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Division I
State of Washington

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

GLENN R. OAKES and CINDY R. OAKES, Appellants, v. MATTHEW CHIU and RAME CHIU, Respondents.	No. 81124-0-I DIVISION ONE UNPUBLISHED OPINION

ANDRUS, A.C.J. — In April 2020, this court affirmed the dismissal of a timber trespass claim that Glenn and Cindy Oakes asserted against their upslope neighbors, Matthew and Rame Chiu, after the Chius allegedly entered their property to cut new growth off a cottonwood stump and sprayed the stump with a pesticide.[1] While this appeal was pending, the Oakes filed a second lawsuit against the Chius, asserting common law trespass. The trial court dismissed the Oakes' second lawsuit, concluding the claim was barred by res judicata, imposed CR 11 sanctions, and awarded attorney fees to the Chius. We affirm the trial court's rulings.

[1] See Oakes v. Chiu, noted at 13 Wn. App. 2d 1034 (2020).

FACTS

Glenn and Cindy Oakes have filed two separate lawsuits against their upslope neighbors, Matthew and Rame Chiu, arising out of the same alleged facts. In the first lawsuit, the Oakes alleged timber trespass under RCW 64.12.030 for the poisoning and tarping of a cottonwood stump on May 20, 2014. The trial court dismissed this claim on summary judgment because the Oakes failed to produce evidence of damage. The trial court denied their request to amend the complaint to assert a common law trespass claim. This court affirmed the dismissal and the denial of leave to amend. Oakes, at *2-3.

In this second lawsuit, the Oakes assert the Chius committed common law trespass based on the same factual allegations relating to the May 20, 2014 tarping incident. The Chius moved for summary judgment, arguing the claim is barred by collateral estoppel, res judicata, and the rules prohibiting claim splitting. The trial court granted summary judgment, concluded the Oakes' second lawsuit was frivolous in violation of CR 11, and found the Oakes brought the claim for "purposes of harassment, in bad faith, or in the very least, a disregard of the facts and applicable law." The court imposed sanctions in the amount of $6,000 and awarded attorney fees and costs of $6,174.49 to the Chius.

The Oakes challenge the summary judgment dismissal and the award of CR 11 sanctions.

ANALYSIS

A. Res Judicata

The Oakes contend the doctrine of res judicata does not preclude their claim for common law trespass because it is a different cause of action than the statutory timber trespass claim they pleaded in their first lawsuit.[2] We disagree.

" 'Filing two separate lawsuits based on the same event—claim splitting—is precluded in Washington.' " Ensley v. Pitcher, 152 Wn. App. 891, 898-899, 222 P.3d 99 (2009) (quoting Landry v. Luscher, 95 Wn. App. 779, 780, 976 P.2d 1274 (1999). The doctrine of res judicata rests on the ground that a matter that has been litigated, or on which there has been an opportunity to litigate, in a former action in a court of competent jurisdiction, should not be permitted to be litigated again. Id. at 899. Dismissal on res judicata grounds is appropriate when a second lawsuit involves the same parties, causes of action, subject matter, and quality of persons for or against whom the claim is made. Id. at 902.

The Oakes argue the causes of action they pleaded in the two lawsuits are not identical because timber trespass and common law trespass have different elements. But literal identity of claims is not necessary for res judicata to apply. Eugster v. Washington State Bar Ass'n, 198 Wn. App. 758, 786-87, 397 P.3d 131 (2017). Instead, we consider four factors to determine whether two causes of action are identical for purposes of res judicata: (1) whether the rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second; (2) whether the two cases involve substantially the same evidence;

[2] We review summary judgment rulings and the application of res judicata de novo. Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998); Ensley v. Pitcher, 152 Wn. App. 891, 899, 222 P.3d 99 (2009).

(3) whether the suits involve infringement of the same right; and (4) whether the two cases arise out of the same transactional nucleus of facts. Ensley, 152 Wn. App. at 903. These four factors are an analytical tool only and all four factors need not be present to bar the claim. Id.

We conclude the Oakes' statutory timber trespass and common law trespass claims are identical for res judicata purposes in this case. First, the Chius prevailed in the first lawsuit because the Oakes could not prove the Chius' actions caused any physical damage to the cottonwood stump. Oakes, at *2. Allowing the Oakes to relitigate whether they sustained damage would impair the Chius' established right to be free from liability.

The Oakes contend they do not have to prove any actual damage to prevail under common law, relying on Bradley v. American Smelting and Refining Co., 104 Wn.2d 677, 691, 709 P.2d 782 (1985) for the proposition that "at common law any trespass entitled a landowner to recover nominal or punitive damages." But the Supreme Court rejected that common law rule in Bradley, holding instead that a plaintiff, to prevail on a cause of action for intentional trespass, must prove that the invasion of property caused "actual and substantial damages." Id. at 692. The Oakes argue that Bradley's holding did not displace the common law rule and only required proof of actual damages because the case related to trespasses caused by airborne contaminants. But it is well-recognized that a plaintiff alleging intentional trespass must prove actual damages, regardless of the factual basis for the claim. See Ofuasia v. Smurr, 198 Wn. App. 133, 149, 392 P.3d 1148 (2017) (fence removal and tree-cutting); Hurley v. Port Blakely Tree Farms LP, 182 Wn. App. 753, 772, 332 P.3d 469 (2014) (logging activity); Wallace v. Lewis County,

134 Wn. App. 1, 15, 137 P.3d 101 (2006) (tire disposal activities on adjacent land). Bradley is not limited to trespass caused by airborne contaminants.

The Oakes alleged that the Chius "intentionally entered the Oakes Property, cut and removed new growth vegetation, applied a poisonous substance to the property including the stump of a cottonwood tree on the Oakes Property, wrapped the stump in black plastic, and left the poisonous substance and black plastic on the stump and surrounding area of the Oakes Property." This claim is one for intentional trespass and requires proof of actual and substantial damage.[3]

The allegations are identical to the trespass the Oakes alleged in the first lawsuit. There, they alleged that "[o]n May 20, 2014, the Defendant Chius' trespassed on Plaintiffs' property (while we were at work) to poison the cottonwood stump located on the steep slope in and near the Native Grown Protection Easement (NGPE)." They alleged the actions compromised the integrity of the slope and damaged the soil and surrounding vegetation. But when this allegation was put to the test on summary judgment, the Chius' certified arborist expert witness testified that the cottonwood was "growing and spreading with great vigor," and there was little evidence of any physical damage or decay. Oakes, at *2. The Oakes' expert admitted the cottonwood continued to sprout and could only speculate as to what further poisoning might do to slope stability. Id. The Oakes could not produce evidence of damage then and we see no basis for allowing them a second bite at this apple.

[3] The Oakes suggest their claim was one of negligent trespass for which only nominal damages are recoverable. But they did not plead negligence; they specifically alleged intentional conduct. And negligent trespass also requires proof of negligence, including injury. Hurley, 182 Wn. App. at 771 (quoting Pruitt v. Douglas County, 116 Wn. App. 547, 554, 66 P.3d 1111 (2003)).

Second, the two claims would involve substantially the same evidence—who did what to the cottonwood stump and what damage, if any, resulted. While a claim for timber trespass under RCW 64.12.030 requires proof that the Chius "cut down, girdle[d], or otherwise injure[d] any tree . . . or shrub," without lawful authority, and a common law trespass requires proof of an invasion of property, in this case, the Oakes contend that the injury to the cottonwood stump was the property invasion. The Oakes' own allegations make the claims intertwined from an evidentiary standpoint.

Third, the same rights and interests are at issue in both lawsuits—the Oakes' exclusive property rights. Res judicata applies not only to causes of action that were actually litigated, but extends to causes of action that could have been litigated in a prior proceeding. Eugster, 198 Wn. App. at 786; In re Marriage of Dicus, 110 Wn. App. 347, 355-56, 40 P.3d 1185 (2002). The Oakes concede they could have pleaded common law trespass and litigated this claim in their first lawsuit against the Chius. Indeed, common law trespass is merely an alternative theory of recovery that could have been raised and decided in their first lawsuit. See Sound Built Homes, Inc. v. Windermere Real Estate/South, Inc., 118 Wn. App. 617, 632, 72 P.3d 788 (2003) (claims of equitable indemnity and negligent misrepresentation in first lawsuit were essentially identical to alternative theories of recovery for breach of implied warranty in second lawsuit and barred by res judicata).

Finally, the two claims arise out of the same transactional nucleus of facts—the May 20, 2014 cutting of new growth and application of a pesticide on the cottonwood stump located on the Oakes' property.

The Oakes' timber trespass and common law trespass are identical causes of action for purposes of res judicata, and the trial court did not err in dismissing the Oakes' claim.[4]

B. CR 11 Sanctions

The Oakes contend the trial court erred in imposing CR 11 sanctions.[5] We disagree. The court reviews the imposition of CR 11 sanctions for abuse of discretion. Biggs v. Vail, 124 Wn.2d 193, 197, 876 P.2d 448 (1994). A court abuses its discretion in imposing sanctions where its conclusion was the result of an exercise of discretion that was manifestly unreasonable or based on untenable grounds or reasons. Watness v. City of Seattle, 11 Wn. App. 2d 722, 736, 457 P.3d 1177 (2019).

An attorney or party signing a pleading certifies that they have read the pleading and that, to the best of their knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, the pleading is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law, and is not interposed for any improper purpose. CR 11. If a complaint lacks a factual or legal basis, the court cannot impose CR 11 sanctions unless it also finds that the attorney who signed and filed the pleading failed to conduct a reasonable inquiry

[4] Because we affirm the trial court on the basis of res judicata, we need not reach the Chius' alternative collateral estoppel argument.

[5] It is unclear from the record whether the order imposed sanctions against the Oakes or against their attorney. But there are no pleadings in the record signed by the Oakes. We presume therefore that the CR 11 sanctions were imposed against their counsel. In Washington, a lawyer sanctioned under CR 11 is an aggrieved party and may seek review of a sanctions order under RAP 3.1. Splash Design, Inc. v. Lee, 104 Wn. App. 38, 44, 14 P.3d 879 (2000). Although clients are generally not aggrieved parties to sanctions against their attorneys and may not appeal sanctions on behalf of their attorneys, Breda v. B.P.O. Elks Lake City, 120 Wn. App. 351, 352-53, 90 P.3d 1079 (2004), no party raised this issue on appeal.

into the factual and legal basis of the claim. Bryant v. Joseph Tree, Inc., 119 Wn.2d 210, 220, 829 P.2d 1099 (1992). The court applies an objective standard to determine whether a reasonable attorney in like circumstances could believe their actions to be factually and legally justified. Id.

The trial court concluded that the Oakes' second complaint, signed by their counsel, was not well grounded in fact or law and was brought "in bad faith, or in the very least, [in] disregard of the facts and applicable law."

The Oakes challenge these conclusions on two grounds. First, they contend their common law trespass claim is warranted by existing law, or a good faith extension of existing law, and is factually well founded. They argue their claim was legally well founded because their common law trespass claim is not identical to the timber trespass claim. We have rejected that contention because it is based on the erroneous contention that claims with different elements cannot be "identical" for res judicata purposes. And factually, while there may be a factual basis for alleging the Chius put pesticide on the Oakes' cottonwood stump, there is no factual basis for asserting they were damaged by the Chius' actions. This court previously affirmed a trial court's determination that the Oakes failed to prove damages. Oakes, at *2. The trial court did not abuse its discretion in concluding that the Oakes' claim was not well grounded in fact or law.

Second, the Oakes argue they did not bring this lawsuit for an improper purpose because the trial court, in dismissing their first lawsuit, stated its dismissal of the timber trespass claim did not preclude the Oakes from refiling a different claim against the Chius. This argument mischaracterizes the trial court's comment at the summary judgment hearing. In the first lawsuit, the Oakes contended at

summary judgment that their complaint was worded broadly enough to include both a trespass to timber claim and a common law trespass claim:

> [I]f you look at their actual complaint, it's titled, "Trespass and injury to property," not timber removal. They use in their allegations and causes of action language like "Unlawful trespassing, interference with, and invasion of plaintiffs' right to possession of their property, and destruction of private property." So it's clearly not --just on its face, using explicit terms, it's clearly not limited just to the timber trespass.

The Oakes argued that if the court intended to dismiss the timber trespass claim, it should permit them to amend the complaint to clarify the other claims had been alleged. The court rejected this argument, concluding "the only thing that's pled and is before me at this point is timber trespass." Oakes, at * 3. Immediately after making this statement, the court commented "that doesn't stop the Oakes from attempting to do something about that now if they want to file something else about it. But what's before me right at the moment is a claim under the timber trespass statute …."

The Oakes filed a motion for reconsideration, specifically arguing that their complaint pleaded facts sufficient to establish recovery under timber trespass or trespass. In fact, they maintained that "[t]he elements [of these two causes of action] are substantially the same." The court denied this reconsideration request, and we affirmed that decision on appeal. Oakes, at *3. Any suggestion that the trial court somehow granted the Oakes permission to file a second lawsuit is simply not borne out by the record.

Moreover, the record establishes that the Oakes had already prosecuted a timber trespass claim to jury verdict against their homeowners' association, Summit, whom they proved had committed timber trespass by cutting down the

cottonwood tree. The Oakes alleged in that lawsuit that Summit committed trespass by cutting down the tree in 2013, and again on May 20, 2014, by poisoning the stump while they were at work—the latter being the same act of trespass they alleged in both lawsuits against the Chius. A jury awarded the Oakes $530 for damage to the tree, and $2,500 in "other property damage." This record demonstrates that the Oakes have fully recovered for whatever damages they may have sustained as a result of the cottonwood incident. The history provides additional factual support for the trial court's finding that the Oakes initiated a second lawsuit against the Chius in bad faith. The trial court did not abuse its discretion in imposing CR 11 sanctions.

C. Attorney Fees

The Chius seek an award of attorney fees on appeal under CR 11 and RAP 18.1, 18.7, and 18.9(a), arguing that the Oakes' appeal, like the lawsuit below, is frivolous. We agree.

Under RAP 18.1, a party may request reasonable attorney fees on appeal if an applicable law grants the party the right to recover. Attorney fees for a frivolous appeal are available under CR 11 as made applicable to appeals by RAP 18.7. Layne v. Hyde, 54 Wn. App. 125, 136, 773 P.2d 83 (1989). RAP 18.9(a) also authorizes this court to impose sanctions, such as attorney fees and costs to an opposing party, against a party who brings a frivolous appeal. Rhinehart v. Seattle Times, 59 Wn. App. 332, 342, 798 P.2d 1155 (1990); Granville Condominium Homeowners Ass'n v. Kuehner, 177 Wn. App. 543, 557, 312 P.3d 702 (2013). An appeal is frivolous if, after considering the entire record and resolving all doubts in favor of the appellant, the appeal presents no debatable

issues upon which reasonable minds might differ, and it is so totally devoid of merit that there is no possibility of reversal. Layne, 54 Wn. App. at 135.

We conclude the Oakes' appeal is frivolous. The case law regarding res judicata is clear: a party is barred from relitigating a claim that is identical to a cause of action previously litigated when the claim could have been brought in the prior lawsuit. See Eugster, 198 Wn. App. at 786; In re Marriage of Dicus, 110 Wn. App. at 355-56. The Oakes concede they could have pleaded common law trespass in their first lawsuit. Indeed, they argued in the first lawsuit that their complaint was worded broadly enough to encompass this claim and that the elements of both claims are "substantially the same." The two claims are in fact identical for res judicata purposes.

We similarly conclude the arguments raised in an attempt to reverse the CR 11 sanctions and attorney fee award reflect a misreading of well-established case law and a mischaracterization of the record below.

The appeal presents no debatable issues on which reasonable minds could differ and is devoid of merit. We therefore award the Chius reasonable attorney fees on appeal subject to their compliance with RAP 18.1.

Affirmed.

Andrus, A.C.J.

WE CONCUR: