IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

EMMETT SOFFEY and MARY SOFFEY, husband and wife,	)	No. 65261-3-I
Respondents,	)	DIVISION ONE
v.	)	UNPUBLISHED OPINION
ANDREI DAN and ANAMARIA DAN, husband and wife,	)	FILED: July 18, 2011
Appellants.	)	

Grosse, J. — In order to establish a wrongful invasion or physical trespass of land, in violation of RCW 4.24.630, there must be a finding that a person acted intentionally, unreasonably, and knew or had reason to know that he or she acted without authorization. To be liable for nuisance, a person must substantially and unreasonably interfere with another's use and enjoyment of land. Following a bench trial in this property dispute between adjoining neighbors, the trial court found that the construction activities of one property owner resulted in both a trespass and a nuisance in violation of the rights of the other. Because substantial evidence supports the trial court's factual findings and those findings support its conclusions of law, we affirm.

FACTS

Emmett and Mary Soffey purchased a residence in Bellevue in 1991. Andrei and Anamaria Dan have occupied the residence on the lot directly south of the Soffeys' property since 2000. The Soffey and Dan properties face east toward the road and

share a boundary line that runs east to west along the sides of both houses. A chain link fence runs along two-thirds of the shared boundary line, starting from the westernmost portion of both back yards. The eastern portion of boundary line is demarcated by landscaping features and a notch in the front curb where both properties meet the road.

The Dans commenced a remodel project in 2004 to substantially expand their single-family home and convert it to a group home for adults with a disability or impairment. In the course of this project, the Dans excavated the front yard bordering the Soffeys' property, and later installed concrete blocks along the boundary line. In the back yard, the Dans deposited construction material, consisting of pieces of broken concrete slab and other matter, and added soil in the northwest corner to raise the grade of the land to support a grassed, fenced-in yard area higher up and adjacent to the house.

The Soffeys filed a lawsuit, alleging that the Dans' construction encroached on their property and created a nuisance. Specifically, the Soffeys requested that the court order the Dans to move the concrete blocks back toward their property, restore some landscaping removed during the excavation of the front yard, and build a retaining wall to compensate for the loss of lateral support caused by the front yard excavation. The Soffeys also sought removal of the construction debris from the northwest back corner of the Dans' yard.

Following a two-day bench trial, the court concluded that the Soffeys established

both trespass and nuisance, and granted partial relief to the Soffeys. The court found that the parties had agreed to abide by a certain line dividing the front yards, which corresponded to the areas historically landscaped and maintained by the parties. The court found that some of the concrete paving blocks extended past the agreed-upon line, by a matter of inches, and ordered the Dans to move selected pavers back to correct the "minor" intrusion. The court also found that the debris and fill in the Dans' back yard was causing stress on the fence separating the lots and protruding into the Soffeys' yard. The court ordered the Dans to remove the material. The court also awarded approximately $16,000 in costs and attorney fees to the Soffeys under RCW 4.24.630. The Dans appeal.

ANALYSIS

Standard of Review

Where a court evaluates evidence in a bench trial, appellate review is limited to determining whether the findings are supported by substantial evidence and whether the findings support the conclusions of law.[1] Substantial evidence is the "quantum of evidence sufficient to persuade a rational fair-minded person the premise is true."[2] We view the evidence and all reasonable inferences in the light most favorable to the prevailing party.[3] Though the trier of fact is free to believe or disbelieve any evidence

[1] Standing Rock Homeowners Ass'n v. Misich, 106 Wn. App. 231, 242-43, 23 P.3d 520 (2001).
[2] Sunnyside Valley Irrig. Dist. v. Dickie, 149 Wn.2d 873, 879, 73 P.3d 369 (2003).
[3] Korst v. McMahon, 136 Wn. App. 202, 206, 148 P.3d 1081 (2006).

presented at trial, "[a]ppellate courts do not hear or weigh evidence, find facts, or substitute their opinions for those of the trier-of-fact."[4] We review questions of law de novo.[5]

Findings of Fact

The Dans challenge the court's finding of the existence of an agreed-upon boundary line separating the eastern portion of the parties' front yards. The Dans concede that they and the Soffeys agreed to respect a dividing line between their yards, extending from the end fence post separating the side yards to the notch in the curb. They contend, however, that they never agreed that this line was the actual property line and maintain that the court lacked "jurisdiction" to decide the property boundary. Because the court lacked proof of the actual legal boundary and did not have authority to decide the issue, the Dans contend that the court erred in concluding that some concrete paving blocks crossed the dividing line of the front yards and amounted to a trespass.

But the trial court did not determine the legal property boundary. Although there was evidence that a survey had been performed during the construction process, no survey was submitted into evidence. The court noted that the survey was, in fact,

[4] Quinn v. Cherry Lane Auto Plaza, Inc., 153 Wn. App. 710, 717, 225 P.3d 266 (2009) (citing Thorndike v. Hesperian Orchards, Inc., 54 Wn.2d 570, 572, 343 P.2d 183 (1959)), rev. denied, 168 Wn.2d 1041 (2010).
[5] Sunnyside Valley, 149 Wn.2d at 880.

irrelevant to its findings that the parties agreed to respect a particular line dividing their front yards and that certain paving stones installed by the Dans along this line "protrude by inches" across this line onto the Soffeys' property.

Even if there was an agreed-upon line, the Dans claim that as a factual matter, the evidence does not support the trial court's finding that some of the concrete blocks crossed it. According to Andrei Dan's testimony, he did abide by the agreed-upon line. But the trial court considered not only Dan's testimony on this point, but also Emmett Soffey's conflicting testimony, photographic, and video evidence. The court also physically visited the site in order to better appreciate the evidence. Viewing the evidence in the light most favorable to the Soffeys, the trial court's finding is supported by substantial evidence.

The Dans also challenge several of the court's factual findings related to the fill and debris in the back yard. Specifically, the court found that prior to the commencement of the Dans' construction, the grade level of the land on both sides of the westernmost portion of the fence was "approximately" the same. The Dans point to Andrei Dan's testimony that several feet of fill already existed in that area before he added any. He said that he added "a foot or so" of fill on top of the existing material, but he did not deposit any material directly adjacent to the fence. Mary Soffey testified repeatedly, however, that prior to construction, both properties sloped down at the westernmost corner and met at the same level at the fence. This testimony constitutes substantial evidence supporting the court's finding. In any event, even if it were not

supported by substantial evidence, the finding is unnecessary to the court's legal conclusions. Regardless of the original grade, Andrei Dan admitted that he added concrete and other fill material on his side of the fence. No evidence or testimony indicated that prior to the Dans' construction, there was any fill material pressing against the fence and spilling over onto the Soffeys' property.

In a similar vein, the Dans challenge the court's finding that the Soffeys "treated" the chain link fence separating the two properties "as their own." They claim this finding is inconsistent with the court's statement in its oral ruling that ownership of the fence was not relevant and it was not ruling on the issue. But, the Dans did not contest the Soffeys' claimed ownership of the fence and the court's finding about the Soffeys' treatment of the fence does not equate to a finding of ownership. And here again, even if unsupported, the finding about the Soffeys' subjective opinion of ownership is superfluous to its conclusions about trespass and nuisance.

More significantly, the Dans contend that the court's findings that the construction debris is "bulging against the chain link fence" and "protrudes past the fence line and onto the Soffey property" are unsupported.[6] They also claim the evidence does not establish that the fence is in danger of collapsing. Both Emmett and Mary Soffey described the fence as bulging toward their property. While both admitted it was difficult to appreciate the extent of the protrusion from the photographs which

[6] The Dans also claim that, contrary to the court's statement in its oral ruling, they did not concede that the fence bulges into the Soffeys' yard. But even assuming this is true, the court found that the fence does in fact, bulge and protrude into the Soffeys' property, independent of any concession by the Dans.

were taken facing the fence, the photographs support the court's finding as they depict the fence with debris directly behind it. Expert testimony was not necessary to establish that the exertion of pressure on the fence created the potential for the fence to give way. The trial court's findings are supported by substantial evidence.

Conclusions of Law

Even assuming the factual findings are supported by substantial evidence, the Dans argue that the court erred in concluding that the debris and fill pile bulging against the fence amounted to an actionable trespass. Under RCW 4.24.630(1), a party is liable for damages to land if he "goes onto the land of another" and either: (1) "removes timber, crops, minerals, or other similar valuable property from the land"; (2) "wrongfully causes waste or injury to the land"; or (3) "wrongfully injures personal property or improvements to real estate on the land." To act "wrongfully" for purposes of the statute, the defendant must have acted "intentionally and unreasonably . . . and knew or had reason to know that he or she lacked authorization."[8]

Contrary to the court's finding, the Dans claim the evidence did not show that they acted "intentionally," "unreasonably," and "knew or had reason to know" they were acting without authority.[9] Because it was not established that the Dans acted wrongfully, they argue that attorney fees were improperly awarded under RCW

---

[8] Clipse v. Michels Pipeline Constr., Inc., 154 Wn. App. 573, 580, 225 P.3d 492 (2010) (emphasis omitted).
[9] Clipse, 154 Wn. App. at 580.

4.24.630.[10] The Dans rely on the fact that the evidence did not show that they lacked any necessary permit or were cited with violation of any Bellevue city code provision for raising the grade of the yard. But, there is no question that the Dans' actions were intentional. And the evidence establishes that the effect on the fence and encroachment onto the Soffeys' property by changing the shape of the fence was observable. The Dans do not allege they had permission to use the fence for the retention of fill and debris and thereby encroach on the Soffeys' property. As the court noted, depositing construction debris in this manner was not unknowing, as it was done "intentionally to rid the property of patio materials and broken up cement blocks without having to pay for its removal off site." Viewing the evidence in the light most favorable to the Soffeys, the record is sufficient to support the court's finding that the Dans acted intentionally and unreasonably causing injury to the Soffeys' property and acted without authorization in doing so. This finding supports the court's legal conclusion.

The Dans also challenge the court's conclusion that the construction debris pile amounts to a nuisance because it has "potential to cause the chain link fence to collapse and to allow a significant volume of construction debris to fall into the [Soffeys'] back yard, creating an unreasonable interference with the [Soffeys'] use and enjoyment of their property." A person is liable for nuisance when he or she substantially and unreasonably interferes with another's use and enjoyment of land.[11]

---

[10] RCW 4.24.630(1) allows recovery for damages and "reasonable costs," including attorney fees, investigative costs and other litigation expenses. The Dans do not challenge the amount the fee award.

[11] RCW 7.48.010; Grundy v. Thurston County, 155 Wn.2d 1, 6, 117 P.3d 1089 (2005).

The Dans argue that the court impermissibly based its conclusion on aesthetics, since the Soffeys admitted that the actual current damage caused by debris falling through the fence was minimal.[12] The Dans further argue that the court used a subjective, rather than an objective, standard in concluding that the debris pile pressing against the fence substantially interfered with the Soffeys' use and enjoyment of their property. And finally, the Dans assert that the threat of potential damage under these circumstances was insufficient to constitute a nuisance.

Nothing in the record suggests that the court's ruling hinged upon mere aesthetics. In fact, the court expressly denied this was the case. Nor did the court base its conclusion on Mary Soffey's subjective interest in gardening. Rather, the court concluded that the pile of fill and rubble straining the fence, protruding onto the Soffeys' property, occasionally falling through the fence, and creating a reasonable fear the fence may eventually collapse, objectively amounted to a substantial interference with the use and enjoyment of property. Moreover, Ferry v. City of Seattle does not support the Dans' position.[13] In that case, property owners successfully enjoined the construction of a reservoir near their homes. The injunction was based, in part, on residents' fear that the reservoir would break and cause damage. In upholding the injunction, the court determined that if the circumstances support a "reasonable expectation that disaster may happen," the challenged structure will be considered a

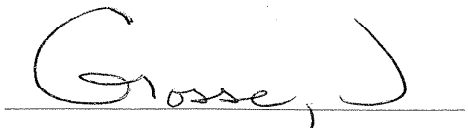
[12] See Mathewson v. Primeau, 64 Wn.2d 929, 938, 395 P.2d 183 (1964) ("That a thing is unsightly or offends the aesthetic sense of a neighbor, does not ordinarily make it a nuisance or afford ground for injunctive relief.").
[13] 116 Wash. 648, 200 P. 336 (1921), rev'd on reh'g, 116 Wash. 648, 203 P. 40 (1922).

nuisance.[14] Nothing in that case nor in subsequent case law suggests that the threat of future damage may only factor into a finding of nuisance if it rises to the level of disaster or loss of life.

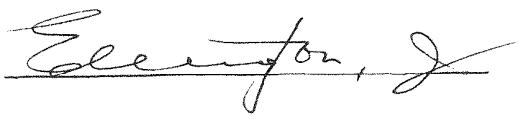
In sum, the trial court's findings of fact are supported by the evidence in the record and those findings support the conclusions of law.

The Soffeys request attorney fees on appeal based on RCW 4.24.630 and RAP 18.1. "A party may recover attorney fees and costs on appeal when granted by applicable law."[15] Because the Soffeys prevail on appeal, they are entitled to fees and costs.

Affirmed.



WE CONCUR:



[14] Ferry, 116 Wash at 663.
[15] Oregon Mut. Ins. Co. v. Barton, 109 Wn. App. 405, 418, 36 P.3d 1065 (2001); RAP 18.1(a).