IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

TRACY F. JONASSEN, Appellant, v. MARILYN Y. ROBBINS, Respondent.	No. 39900-8-II UNPUBLISHED OPINION

Van Deren, J. — Tracy Jonassen appeals the trial court's ruling holding him in contempt for violating an order granting his neighbor, Marilyn Robbins, an easement over his property. He argues that the trial court did not strictly construe its order and that substantial evidence did not support the court's ruling that he was in contempt. He also appeals the trial court's order requiring him to change his installed curb's height and color to distinguish it from Robbins's driveway, arguing that the order impermissibly increased the burden on his servient estate. We affirm.

FACTS

Marilyn Robbins's property in Tacoma, Washington, is adjacent to Tracy Jonassen's. Robbins's driveway runs west from her garage, along the northern edge of Jonassen's property. Robbins used the north two feet of Jonassen's property for more than ten years "for passengers

and guests to enter or exit or go around vehicles parked in [her] driveway along with the wheeling of garbage cans to the street." Clerk's Papers (CP) at 60.

On January 23, 2006, the trial court entered an order that recognized Robbins's prescriptive easement "to use . . . the north two feet of the Jonassen property . . . as is required to enter or exit or go around cars parked on . . . Robbins'[s] driveway and for the movement of garbage cans." CP at 66. The court allowed Jonassen to separate his property from Robbins's property "by erecting a ground level curb or other ground level barrier immediately inside his north property line." CP at 65. The order stated that "[t]he barrier must be low enough for a person to step over and may not impede the opening doors of cars parked on the driveway and may not create a hazard for uses of the driveway." CP at 65-66.

In April and May 2008, Jonassen constructed a four foot high retaining wall and placed several bales of hay within Robbins's prescriptive easement. On August 4, 2009, Robbins filed a motion to enforce the January 23, 2006, order and asked the trial court to hold Jonassen in contempt of the 2006 order. Before the hearing on Robbins's contempt motion, Jonassen relocated the retaining wall and replaced the hay bales with an eight inch high curb.

The trial court held Jonassen in contempt of its 2006 order based on his erection of the eight inch curb and required him to remove the curb. On Jonassen's subsequent motion for reconsideration, the court allowed Jonassen to remove the existing curb and replace it with one with "a maximum height of 1½ inches above [Robbins]'s driveway grade and backfilled in the easement area to provide a level surface." CP at 306. It also ordered him to make the lip of the curb "a color distinguishable from [Robbins]'s driveway so as to alert [Robbins] and her guests to its existence and not present a trip hazard." CP at 306-07.

Jonassen appeals.

ANALYSIS

I. Contempt

Jonassen argues that we should reverse the trial court and vacate its contempt finding and the award of $2,500 fees and costs under RCW 7.21.030(3) because (1) the court did not "strictly construe[ ]" its 2006 order and (2) substantial evidence did not support a finding of contempt. Reply Br. of Appellant at 1. We hold that the trial court did not abuse its discretion because substantial evidence supported its contempt ruling.

A. Standard of Review

Where the trial court has weighed the evidence, our review is limited to determining whether substantial evidence supports the trial court's findings of fact. *Ridgeview Props. v. Starbuck*, 96 Wn.2d 716, 719, 638 P.2d 1231 (1982); *Keever & Assocs., Inc. v. Randall*, 129 Wn. App. 733, 737, 119 P.3d 926 (2005). "Substantial evidence" is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. *World Wide Video, Inc. v. City of Tukwila*, 117 Wn.2d 382, 387, 816 P.2d 18 (1991). If that standard is satisfied, we will not substitute our judgment for that of the trial court even though we might have resolved disputed facts differently. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003). There is a presumption in favor of the trial court's findings, and . . . the party claiming error has the burden of showing that a finding of fact is not supported by substantial evidence. *Fisher Props., Inc. v. Arden-Mayfair, Inc.*, 115 Wn.2d 364, 369, 798 P.2d 799 (1990).

"'Contempt of court' means [inter alia] intentional . . . [d]isobedience of any lawful judgment [or] order . . . of the court." RCW 7.21.010(1)(b). Whether contempt is warranted is a

matter within the sound discretion of the trial court. *Schuster v. Schuster*, 90 Wn.2d 626, 630, 585 P.2d 130 (1978). Abuse of discretion occurs "[w]hen a trial court's exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons." *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). We uphold a finding of contempt if we can find any proper basis for it. *Trummel v. Mitchell*, 156 Wn.2d 653, 672, 131 P.3d 305 (2006). A court order "will be enforced according to the plain meaning of its terms when read in light of the issues and purposes surrounding its entry." *R/L Assocs., Inc. v. City of Seattle*, 113 Wn.2d 402, 410, 780 P.2d 838 (1989).

B. Contempt

The court's 2006 order allowed Jonassen to construct "a ground level curb" that would "not create a hazard for uses of the driveway." CP at 65-66. At the contempt hearing, the evidence showed that Jonassen installed an eight inch high curb that was not backfilled and was situated so that those exiting and entering cars on Robbins's driveway could trip over it. Furthermore, the evidence showed that hoisting full garbage cans over the eight inch curb onto the easement area could be difficult or hazardous. Accordingly, the trial court found that the curb was "hazardous" and impeded both "the transport of garbage cans" and Robbins's guests "exiting and entering cars." Report of Proceedings (RP) (Sept. 18, 2009) at 24.

We hold that substantial evidence supports the trial court's finding that the curb "create[d] a hazard for users of the driveway." CP at 66. Because we uphold a finding of contempt if we can find any proper basis for it, we hold that the trial court did not abuse its discretion in finding Jonassen in contempt. *Trummel*, 156 Wn.2d at 672.

II. Motion for Reconsideration

In his motion for reconsideration, Jonassen requested that the trial court reconsider the remedy for his contempt. Specifically, he argued that, instead of removing the curb, the court "allow [him] to back-fill in the 2 foot easement area which abuts the curb, to level that area with the curb in order to cure any hazard." CP at 257. Alternatively, he requested that the court "clarify the [2006 order] by specifying the height and width of a curb." CP at 257.

Jonassen now argues that the trial court erred in its order on reconsideration because it misapplied the legal standard for prescriptive easements and impermissibly "increased" the burden on his land when it limited "his installation to a 1.5 inch lip of pavement . . . . with an affirmative obligation to paint that lip a distinguishing color." Br. of Appellant at 30.

Initially, Robbins argues that Jonassen, in challenging the trial court's application of the legal standard for prescriptive easements, is contesting the 2006 order that granted Robbins the prescriptive easement and that the issue is time barred. We disagree. Jonassen challenges the "increas[e in] the encroachment of a preexisting easement" that he argues results from the trial court's order on reconsideration. Br. of Appellant at 29. Specifically, he argues that the order on reconsideration increased Robbins's encroachment of his property by both limiting Jonassen's "installation to a 1.5 inch lip of pavement" and creating an "affirmative obligation to paint that lip a distinguishing color." Br. of Appellant at 29-30. Thus, his appeal is timely and we review the trial court's decision on the motion for reconsideration for abuse of discretion. *Rivers v. Wash. State Conference of Mason Contractors*, 145 Wn.2d 674, 685, 41 P.3d 1175 (2002).

"In ascertaining whether a particular use is permissible under a prescriptive easement, the court should compare that use with the uses leading to the prescriptive easement in regard to: '(a) their physical character, (b) their purpose, [and] (c) the relative burden caused by them upon

the servient tenement.'" *Lee v. Lozier*, 88 Wn. App. 176, 187-88, 945 P.2d 214 (1997) (quoting Restatement of Prop.: Servitudes § 478 (1944). "[T]he use under which a prescriptive interest arises determines the general outlines rather than the minute details of the interest." *Lozier*, 88 Wn. App. at 187-88 (emphasis omitted) (quoting Restatement, § 477 cmt. a). The easement acquired extends only to the uses "necessary to accomplish the purpose for which the easement was claimed," *Yakima Valley Canal Co. v. Walker*, 76 Wn.2d 90, 94, 455 P.2d 372 (1969), and the dominant estate holder "may not compel a change in use on the servient estate holder." *Lowe v. Double L Props., Inc.*, 105 Wn. App. 888, 894, 20 P.3d 500 (2001).

Robbins had used the "north 2 feet of the Jonassen property . . . for passengers and guests to enter or exit or go around vehicles parked in [her] driveway along with the wheeling of garbage cans to the street" for over 10 years before the trial court granted her a legal prescriptive easement for those same uses. CP at 60. When the court later ordered Jonassen to limit the height of the curb he installed in the prescriptive easement area to 1.5 inches and required that the curb "be a color distinguishable from [Robbins]'s driveway," Br. of Appellant at 29-30, it did not "compel a change in [Jonassen's] use." *Lowe*, 105 Wn. App. at 894. Instead, these requirements ensured that Robbins's use of the easement could continue free of impediment or hazard. *See Lozier*, 88 Wn. App. at 187-88.

Moreover, Jonassen had already constructed a curb and the curb was already a different color[1] than Robbins's driveway. Thus, the burden on Jonassen from the maximum height and distinguishing color requirements was minor relative to the burden on Robbins, who, in the

[1] "[Jonassen's attorney]: . . . The curb [Jonassen] has now is a slightly different color, so I think that it's noticeable enough. THE COURT: Well, I just hope no one falls." Report of Proceedings (Oct. 9, 2009) at 13.

absence of these requirements, could not use the easement for the permissible uses without impediment or hazard. *Lozier*, 88 Wn. App. at 187-88; Restatement, § 478. The court's requirements thus are "necessary to accomplish the purpose for which the easement [was] claimed." *Yakima Valley Canal*, 76 Wn.2d at 94.

We hold that the court did not abuse its discretion in ordering maximum height and distinguishing color requirements for Jonassen's curb or in awarding $2,500 in fees and costs. Additionally, Robbins argues that she "should be awarded attorney[ ] fees and costs 'incurred . . . in defending an appeal of contempt order.'" Br. of Resp't at 22 (internal quotation marks omitted) (quoting *Graves v. Duerden*, 51 Wn. App. 642, 652, 754 P.2d 1027 (1988)). Because "[a] party defending the appeal of a contempt order may recover fees under RCW 7.21.030(3)," we grant the request and award attorney fees and costs to Robbins in an amount to be determined by a commissioner of this court. *In re Marriage of Curtis*, 106 Wn. App. 191, 202, 23 P.3d 13 (2001).

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Van Deren, J.

We concur:

No. 39900-8-II

Armstrong, J.

Hunt, J.