

WILLIAM R. GRACE

v.

THERESA GRACE SEARS et al.

Argued November 7, 2012

Decided January 10, 2013

Panel: SAUFLEY, C.J., and ALEXANDER, LEVY, SILVER, GORMAN, and
JABAR, JJ.

MEMORANDUM OF DECISION

Theresa Grace Sears and Barnacles, LLC (collectively Sears) appeal from a judgment entered in the Superior Court (Hancock County, *A. Murray, J.*) in favor of Sears's brother, William R. Grace, following a trial in which certain causes of action were tried before a jury and others before the court. On appeal, Sears challenges the portions of the judgment finding Sears liable for abuse of process, awarding damages to Grace including punitive damages, ordering specific performance of the parties' 2006 mediated agreement (the Agreement),¹ and declaring the common boundary between Grace's and Sears's abutting oceanfront properties.

Contrary to Sears's primary contention on appeal, the trial court did not err when it denied her motions for judgment as a matter of law on Grace's abuse of process claim and sent that claim to the jury, which was then instructed properly and in accordance with instructions agreed to by the parties. *See Simon v. Navon*,

¹ The Agreement was the product of mediation during the course of related litigation in the United States District Court for the District of Maine and is referenced and described in the opinion resolving that litigation, *Grace v. Yarnall*, 441 F. Supp. 2d 130, 136 (D. Me. 2006).

71 F.3d 9, 15-17 (1st Cir. 1995); *Grace v. Yarnall*, 441 F. Supp. 2d 130, 136 (D. Me. 2006); *Grace v. Yarnall*, 346 F. Supp. 2d 222, 224-25 (D. Me. 2004); *Tanguay v. Asen*, 1998 ME 277, ¶ 5, 722 A.2d 49 (stating the elements of abuse of process claim); *Potter, Prescott, Jamieson & Nelson, P.A. v. Campbell*, 1998 ME 70, ¶ 7, 708 A.2d 283 (stating that *Simon* is consistent with our abuse of process opinions); *see also* M.R. Civ. P. 50; *Russell v. ExpressJet Airlines, Inc.*, 2011 ME 123, ¶ 10, 32 A.3d 1030 (stating the standard of review); *Advanced Constr. Corp. v. Pilecki*, 2006 ME 84, ¶ 24, 901 A.2d 189; *Withers v. Hackett*, 1998 ME 164, ¶ 10, 714 A.2d 798 (stating that we give “enormous deference” to a properly instructed jury).

We additionally affirm the damages awarded for attorney fees on the abuse of process claim, noting that Sears waived any argument that attorney fees are unrecoverable as damages in an abuse of process claim when she agreed at trial that they are. *See Graham v. Brown*, 2011 ME 93, ¶ 12, 26 A.3d 823; *Estate of Hoch v. Stifel*, 2011 ME 24, ¶ 43, 16 A.3d 137; *Teel v. Colson*, 396 A.2d 529, 533-34 (Me. 1979) (discussing waiver of arguments on appeal). We also affirm the remaining damages awarded on the abuse of process or breach of contract claims and the punitive damages award. *See Harris v. Soley*, 2000 ME 150, ¶¶ 30-35, 756 A.2d 499; *Forbes v. Wells Beach Casino, Inc.*, 409 A.2d 646, 654-55 (Me. 1979); *Saliem v. Glovsky*, 132 Me. 402, 409, 172 A. 4 (1934); *see generally Goucher v. Dineen*, 471 A.2d 688, 689 (Me. 1984); *cf. Withers*, 1998 ME 164, ¶¶ 6, 11, 714 A.2d 798.

Finally, the court did not exceed the bounds of its discretion in ordering specific performance of the Agreement, *see Sullivan v. Porter*, 2004 ME 134, ¶ 25, 861 A.2d 625; *O’Halloran v. Oechsle*, 402 A.2d 67, 70 (Me. 1979), nor did it err as a matter of law or of fact in determining the location of the common boundary between the Grace and Sears properties, *see Dupuis v. Soucy*, 2011 ME 2, ¶¶ 16, 18, 11 A.3d 318; *Lloyd v. Benson*, 2006 ME 129, ¶¶ 8, 11, 910 A.2d 1048; *Wells v. Powers*, 2005 ME 62, ¶¶ 2-3, 873 A.2d 361.

The entry is:

Judgment affirmed.

On the briefs:

Catherine R. Connors, Esq., and Katharine I. Rand, Esq., Pierce Atwood LLP, Portland, for appellants Theresa Grace Sears and Barnacles, LLC

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At oral argument:

Catherine R. Connors, Esq., for appellants Theresa Grace Sears and Barnacles, LLC

David J. Perkins, Esq., for appellee William R. Grace