IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

BRETT DANIELSON and KRISTEN DANIELSON, husband and wife,	)	**No. 28075-6-III**
Appellants,	)	**Division Three**
v.	)	
GREGORY FURULIE and MICHELE FURULIE, husband and wife,	)	**UNPUBLISHED OPINION**
Respondents.	)	

Sweeney, J. — A litigant is entitled to attorney fees and costs for its efforts in dissolving a wrongfully issued injunction. The suit here followed a boundary dispute. The court concluded that a preliminary restraining order prohibiting movement of a common fence was unnecessary and therefore wrongful. That conclusion is supported by the unchallenged findings of fact. We, then, affirm the court's award of attorney fees and costs but deny fees on appeal.

FACTS

Brett and Kristen Danielson and Gregory and Michele Furulie own adjacent

properties in west Spokane County. The Furulies bought their 10-acre parcel in 1994. The property benefited from a road easement through the 10-acre parcel to the east. The Danielsons purchased that eastern 10-acre parcel in 2004, subject to the Furulies' easement. A north-south fence ran between the Danielsons' and the Furulies' properties when the Danielsons purchased their property. The Danielsons understood that the fence was the common boundary between the properties. And they later learned that the fence encroached onto the Furulie parcel. But the fence stayed in place. The Danielsons maintained the fence and relied on it to keep their livestock on their property. Previous owners of the Danielsons' property used and maintained the fence for the same purpose.

The Furulies lived abroad until approximately late 2006 or early 2007, when Mr. Furulie retired from the military and the Furulies returned to build a house on their property. A survey by the Furulies located the correct eastern boundary of the property. And Mr. Furulie sent the Danielsons a series of letters to tell them they intended to build a house on their property and use the road easement to transport materials during construction. Mr. Furulie also asked the Danielsons to move fences crossing the easement.

The Danielsons hired a lawyer by February 20, 2007. The lawyer wrote to the Furulies and told them that the Danielsons believed they had acquired title to all the

property within the fence through adverse possession. On March 16, Mr. Furulie moved the fence to within one foot of the actual boundary line, but it still sat on his side of the property line. The same evening, the Danielsons began relocating the fence to its old position. The Furulies returned home and again began moving the fence to its new position. One of them called the police. Officers responded and secured an agreement that they would pursue civil remedies in court.

On March 20, the Danielsons sued the Furulies to quiet title to the disputed land based on a claim of adverse possession. The Danielsons also secured an ex parte temporary restraining order, restricting the Furulies from moving the fence or otherwise interfering with the Danielsons' use of the land. The court scheduled a show cause hearing for April 2 and then rescheduled the hearing for April 20 to accommodate the parties, their attorneys, and the court. On the morning of April 20, the Furulies' counsel filed and served on the Danielsons' attorney declarations, certified property records, and legal briefing in response to the ex parte restraining order and show cause order. The Furulies requested damages for what they characterized as a wrongful temporary restraining order. The Furulies incurred $4,500 in fees and costs responding to the temporary restraining order.

The Danielsons and the Furulies agreed to dissolve the temporary restraining order

before the show cause hearing. The Danielsons later told the court they did not intend to pursue their quiet title claim any further.

In September 2007, the Furulies moved for an award of attorney fees and costs to dissolve the temporary restraining order. The trial court awarded the attorney fees and costs to the Furulies. The trial court found, among other things, that the temporary restraining order was wrongful "[i]n light of the Danielsons' knowledge of facts casting doubt on their claim of adverse possession." Clerk's Papers (CP) at 80. The trial court also dismissed the Danielsons' complaint without prejudice and denied their motion for reconsideration.

The Danielsons appeal.

DISCUSSION

The Danielsons contend the court's award of fees and costs is wrong for a number reasons. First, they argue that they met the requirements for a preliminary injunction and that their injunction was therefore not wrongful. The Danielsons maintain that they not only have a "clear legal and equitable right," but also a responsibility to maintain the integrity of the fence to prevent escape and "injury" to their horses. Appellants' Br. at 6. They argue that the Furulies invaded those rights on March 16, 2007. This invasion gave the Danielsons a well-grounded fear that the Furulies would again act unilaterally to

move the fence. The Danielsons also assert that they were entitled to preserve evidence of the long-standing nature of the fence to support their claim of adverse possession. Finally, the Danielsons contend that the Furulies may not properly recover attorney fees because they did not move to dissolve the temporary restraining order.

A trial court's unchallenged findings of fact are verities on appeal. *See State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). We review challenged conclusions of law de novo. *City of Woodinville v. Northshore United Church of Christ*, 166 Wn.2d 633, 640, 211 P.3d 406 (2009).

An award of attorney fees is proper only if the fees are authorized by contract, statute, or recognized ground of equity. *Hsu Ying Li v. Tang*, 87 Wn.2d 796, 797-98, 557 P.2d 342 (1976). This is the "American rule." *Bldg. Indus. Ass'n of Wash. v. McCarthy*, 152 Wn. App. 720, 750, 218 P.3d 196 (2009). A recognized equitable ground for attorney fees is successfully resisting a wrongful injunction. *White v. Wilhelm*, 34 Wn. App. 763, 773-74, 665 P.2d 407 (1983).

Wrongful Temporary Restraining Order

RCW 7.40.020 sets out the requirements for preliminary injunctive relief. "'[O]ne who seeks relief by temporary or permanent injunction must show (1) that he has a clear legal or equitable right, (2) that he has a well-grounded fear of immediate invasion of that

right, and (3) that the acts complained of are either resulting in or will result in actual and substantial injury to him.'" *Tyler Pipe Indus., Inc. v. Dep't of Revenue,* 96 Wn.2d 785, 792, 638 P.2d 1213 (1982) (quoting *Port of Seattle v. Int'l Longshoremen's & Warehousemen's Union*, 52 Wn.2d 317, 319, 324 P.2d 1099 (1958)). All three of these criteria must be satisfied to warrant preliminary injunctive relief. *Wash. Fed'n of State Employees, Council 28 v. State*, 99 Wn.2d 878, 888, 665 P.2d 1337 (1983).

The Danielsons challenge the trial court's conclusion that the temporary restraining order was wrongful and that the Furulies were thus entitled to fees.

The Danielsons do not, however, challenge the trial court's finding of fact that "[i]f the Danielsons[] were concerned that their livestock were not fully and effectively contained after the Furulies[] relocated the fence closer to the surveyed property line, then, pending the resolution of a quiet title action, the Danielsons could have constructed temporary fencing along the property line established by their survey." CP at 80. They also do not assign error to the finding of fact that "the Danielsons were aware from their survey that the fence did not establish the property line, and had been informed by Robert Johnston that his use of the Furulie land from 1997 to 2000—a period necessary to their adverse possession claim—was permissive." CP at 80. These findings support the trial judge's conclusion that a temporary restraining order was unnecessary and, therefore,

wrongful. RCW 7.40.020; *Hill*, 123 Wn.2d at 644.

Fees Without a Motion To Dissolve

Ritchie v. Markley, a case the Danielsons rely on, stands for the proposition that an attorney fee award is appropriate if injunctive relief is the sole purpose of the suit and the injunction is dissolved, including where the injunction is dissolved by stipulation of the parties. 23 Wn. App. 569, 575, 597 P.2d 449 (1979), *overruled on other grounds by Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 828 P.2d 549 (1992). No motion to dissolve the injunction was required here.

Fees on Appeal

The Furulies contend that they are entitled to fees on appeal because, generally, the grounds for obtaining attorney fees at trial will also support an award on appeal. *Landberg v. Carlson*, 108 Wn. App. 749, 758, 33 P.3d 406 (2001). They also maintain that the Danielsons' appeal is frivolous, so the court may award attorney fees as a sanction. RAP 18.9(a).

The appeal is not clearly frivolous or prosecuted in bad faith. *State ex rel. Quick-Ruben v. Verharen*, 136 Wn.2d 888, 905, 969 P.2d 64 (1998) (defining frivolous as "'so totally devoid of merit that there [is] no reasonable possibility of reversal'" (alteration in original) (quoting *Presidential Estates Apartment Assocs. v. Barrett*, 129 Wn.2d 320,

330, 917 P.2d 100 (1996))). And "the equitable rule allowing attorneys' fees for dissolving a temporary restraining order does not entitle a successful defendant to recover all fees incurred in defending against injunctive relief." *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 144, 937 P.2d 154, 943 P.2d 1358 (1997). It entitles the defendant to only those fees incurred *before* dissolution of the order to discourage a plaintiff from seeking relief before a hearing on the merits. *Id.* at 144-45. A successful defendant may not recover those fees incurred after the dissolution of a wrongfully issued temporary restraining order because the fee award would no longer serve the rule's purpose. *Id.* at 144. Here, the trial court dissolved the temporary restraining order on the parties' stipulation. All the fees the Furulies incurred on appeal, then, were incurred post-dissolution. The Furulies, therefore, are not entitled to attorney fees on appeal. However, they are entitled to their costs as the substantially prevailing party. RAP 14.1; RAP 14.2.

We affirm the trial court's findings, conclusions, and order awarding attorney fees; award costs to the Furulies on appeal; and deny their request for attorney fees on appeal.

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

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Sweeney, J.

WE CONCUR:

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Brown, A.C.J.

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Korsmo, J.