen Immelt produced evidence of 559 appraisal reports submitted using their digital signatures, allegedly without permission. On September 2, 2011, the trial court entered findings of fact, conclusions of law and order after trial. The trial court found that Ellwanger and Helen Immelt were paid for all the reports on which they worked or which were forwarded unfinished with a signature in place. However, the court found credible evidence that Bonneville and one of his associates, Patricia Prokop, affixed the digital signatures of

Ellwanger or Helen Immelt to a total of 160 appraisal reports without their permission. The court concluded that Ellwanger and Immelt had shown by a preponderance of the evidence that Bonneville and Prokop violated their personality rights under RCW 63.60.050 and RCW 63.60.060, thereby entitling them to statutory damages of $1500 per unauthorized appraisal report.[2] The trial court found insufficient evidence for any of Helen Immelt's or Ellwanger's remaining claims against any of the appellants, no evidence of liability or damages to Jay Immelt, and no substantial justification for the recording of a lis pendens on any of the defendants' properties. The court also ruled that respondents were entitled to attorney fees and costs pursuant to RCW 63.60.060(5).

Respondents and appellants filed cross motions for reconsideration. On March 9, 2012, six months after issuing its findings of fact and conclusions of law, the trial court denied the parties' motions, with the exception of plaintiffs' request to amend two findings of fact regarding calculation of damages. On April 2, 2012, appellants moved for an order canceling the lis pendens notices and for an award of damages in the amount of $1,719,892 and attorney fees and costs in the amount of $3,989 pursuant to RCW 4.28.328 for wrongful filing of notices of lis pendens. The motion was accompanied by two declarations in support of the damages claim. On April 3, 2012, Ellwanger and Immelt filed a release of lis pendens from appellant's properties.

On April 12 and 19, 2012, the trial court entered orders on the parties' motions for attorney fees pursuant to RCW 63.60.060(5).[3] On April 19, the trial court also entered an

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[2] The total amount of the judgment was $165,000.

[3] The court subsequently issued an order amending, clarifying, and superceding these orders, ordering that Ellwanger and the Immelts are liable to defendants Sara Nichols and the estate of Johanna Ellwanger for one dollar in attorney fees, and that Bonneville and Prokop are liable to Helen Immelt and Justin Ellwanger for one dollar in attorney fees.

order canceling the notices of lis pendens but denying appellant's request for damages and attorney fees pursuant to RCW 4.28.328 for wrongful filing of notices of lis pendens, stating that "[d]efendants failed to prove attorney fees or costs. 'Exhibit A' to the Tall declaration was not provided to the court and defendants presented no evidence of damages at trial." CP at 137.

Bonneville and Prokop appealed. After briefing was completed, Ellwanger and Immelt filed a motion on the merits to affirm pursuant to RAP 18.14. A commissioner of this court transferred the motion to a panel of judges without oral argument. We grant a motion on the merits to affirm in whole or in part "if the appeal or any part thereof is determined to be clearly without merit." RAP 18.14(e)(1). We deny the motion.

## DISCUSSION

### Personality Rights Statute

Appellants do not challenge the trial court's finding that there was sufficient evidence that they inserted respondents' digital signatures on 160 real estate appraisal reports without authorization.[4] Rather, they contend that these acts did not infringe respondents' personality rights because real estate appraisal reports are not "products" within the meaning of chapter 63.60 RCW.

As a preliminary matter, respondents argue that the appeal of this issue should be dismissed because appellants failed to comply with RAP 9.2(b), which provides that "[a] party should arrange for the transcription of all those portions of the verbatim report of

[4] As a result of the trial court's unappealed rulings finding that Jay Immelt's legal rights were not infringed and that only Bonneville and Prokop were liable for personality rights infringement, "appellants" include only Bonneville and Prokop and "respondents" include only Justin Ellwanger and Helen Immelt. Although Jay Immelt has been disbarred, he is permitted to argue for appellants to the extent that his own interests could be implicated by an adverse ruling of this court.

proceedings necessary to present the issues raised on review." They contend that, without a verbatim report of proceedings, this court lacks a record from which it can determine what a real estate appraisal report is and whether such reports are "products" under the personality rights statute. Respondents correctly note that appellants have the burden of providing an adequate record on appeal, and that when the record is inadequate for the appellate court to review the issue, the trial court's decision will stand. Story v. Shelter Bay Co., 52 Wn. App. 334, 345, 760 P.2d 368 (1988). However, respondents have not persuasively explained why a verbatim report of proceedings is necessary for this court to review this question. The trial court made detailed findings regarding the appraisal business model that describe the process of creating the reports. Respondents have not argued that appraisal reports are anything other than what the trial court described them to be: the written work product of a licensed real estate appraiser, based on photographs, measurements, and comparable sales. We conclude that a verbatim report of proceedings is not necessary to review the merits of this issue.

Respondents further argue that appeal of this issue should be dismissed because appellants failed to assign error to Finding of Fact 75, which states: "There is credible evidence of a violation of the infringement of personality rights statute, RCW 63.60. Plaintiffs have demonstrated that Defendants Ms. Prokop and Mr. Bonneville have used Plaintiffs' signatures in products, i.e. service reports, without permission." CP at 173. Ordinarily, "unchallenged findings of fact are verities on appeal." In re Estate of Jones, 152 Wn.2d 1, 8, 93 P.3d 147 (2004) (quoting State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994)). However, "the appellate court may excuse a party's failure to assign error where the briefing makes the nature of the challenge clear and the challenged finding is

argued in the text of the brief." Noble v. Lubrin, 114 Wn. App. 812, 817, 60 P.3d 1224 (2003). Although appellants did not assign error to Finding of Fact 75, it is apparent from the arguments in the brief that they are challenging the trial court's determination that real estate appraisal reports are "products" within the meaning of Chapter 63.60 RCW.[5] In addition, appellants assigned error to Conclusion of Law 6, which states: "Plaintiffs have borne their burden to show, by a preponderance of the evidence, that Defendants infringed their personality rights under RCW 63.60.050, .060. . . ." We conclude that appellants have adequately raised this issue, and proceed to analyze the merits of the claim.

Appellants argue that chapter 63.60 RCW was enacted to allow a party to stop the unauthorized exploitation of his or her name, image, or signature from being used to sell unlicensed merchandise. They contend that it does not apply to written reports, including real estate appraisals.

Questions of statutory construction are reviewed de novo. In re Marriage of Brown, 159 Wn. App. 931, 935, 247 P.3d 466 (2011). "The court's fundamental objective is to ascertain and carry out the legislature's intent, and if the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." State ex rel. Citizens Against Tolls (CAT) v. Murphy, 151 Wn.2d 226, 242, 88 P.3d 375 (2004). "Plain meaning is discerned from the ordinary meaning of the language at issue, the context of the statute in which the provision is found, related provisions, and the statutory scheme as a whole." In re Estate of Blessing, 174 Wn.2d

[5] To the extent that Finding of Fact 75 required the court to engage in statutory interpretation in deciding that chapter 63.60 RCW applies to real estate appraisal reports, it partially reflects a conclusion of law.

228, 231, 273 P.3d 975 (2012) (citing State v. Jacobs, 154 Wn.2d 596, 600, 115 P.3d 281 (2005)).

RCW 63.60.030(1) provides:

> Every individual or personality has a property right in the use of his or her name, voice, signature, photograph, or likeness." RCW 63.60.050 provides that "[a]ny person who uses or authorizes the use of a living or deceased individual's or personality's name, voice, signature, photograph or likeness, on or in goods, merchandise, or products entered into commerce in this state, or for purposes of advertising products, merchandise, goods, or services, or for purposes of fund-raising or solicitation of donations, or if any person disseminates or publishes such advertisements in this state, without written or oral, express or implied consent of the owner of the right, has infringed such right.

The terms "goods, merchandise, or products" are not defined anywhere in the statute, and there is no case law on point. If the statute does not define a term, the court may look to a dictionary for its ordinary meaning. State v. Gonzales, 168 Wn.2d 256, 263, 226 P.3d 131 (2010). WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1810 (2002) defines "product" as "something produced by physical labor or intellectual effort: the result of work or thought." Real estate appraisal reports plainly fit under this definition.

Appellants point to RCW 63.60.060(4) as evidence that the legislature intended to limit the statute's reach to tangible items and to exclude written reports. RCW 63.60.060(4) provides that "[a]s part of a final judgment or decree, the court may order the destruction or other reasonable disposition of all materials found to have been made or used in violation of the injured party's rights, and of all plates, molds, matrices, masters, tapes, film negatives, or other articles by means of which such materials may be reproduced." This argument is not persuasive. This section provides a remedy which inhibits the offending party's ability to further infringe the claimant's personality rights.

There is nothing in this section, or elsewhere in chapter 63.60 RCW, indicating that the legislature intended to limit the reach of the statute to tangible items which are reproducible by the means described. The trial court did not err in concluding that real estate appraisal reports are "products" to which the personality rights statute applies.

Lis Pendens

Appellants argue that the trial court erred in denying their claim for damages arising from the recording of unjustified notices of lis pendens on numerous properties. A lis pendens is an "instrument having the effect of clouding the title to real property. . . ." RCW 4.28.328(1)(a). RCW 4.28.328(3) provides:

> Unless the claimant establishes a substantial justification for filing the lis pendens, a claimant is liable to an aggrieved party who prevails in defense of the action in which the lis pendens was filed for actual damages caused by filing the lis pendens, and in the court's discretion, reasonable attorneys' fees and costs incurred in defending the action.

Substantial justification for a lis pendens exists where a claimant has a reasonable basis in fact or law to file it. Udall v. T.D. Escrow Services, Inc., 132 Wn. App. 290, 303, 130 P.3d 908 (2006), reversed on other grounds, 159 Wn.2d 903, 154 P.3d 882 (2007).

In its findings of fact and conclusions of law following trial, the court found that "[p]laintiffs have not shown substantial justification for the recording of a *lis pendens* on any of the Defendants' properties." Finding of Fact 87; CP at 18. The trial court nevertheless denied appellants' request for damages, fees, and costs on the ground that "[d]efendants failed to prove attorney fees or costs. 'Exhibit A' to the Tall declaration was not provided to the court and defendants presented no evidence of damages at trial." CP at 152.

As with the previous issue, respondents argue that this court has no choice but to uphold the trial court's decision for lack of an adequate record and failure to assign error to findings of fact. We disagree. Although a verbatim report of proceedings would have been helpful in analyzing this issue, it is not absolutely necessary. And appellants' opening brief clearly states that "[t]he trial judge erred in refusing to grant damages and attorney fees for the respondents' violation of RCW 4.28.328 because no evidence was submitted at trial before the court made its determination that there was no substantial justification for recording the numerous lis pendens." Appellant's Brief at 1. We note, however, that appellants failed to provide any argument or citation to the record regarding the trial court's finding that they failed to prove attorney's fees and costs as required by RAP 10.3(a)(6). "[T]his court will not review issues for which inadequate argument has been briefed or only passing treatment has been made." Habitat Watch v. Skagit County, 155 Wn.2d 397, 416, 120 P.3d 56 (2005), quoting State v. Thomas, 150 Wn.2d 821, 868-69, 83 P.3d 970 (2004). Thus, we reach the merits of appellants' arguments regarding lis pendens damages.

RCW 4.28.320 provides that a notice of lis pendens may be canceled "at any time after the action shall be settled, discontinued or abated, on application of any person aggrieved and on good cause shown. . . ." Appellants argue that this statute does not require the aggrieved party to prove damages before the court makes a determination that the filing party had no substantial justification to record the lis pendens. Rather, they contend that just as costs and attorney fees are awarded by post trial motion upon declaration, a party damaged by the filing of a lis pendens may seek damages, fees and

costs under RCW 4.28.328(3) by post trial motion accompanied by supporting declarations.

There are no cases addressing the question of whether a party aggrieved by the filing of a lis pendens is required to submit evidence in support of their damages claim during trial. Thus, we are presented with a question of statutory interpretation. "If a statute is ambiguous, we employ tools of statutory construction to ascertain its meaning." Cerillo v. Esparza, 158 Wn.2d 194, 201, 142 P.3d 155 (2006). "A statute is ambiguous if it is 'susceptible to two or more reasonable interpretations,' but 'a statute is not ambiguous merely because different interpretations are conceivable.'" Agrilink Foods, Inc. v. Dep't of Revenue, 153 Wn.2d 392, 397, 103 P.3d 1226 (2005) (quoting State v. Hahn, 83 Wn. App. 825, 831, 924 P.2d 392 (1996)).

We acknowledge that the lis pendens statute is open to interpretation regarding the precise timing and procedure to contest lis pendens notices and seek damages for wrongful filing. However, on the facts of this case, we conclude that appellants' interpretation was not reasonable. Although the record is sparse, it appears that respondents filed notices of lis pendens based on their claim for constructive trust or equitable lien. The court ruled that respondent's introduced no evidence to support imposing an equitable lien or constructive trust on any of the defendants' properties, and also ruled that respondents failed to show substantial justification for recording a lis pendens on any of the appellants' properties. Thus, it is readily apparent that the lis pendens issue was litigated at trial. Appellants had ample opportunity to produce evidence of lis pendens damages at that time, even if the final amount of those damages

was not yet quantifiable. They chose not to.[6] Judicial economy would not be served by allowing appellants two separate proceedings to litigate their damages claim: one during trial, and another after. Accordingly, the trial court did not err in dismissing appellant's lis pendens damages claim for failure to produce evidence of damages during a trial at which the underlying basis for the lis pendens notices was at issue.

Attorney Fees

Appellants and respondents both seek an award of attorney fees and costs on appeal pursuant to RCW 63.60.060(5), which provides that "[t]he prevailing party may recover reasonable attorneys' fees, expenses, and court costs incurred in recovering any remedy or defending any claim brought under this section." "We may award attorney fees under RAP 18.1(a) if applicable law grants to a party the right to recover reasonable attorney fees and if the party requests the fees as prescribed by RAP 18.1." Wachovia SBA Lending, Inc. v. Kraft, 165 Wn.2d 481, 493, 200 P.3d 683 (2009). Upon compliance with RAP 18.1, respondents are entitled to an award of reasonable attorney fees and

[6] The findings of fact and conclusion of law indicate that appellants filed a counterclaim against respondents early in the trial, including a request for release of lis pendens. The trial court granted plaintiffs' motion in limine to dismiss the "loosely defined" counterclaims, finding that Pierce County Superior Court had previously dismissed substantially identical claims in a prior lawsuit. The record does not contain the counterclaim, the motion in limine, or the verbatim report of proceedings, all which might shed light on the trial court's reasons for dismissing the request for release of lis pendens along with the other claim. We note that during oral argument on appeal, counsel for appellants candidly admitted that he had no intention of submitting evidence of damages until after trial, based upon his reading of the statute.

costs on appeal.[8]

Affirmed.

WE CONCUR:

[8] We note it appears that respondents represented themselves in this appeal, thus the award of attorney fees is contingent upon a showing that fees were actually incurred.