No. 1021623

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

MJD PROPERTIES, LLC, a Washington limited liability company,

Respondent,

v.

JEFFREY HALEY, an individual

Petitioner.

ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT

Respondent MJD Properties, LLC ("MJD") requests the relief set forth in Part II.

II. ISSUES PRESENTED FOR REVIEW THAT WERE NOT DECIDED BVY THE COURT OF APPEALS

Respondent MJD asks this Court to deny Petitioner Jeffrey Haley's ("Haley") request to review the Court of Appeals' April 24, 2023 decision and its denial of Haley's Motion for Reconsideration. Haley fails to cite any legitimate basis under RAP 13.4(b) why this court should grant discretionary review of the Court of Appeals' decision. The Court of Appeals correctly found that Haley's claims for declaratory relief are barred under principles of claim preclusion.

Pursuant to RAP 13.4(d), this Court should decide the following issues that were raised but not decided in the Court of Appeals:

A. Whether the trial court's decision contravenes Washington law on the duties of a common boundary

landowners and sanctions a trespass of MJD's property rights to the eighteen common boundary trees and the four trees located entirely on MJD's property.

B. Whether the trial court erred in denying MJD's motion for summary judgment and entering findings of fact and conclusions of law and Judgment ruling that Haley's current claims for declaratory relief relating to the arborvitae trees are not barred by the three-year statute of limitations under RCW 4.16.080.

III. COUNTER STATEMENT OF THE CASE

A. Haley's Prior Lawsuit Alleged a Claim for Declaratory Relief Asserting the Same Right to Top all Twenty-Two Arborvitae Trees, Including the Common Boundary Arborvitae Trees.

Haley's statement of the case is mostly inaccurate and contains numerous self-serving misrepresentations of the facts which are not supported by the evidence. As the Court of Appeals' decision noted, Haley did in fact seek a claim for declaratory relief in the 2012 lawsuit that he had a right to top all

twenty-two arborvitae trees. (CP 145-150; CP 151-158). Haley also asserted in his 2012 Counterclaims that the trunks of some of the arborvitae trees straddle the property line between Lots B and C, and that the trunks of the remaining arborvitae trees are exclusively on Lot B. (CP 148 and 154). Contrary to Haley's assertions, Haley never alleged, and it was never assumed by the parties or the court that all of the arborvitae trees were located solely on MJD's property.

Haley's counterclaims asserted in the 2012 Lawsuit sought the same right to top all twenty-two arborvitae trees and were premised on the same factual allegations and evidence as alleged in his second lawsuit regarding the arborvitae trees. (CP 147-148).

On November 4, 2016, the trial court granted MJD's second motion for summary judgment of Haley's counterclaims relating to the arborvitae trees, which were dismissed with prejudice. (CP 160-162). On March 27, 2017, an arbitration award was entered dismissing Haley's claims against MJD, and

a Judgment was entered against Haley on May 1, 2017. (CP 164-167).

B. Haley's Current Lawsuit Involves the Arborvitae Trees and Alleges the Same Right to Top All Twenty-Two Arborvitae Trees.

In Haley's second lawsuit filed almost a decade later, Haley relied on the same factual allegations and asserted the same right to top all twenty-two arborvitae trees, but under a different legal theory based on light and air, which is not even recognized under Washington law. (CP 1-10, ¶¶ 3.3, 3.4, 3.5, 3.6, 3.7, 3.14). Haley alleged in his counterclaims that MJD has allowed what he now calls a "Hedge" to grow such that it deprives the Haley Property of light and air. (CP 5, ¶ 3.14 and ¶ 3.17). Haley's claims for Declaratory Relief assert that for the plants whose trunks straddle the property line, that he has a right to cut and trim any portion of the plants that extend into the Haley Property, including roots, branches, and portions of trunks, even if doing so may kill the plant. (CP 7, ¶ 5.5).

On September 10, 2021, MJD filed a motion for summary judgment of Haley's claims for declaratory relief and mandatory injunction to abate a spite structure relating to the arborvitae trees on the basis that the claims are barred by res judicata and are time barred, and that under Washington law, Haley has no right to top or kill any common boundary tree without MJD's consent, and he has no right to top any tree that is located solely on MJD's property. (CP 53-71). MJD submitted the Declaration of Mark Borys, Survey Director of BBA Land Surveying, LLC, which included his survey of the trunks of all twenty-two arborvitae trees. (CP 205-210). Mr. Borys' Arborvitae Trunk Detail confirms that four trunks of the arborvitae trees marked A, B, C and D are located entirely on MJD's Lot C. Seventeen of the trunks marked E through N and P through V are located in varying percentages on both Lots Of C and B, and only one trunk marked O is located entirely on Lot B. Id.

MJD also submitted the Declaration of Edwin Green, Founder of Terrane, in support of its motion for summary

judgment. (CP 211-215). Haley alleged in his Complaint that Terrane had surveyed the location of the trunks of the arborvitae tree in relation to the property line, and that their survey shows that eight of the arborvitae trees are located entirely on the Haley Property. (CP 6, ¶ 3.16; CP 10). This was false. Mr. Green testified that Haley specifically requested that Terrane not survey or show the individual dimensions from any portion of the arborvitae trees in relation to the property line. (CP 212, ¶ 4).

Haley argued that his spite structure claim is not barred by res judicata because the 2012 Lawsuit did not allege a claim of spite structure, and that his claims for declaratory relief and mandatory injunction is "ongoing" and continues as long as the spite structure is maintained by Defendants." (CP 420).

MJD argued that Haley's current claims allege the same transactional core of facts in his 2012 Complaint but now under a different theory of liability and are barred by res judicata. MJD also argued that Haley's claims for declaratory relief and spite structure are barred by the two or three-year statute of limitations

under RCW 4.16.130. (CP 424). On October 19, 2021, the trial court dismissed Haley's claim for mandatory injunction to abate a spite structure under RCW 7.40.030 ruling that the claim is barred by res judicata by the decision in the 2012 King County Lawsuit. (CP 450, ¶ 1). However, the trial court denied MJD's motion for summary judgment of Haley's declaratory relief claims based on res judicata, the three-year statute of limitations and under Washington law, finding a question of fact existed as to these claims. (CP 450, ¶ 3).

On February 4, 2022, Haley filed an amended complaint which changed his claims concerning the arborvitae trees, characterizing them as a "common boundary line Hedge" and sought the right to top fifteen feet off all twenty-two arborvitaes. (CP 454-477). On February 28, 2022, MJD filed its Answer asserting affirmative defenses of failure to state a claim, res judicata, violation of Washington law on the duty of a co-tenant to a common boundary tree and the duty of an owner with respect

to a tree located solely on a neighbor's property, and that Haley's claims are barred by the statute of limitations. (CP 783-806).

On April 1, 2022, MJD filed a second motion for partial summary judgment Haley's claims, including Haley's newly asserted claims for declaratory relief. (CP 809-831). MJD argued that Haley's claims for declaratory relief are barred by res judicata, are time barred by the three-year statute of limitations under RCW 4.17.080 and contravene well established Washington law prohibiting a neighbor from interfering with MJD's rights to the common boundary trees without his consent.

Haley again argued that his new claims for declaratory relief are not barred by res judicata and falsely asserting that his 2012 lawsuit did not seek "declaratory relief" regarding his right to top the arborvitae trees. (CP 1064, Lines 15-17). The trial court denied MJD's motion for summary judgment finding no support for reconsidering this issue. (CP 1130-1131).

A bench trial of this matter was held on May 16, 17, 18, 19 and 23, 2022 before Judge Samuel Chung. Haley did not

introduce any survey at trial of the arborvitae trees in relation to the property line. MJD introduced at trial expert Mark Borys of BBA Land Surveying who testified that he measured the trunks of all twenty-two arborvitae trees at ground level, and determined that 4 arborvitae trees (marked A, B, C D) are located entirely on MJD's property, 17 arborvitae trees overlap the property line in varying degrees, and only 1 arborvitae tree is located entirely on Haley's property. (CP 1232, Lines 12-19).

On August 4, 2022, Judge Chung issued his findings of fact and conclusions of law and final judgment on Haley's other claims, but reserved ruling on Haley's declaratory relief claims relating to the arborvitae trees, and directed the parties to submit to the Court new surveys of the arborvitae trees that locates each of the trunks of the arborvitae trees relative to the property line measured at a height which is 4.5 feet up from the ground. (CP 1238, Lines 17-22). The trial court rejected MJD's defense of res judicata ruling:

> (1) the condition of the properties is now different as the hedge has grown since 2012 to where it is now 23 feet and,
>
> 2) the allegation in the current litigation is that the hedge blocks light and air and create a shadow in Mr. Haley's back yard, which is different from the aesthetic basis for the dismissal of the prior claims. The Court finds that the issues raised here were not litigated to their fullest extent in the prior action and res judicata is not applicable.

(CP 1237, Line 19 to CP 1238, Line 22).

On August 9, 2022, MJD filed a new survey by Mark Borys which measured the trunks of all 22 arborvitae trees at 4.5 feet above ground. (CP 1239-1245). Mr. Borys' new survey shows that four arborvitae trees marked A, B, C and D are located entirely on MJD's property. The other eighteen arborvitae trees are located in various percentages on both Lot C and Lot B. Haley did not object to MJD's new survey. (CP 1356).

On September 20, 2022, the trial court issued its Final Order Re: Arborvitae Trees. (CP 1256-1361). The trial court completely disregarded Washington law and ruled that all 22 arborvitae trees form a single "common unit barrier" between the

two properties and are to be treated as owned as tenants in common by MJD and Haley. The trial court ruled that all 22 arborvitae trees, including the 4 trees located solely on MJD's property, may be topped by several feet to a uniform height and that both parties *shall* share in the costs of the maintenance and trimming of all the trees. (CP 1356-1361).

On October 19, 2022, the trial court entered its Findings of Facts, Conclusions of Law and Final Judgment Re: Arborvitae Trees. (CP 1393 to CP 1401). Although the trial court recognized and cited the Court of Appeal's decision in *Happy Bunch, LLC v. Grandview North*, LLC, 142 Wn. App. 81, 173 P.3d 959 (2007), the trial court found all twenty-two arborvitae trees are co-owned by MJD and Haley. Contrary to the trial court's ruling, the four trees are located entirely on MJD's property and are not commonly owned.

The trial court clearly erred by ruling that all twenty-two arborvitaes "shall" be topped uniformly together and then maintained at a height that protects the privacy of each party" and

"that the costs of the trimming and maintaining the height of the arborvitae trees shall be equally borne by both Lot B and Lot C." (CP 1401, ¶¶ 8, 9). The trial court's ruling allows a neighbor to commit timber trespass by topping his neighbor's percentage interest in a commonly owned tree and by topping a neighbor's tree that is not even a common boundary tree.

C. Haley's Multiple Threats to Kill all Twenty-Two Arborvitae Trees in Violation of the Stay and Washington Law.

Despite MJD filing a cash supersedeas bond which stayed the trial court's decision, on October 27, 2022, Haley sent an email to John Pugh stating he had scheduled an unlicensed contractor, Jose Brito, to top all twenty-two arborvitae trees on November 4, 2022, and produced an estimate for this work. Haley threatened that MJD would have to post a supersedeas bond of $20,000 in order to delay this work until after the appeal. (See Appendix A – Appendix B to MJD's Motion for Emergency Injunction).

On November 1, 2022, MJD filed in the Court of Appeals an Emergency Rule RAP 8.1(b)(3) Motion for Stay of Enforcement of Trial Court Decision. (See Appendix A). On November 3, 2022, the Court of Appeals' Commissioner issues a ruling granting MJD's Motion to Stay in Part. (See Appendix B). On November 21, 2022, the trial court issued its order denying Haley's Response requesting that the Court increase the amount of MJD's cash supersedeas bond to $20,000. (See Appendix C).

Despite the stay, on June 10, 2023, Haley again sent John Pugh and his counsel another email threatening that if MJD will not agree to top all of the arborvitae trees to 13 feet, he will begin cutting the roots and branches of all the trees at his property line, which he admits will "surely kill every plant on the hedge." (See Appendix D). Again, due to Haley's threats, on June 12, 2023, MJD had to file yet another emergency motion in the Court of Appeals to prevent Haley from intentionally killing all twenty-two arborvitae trees. (See Appendix D). On June 13, 2023, the

Court Commissioner issued a notation ruling that the stay of the trial court's decision remains in effect until mandate. (See Appendix E). Haley's Petition for Review makes it clear that he has every intention of killing all eighteen common boundary trees, which will give him the view he has been seeking for over a decade.

There is nothing unresolved about the parties' relative property rights. Haley never objected to MJD's new survey filed in the trial court which shows that eighteen of the arborvitae trees are commonly owned by MJD and Haley, and four of the arborvitae trees are located entirely on MJD's property. Haley also knows that he has no right to cut the roots of any of the eighteen common-boundary arborvitae trees, because he admits it will kill the trees. However, Haley is feigning ignorance to justify a trespass on MJD's property rights. This Court should put an end to Haley's antics and rule that he has no right to top or cut the roots of any of the eighteen common boundary trees,

and he has no right to top the four arborvitae trees that are entirely on MJD's property.

IV. ARGUMENTS WHY REVIEW SHOULD BE DENIED

A. Standard of Review

To obtain this Court's review, Haley must show that the Court of Appeals' decision conflicts with a decision of this court or with a published Court of Appeals decision, or that it is raising a significant constitutional question or an issue of substantial public interest. RAP 13.4(b). As discussed below, the issues raised by Haley do not merit review under 13.4(b)(4).

B. Under Washington Law, Claim Preclusion Bars Haley's Claims and No Declaratory Judgment Exception Applies

Haley attempts to create new law in Washington by asserting for the first time in his Petition for Review that this court should craft a new declaratory judgment exception relating to property rights to res judicata. Haley never raised this argument to the trial court or in his appellate brief. The

Washington Supreme Court generally does not consider issues raised first in a petition for review. *See Crystal Ridge Homeowners Ass'n v. City of Bothell,* 182 Wn.2d 665, 678, 343 P.3d 746 (2015) ("This court generally does not consider issues, even constitutional ones, raised first in a petition for review." (citing *State v. Benn*, 161 Wn.2d 256, 262 n.1, 165 P.3d 1232 (2007)). Moreover, Haley provides no support for his argument.

Under Washington law, the doctrine of res judicata, or claim preclusion, provides that a final judgment on the merits of an action precludes the parties from relitigating issues that were or could have been raised in that action. *Hisle v. Todd Pac. Shipyards Corp*., 151 Wn.2d 853, 865, 93 P.3d 108 (2004). In evaluating whether two causes of action are the same, the courts consider a number of factors including: "'(1) [w]hether the rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right;

and (4) whether the two suits arise out of the same transactional nucleus of operative facts. *Berschauer Phillips Constr. Co. v. Mut. of Enumclaw Ins. Co.*, 175 Wn. App. 222, 230, 308 P.3d 681 (2013).

As the Court of Appeals noted, in addition to Haley's claims for implied and/or prescriptive easement, nuisance and outrage, Haley did seek declaratory relief in his first lawsuit seeking the same right to top all twenty-two arborvitae trees. Haley also asserted the same transactional nucleus of fact in his prior lawsuit that he is alleging in the current action regarding the same twenty-two arborvitae trees. Contrary to Haley's assertions, he did assert in the first action that some of the arborvitae trees straddle the property line. The same rights and interest are at issue in both lawsuits---Haley's right to top all twenty-two arborvitae trees and MJD's refusal to allow Haley to top the arborvitae trees.

This Court has rejected the argument "that a party can bring as many actions as he or she has substantive legal theories,

even if all theories involve the same facts, the same evidence, and the same transaction." *Sound Built Homes, Inc. v. Windermere Real Estate/S., Inc*., 118 Wn. App. 617, 632, 72 P.3d 788 (2003). 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. *Id*. For purposes of res judicata, Haley's causes of action in the first lawsuit and in the second lawsuit are the same.

Furthermore, affirming the trial court's decision would destroy MJD's rights to all twenty-two arborvitae trees. The prior lawsuit established that Haley had no right to top the twenty-two arborvitae trees, including the eighteen trees that straddle the property line as well as the four arborvitae trees that are located entirely on MJD's property. Res judicata attempts to prevent piecemeal litigation and supports the finality of judgment. *Bordeaux v. Ingersoll Rand Co*., 71 Wn.2d 392, 395, 429 P.2d 207 (1967) ("Res judicata is designed to curtail multiplicity of actions and harassment in the courts…"). The

only difference in Haley's second action is that Haley asserted a new theory of "light and air," which is not even a recognized cause of action in Washington. A property owner has no property right to any particular view or light or air over adjoining property. *Roe v. Walsh*, 76 Wash. 148, 135 P. 1031, 136 P. 1146 (1913); *Collinson v. John L. Scott, Inc.*, 55 Wn. App. 481, 778 P.2d 534 (1989). Claim preclusion applies if the claim could have been raised and decided in the prior action and it is merely an alternative theory of recovery, or an alternate remedy. *Hisle v. Todd Pac. Shipyards Corp*., 151 Wn.2d 853, 865, 93 P.3d 108 (2004).

Haley's reliance on *Meder v. CCME Corp*., 7 Wn. App. 801, 502 P.2d 1252 (1972) is misplaced. In that case the plaintiff presented various claims with respect to a real estate contract which, in a previous action, she had unsuccessfully sought to rescind. Although all of these claims related to the same contract, they were not necessarily involved in an action for its rescission. Those claims which were held barred sought the same

relief which had been denied in the prior action, or another form of equitable relief -- reformation -- which could have been granted upon the same kind of factual showing. The court did not hold that a declaratory judgment exception applies to res judicata.

C. Haley's Case Presents No Issue of Public Interest That Should be Determined by the Supreme Court

Haley does not even attempt to support his petition for review based on the public interest element of RAP 13.4(b)(4). The Court of Appeals decision that Haley's declaratory relief claims relating to the arborvitae trees are barred by claim preclusion, while affecting parties to this proceeding, is not an issue of substantial public interest that should be determined by the Supreme Court under RAP 13.4(b)(4).

Haley argues for the first time in his Petition for Review that this case involves "special circumstances" that warrant an exception to the general rules of claim preclusion, which makes it an "issue of state-wide importance" justifying review under RAP

13.4(b)(4). Again, Haley failed to raise this argument to the trial court or in his appellate brief and cannot raise it for the first time in his Petition for Review. *See Crystal Ridge Homeowners Ass'n v. City of Bothell,* 182 Wn.2d 665, 678, 343 P.3d 746 (2015). Even assuming Haley had raised this argument, his arguments are without merit. Haley relies on the English authority of *Henderson v. Henderson,* 3 Hare 100 (1843), which holds that:

> (t)he plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of the litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

3 Hare at 115. There is nothing in this language, applied to the facts of this case, which gives support to Haley's argument that a claim for declaratory judgment regarding property rights is a "special case" or exception to claim preclusion. Haley sought declaratory relief in the first action, and relied on the same underlying facts, and sought the same right to top all twenty-two arborvitaes, including the common boundary arborvitae trees. The

fact that Haley described the alleged harm resulting from the height of the arborvitae trees differently in the two cases—blocking views verses blocking light and air, is immaterial. Both actions involve the same evidence, the same alleged infringement of rights, and the same transactional nucleas of facts. Contrary to Haley's assertion, Haley's counterclaims in the first action alleged that some of the arborvitae trees straddle the property line. There is no evidence to support Haley's assertion that Haley's claim in the first lawsuit were based on the "presumption all the trunks emerged on MJD's property." Haley did not even assert in his first lawsuit that ANY of the arborvitae trees "emerged on MJD's property."

As the Court of Appeals found, the fact that the trees continued to grow between the first and second lawsuits (which evidence proves was from 20 feet to 23 feet), did not change the underlying factual basis for Haley's claims. In both actions, Haley sought the same right to top all twenty-two arborvitae trees.

Haley's claims are barred by claim preclusion. *Rains v. State*, 100 Wn.2d 660, 663-64, 674 P.2d 165 (1983).

D. Haley's Declaratory Relief Claims Relating to the Arborvitae Trees are Barred by the Statute of Limitations.

This Court should decide the issue raised by MJD but not decided by the Court of Appeals that Haley's declaratory relief claims are barred by the three-year statute of limitations. RCW 4.16.080 applies to any claim for damages or declaratory relief sought by Haley. Haley's has been alleging for over ten years, since at least 2012, that he has a right to top all of the arborvitae trees, including the trees that are located solely on MJD's Property. The factual core on which all of Haley's claims against MJD in the current action have existed since at least 2012. Haley's claims for declaratory relief under RCW 7.40.030 are clearly time barred.

E. The Trial Court's Decision Directly Contravenes Established Washington Law and Sanctions a Trespass.

This Court should decide the issue raised by MJD but not decided by the Court of Appeals that the trial court's decision contravenes Washington law and sanctions a trespass on MJD's property rights. It is long been established in this State that when a tree stands on a common property line, it is the common property of both parties and trespass will lie if one cuts or destroys it without the consent of the other. *Herring v. Pelayo*, 198 Wn. App. 828, 835, 397 P.3d 125 (2017). According to MJD's new survey of all 22 arborvitae trees, which Haley did not dispute, the trunks of eighteen of the arborvitae trees straddle the property line by varying percentages. MJD's interest in the eighteen common boundary arborvitae trees is proportionate to the percentage of their trunks growing on MJD's property. *Happy Bunch, LLC v. Grandview N., LLC*, 142 Wn. App. 81, 93, 173 P.3d 959, 965 (2007) ("The trees being owned in common; the trial court correctly ruled that Grandview had an interest in the

trees proportionate to the percentage of their trunks growing on Grandview's property.") Because the eighteen arborvitae trees are common boundary trees, both MJD and Haley have undivided property interests in these trees. *Herring v. Pelavo*, 198 Wn. App. 828, 837, 397 P.3d 125 (2017). Under Washington law, where a tree stands on a common property line, the common owners of the tree may only trim vegetation overhanging their property *but not in a manner that the common owner knows will kill the tree*. *Herring*, 198 Wn. App. at 838-839, 397 P.3d 125 (2017) (emphasis added). Haley's claimed "theory of ownership rights" in which he claims he has the right to cut the roots of all eighteen common boundary trees and kill all eighteen common boundary trees or cause them to fall over, clearly violates Washington law.

The trial court's decision gives a co-tenant the unfettered right to cut the portions of a common boundary tree that stand on their neighbor's property, without the neighbor's consent, and renders the timber trespass statute inapplicable to neighbors

sharing a common boundary tree. The trial court's decision would have created an entirely new theory of the duty of a co-tenant of a common boundary tree under Washington law and sanctions a trespass of the common owner's interest in the tree.

Because the eighteen arborvitae trees straddle the common property line, Haley's only right is to trim branches overhanging his property but not in a manner that will injure or kill the trees. *Herring*, 198 Wn. App. at 838-839, 397 P.3d 125 (2017). This Court should rule that Haley has no right to top any of the eighteen common boundary trees without MJD's consent. Additionally, this Court should rule that Haley has no right to cut the roots of the eighteen common boundary arborvitae trees at his property line, which Haley admits will kill all the trees.

With respect to the four arborvitae trees that are located entirely on MJD's property, the trial court's decision sanctions a trespass by ruling that Haley has an unfettered right to trespass on MJD's Property and top these four arborvitae trees. Under Washington law, a landowner has the legal authority to engage

in self-help and trim the branches and roots of a neighbor's trees that overhang his or her property line. *Mustoe v. Ma*, 193 Wn. App. 161, 164, 371 P.3d 544 (2016). However, Haley does not have the right to top or cut down MJD's four trees, nor is he entitled to cross MJD's property line to trim the overhanging branches or to top these trees. *Gostina v. Ryland*, 116 Wash. 228, 234-36, 199 P. 298 (1921); *Milner v. Carpenter Grp., LLC*., 14 Wn. App. 2d 1063 (2020). The Court should rule that Haley has no right to top the four arborvitae trees located entirely on MJD's property and has no right to trespass on MJD's property to trim any overhanging branches at the property line.

F. Attorney's Fees and Costs Under RAP 18.1(J)

If attorney fees and expenses are awarded to the party who prevailed in the Court of Appeals, and if a petition for review to the Supreme Court is subsequently denied, reasonable attorney fees and expenses may be awarded for the prevailing party's preparation and filing of a timely answer to the petition for review. RAP 18.1(j). MJD is entitled to an award of fees and costs if the

Court denies Haley's Petition for Review.

V. CONCLUSION

For the foregoing reasons, the Court should deny Petitioner Haley's petition for discretionary review and award MJD its fees and costs incurred relating to the Petition for Review. Additionally, this Court should rule (1) that Haley's claims are barred by the three year statute of limitations; (2) Haley has no right to top or cut the roots of any of the eighteen common boundary trees; and (3) Haley has no right to top the four arborvitae trees that are located entirely on MJD's property, or trespass on MJD's property to trim any branches that may overhang Haley's property line.

I certify that the Answer to Petition for Review contains 4,884 words, which complies with RAP 18.17(c)(10).

DATED this13th day of July 2023.

Respectfully submitted,

By: *_/s/ Eileen I. McKillop_*
Eileen I. McKillop, WSBA 21602

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on this day, I served a true and correct copy of Respondent MJD Properties, LLC's Answer to Petition for Review on the following:

Washington Supreme Court Temple of Justice PO Box 40929 Olympia, WA 98504	☑by **Efiling Portal** ☐by **Electronic Mail** ☐by **First Class Mail** ☐by **Hand Delivery** ☐by **Overnight Del.**
Jeffrey Haley 5220 Butterworth Road Mercer Island, WA 98040 T: 206-919-1798 Email: jeff@haley.net	☑by **Efiling Portal** ☐by **Electronic Mail** ☐by **First Class Mail** ☐by **Hand Delivery** ☐by **Overnight Del.**
Gregory M. Miller, WSBA #14459 John R. Welch, WSBA 26649 Carney Badley Spellman, P.S. 701 Fifth Avenue, Suite 3600 Seattle, WA 98104 T: 206-622-8020 Email: miller@carneylaw.com welch@carlenlaw.com	☑by **Efiling Portal** ☐by **Electronic Mail** ☐by **First Class Mail** ☐by **Hand Delivery** ☐by **Overnight Del.**

Signed at Seattle, Washington this 13th day of July, 2023.

/s/ Eileen I. McKillop
Eileen I. McKillop, WSBA 21602

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Respectfully submitted,

By: *__/s/ Eileen I. McKillop__*
Eileen I. McKillop, WSBA 21602
Attorneys for Appellants MJD Properties, LLC, and John Pugh

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Jeffrey Haley 5220 Butterworth Road Mercer Island, WA 98040 T: 206-919-1798 Email: jeff@haley.net	☑by **Efiling Portal** ☐by **Electronic Mail** ☐by **First Class Mail** ☐by **Hand Delivery** ☐by **Overnight Del.**
Gregory M. Miller, WSBA #14459 John R. Welch, WSBA 26649 Carney Badley Spellman, P.S. 701 Fifth Avenue, Suite 3600 Seattle, WA 98104 T: 206-622-8020 Email: miller@carneylaw.com welch@carlenlaw.com	☑by **Efiling Portal** ☐by **Electronic Mail** ☐by **First Class Mail** ☐by **Hand Delivery** ☐by **Overnight Del.**

Signed at Seattle, Washington this 13th day of July, 2023.

/s/ Eileen I. McKillop
Eileen I. McKillop, WSBA 21602

APPENDIX A

No. 846035

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

MJD PROPERTIES, LLC, a Washington limited liability company, and JOHN PUGH, an individual,

Appellants.

v.

JEFFREY HALEY, an individual

Respondent.

APPELLANT MJD PROPERTIES, LLC'S EMERGENCY RULE 8.1(b)(3) MOTION FOR STAY OF ENFORCEMENT OF TRIAL COURT DECISION

Eileen I. McKillop, WSBA 21602
SELMAN BREITMAN, LLP
600 University Street, Suite 2305
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Attorneys for Appellants MJD Properties, LLC. and John Pugh

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A. IDENTITY OF APPELLANT

Appellant MJD Properties, LLC ("MJD") respectfully asks this Court for an order, pursuant to Rules of Appellate Procedure 8.1(a)(3), staying the enforcement of the trial court's Decision and Judgment Re: Arborvitae Trees entered on October 19, 2020 pending appeal. Appellant MJD and Respondent Jeffrey Haley ("Haley") are neighbors who share a common property line. The issue in this case involves the competing rights of adjoining landowners Haley and MJD to twenty-two arborvitae trees, four of which are located solely on MJD's property, and seventeen of which are located on the common property line between Haley's Lot B and MJD's Lot C. The trial court ruled that all twenty-two arborvitae trees, including the four arborvitae trees located solely on MJD's property, "*shall* be topped uniformly together and then maintained at a height that protects the privacy of each party" and that "the cost of the trimming cost and maintaining the height of the arborvitae trees *shall* be equally borne by both Lot B and Lot C." Appellant

MJD asserts that the trial court's decision contravenes established Washington law on the rights and duties of a cotenant of common property, sanctions a timber trespass by Haley of MJD's arborvitae trees located solely on its property, and violates MJD's property rights as a tenant in common in the common boundary trees.

Despite MJD posting a cash supersedeas bond on October 20, 2022, which stayed the Court's decision and final judgment regarding the arborvitae trees under RAP 8.1(b)(2), on October 27, 2022, Respondent Jeffrey Haley notified MJD that he plans to have all twenty-two arborvitae trees topped on November 4, 2022, without MJD's consent, and submitted an estimate for this work. An emergency order staying the Court's decision and final judgment pending appeal is necessary to prevent Jeffrey Haley from topping all of the arborvitae trees which unjustifiably deprives MJD of its property rights and will cause irreparable injury to all twenty-two arborvitae trees.

B. COPIES OF PARTS OF THE RECORD RELEVANT TO THIS MOTION

Appellant MJD respectfully requests an emergency stay of the trial court's Findings of Fact and Conclusion of Law and Final Judgment RE: Arborvitae Trees entered on October 19, 2022. (See Appendix A). The Court found that four (4) arborvitae trees labeled A, B, C and D on BBA Land Surveyor's survey are located entirely on MJD's Lot C. The Court also found that the other seventeen (17) arborvitae trees labeled E through V on the same survey are located on the common boundary line and are commonly owned by MJD and Haley. However, the Court ruled that although the four arborvitae trees labeled A, B, C and D and located solely on MJD's property, all twenty-two arborvitae trees "form a single inseparable common unit barrier between Lot B and Lot C", and that all twenty-two (22) arborvitae trees labeled A through V "*shall* be topped uniformly together and then maintained at a height that protects the privacy of each party." The Court also ruled that MJD shall pay 1/2 of the costs of Jeffrey

Haley's topping all twenty-two arborvitae trees and the cost to maintain the height of all twenty-two arborvitae trees.

Even before the Court had even filed its Final Judgment Re: Arborvitae Trees, on October 3, 2022 Jeffrey Haley began threatening John Pugh, member of MJD, stating that on October 13, 2022, he was having the tops of all twenty-two arborvitae trees cut to a height 8 inches above his deck railing, including the four arborvitae trees located solely on MJD's property. (See Appendix B). After MJD's counsel threatened sanctions because no final judgment had even been entered, on October 5, 2022, Haley's counsel reassured MJD's counsel that Haley will not be moving forward with his proposed plan to top all of the arborvitae trees on October 13, 2022. Id.

On October 19, 2020, the trial court entered its Findings of Fact and Conclusions of Law and Final Judgment Re: Arborvitae Trees. (See Appendix A). On October 20, 2022, MJD filed and served a Notice of Appeal of the Court's Decision and Final Judgment Re: Arborvitae Trees. (See Appendix C).

On this same date, October 20, 2022, MJD filed and served a Notice of Posting Cash Deposit Bond and Stay of Execution of Court's Decision and Final Judgment Re: Arborvitae Trees. (See Appendix D).

Despite MJD posting of a cash supersedeas bond which stays the trial court's decision Re: Arborvitaes under RAP 8.1(b)(2), on October 27, 2022, Respondent Jeffrey Haley again threatened John Pugh stating that he has scheduled Jose Brito to top the "hedge" on Friday, November 4, 2022, and produced an estimate dated October 27, 2022 from Jose Brito, who is an unlicensed and uninsured contractor, in the amount of $2,100 to top all of the arborvitae trees "to the highest of the 15 ft tall all across". (Appendix E). MJD has not consented to Haley's topping of any of the arborvitae trees or Haley's worker trespassing on its property. Unless this Court orders a stay of the trial court's decision pending appeal, there is no doubt that Haley will cut several feet off the tops of MJD's four arborvitae trees and the seventeen common boundary arborvitae trees. Haley is

willing to commit timber trespass because the cost of any treble damages is minimal compared to the view he will gain by topping all of the arborvitae trees. In 2015, Haley was found liable for timber trespass for chopping several feet off MJD's weeping copper beech tree to gain a view. *MJD Properties v. Haley*, 189 Wn. App. 963, 358 P.3d 476 (2015). Unless this Court issues an emergency order staying the trial court's decision pending appeal, Haley will again commit timber trespass on November 4, 2022 and top all of the arborvitae trees to gain a view.

C. STATEMENT OF GROUNDS FOR RELIEF SOUGHT AND LEGAL ARGUMENT

1. The Trial Court's Decision Should be Stayed under RAP 8.1(b)(2) and RAP 8.1(b)(3).

Stay of enforcement of judgments pending appeal is governed by RAP 8.1(b). A judgment is stayed under RAP 8.1 by following its mandatory procedures, including the posting of a bond. RAP 8.1(b); *Lampson Universal Rigging, Inc. v. Washington Pub. Power Supply Sys.*, 105 Wn.2d 376, 378–79,

715 P.2d 1131 (1986). RAP 8.1(b)(2) gives a party the right to stay enforcement of a judgment affecting right to possession, ownership, or use of real property, or tangible personal property, as a matter of right by a bond, cash, or an alternative security filed with the trial court.

A party may object to the sufficiency of the bond amount by filing a motion in the trial court. RAP 8.1(d). The party must file and serve the motion objecting to the sufficiency of the bond within seven days after being served with a copy of the bond and any supporting affidavits. Id. Haley did not file or serve MJD with a motion objecting to the sufficiency of the bond within seven days after being served with a copy of the bond on October 20, 2022.

MJD has complied with the mandatory procedural requirements of RAP 8.1(b)(2), including posting of bond. RAP 8.1(b)(2) states that upon the filing of a supersedeas bond, cash, or other security, enforcement of a trial court decision against the party furnishing the bond, cash or other security is stayed. MJD

is entitled to a stay as a matter of right pending appeal under RAP 8.1(b)(2) upon filing of the cash bond. Moreover, if enforcement has been stayed but the judgment creditor nevertheless seeks to enforce the judgment while an appeal is pending, the enforcement proceedings may be set aside.

Furthermore, as to the four arborvitae trees located solely on MJD's property, staying the trial court's decision does not affect Haley's loss of use of his land or property, but rather only affects MJD's loss of use of its four arborvitae trees located solely on its property. As to the seventeen common boundary arborvitae trees, MJD and Haley are common owners of these trees, and staying the trial court's decision will only affect MJD's percentage ownership of the seventeen arborvitae trees growing on MJD's property. Because the overwhelming majority of the seventeen arborvitae trees' trunks are located on MJD's side of the property line, the trial court's decision allowing Haley to top these seventeen arborvitae trees interferes with MJD's rights to use, maintain and possess these seventeen commonly owned

trees. Haley unquestionably has the right to trim any branches that encroach over his property line, but not in a manner that will kill the tree. *Herring v. Pelayo*, 198 Wn. App. 828, 838-39, 397 P.3d 125 (2017).

Additionally, because this case involves equitable relief ordered by the trial court, this court has authority to stay enforcement of the trial court's decision upon such terms as are just. RAP 8.1(b)(3). In evaluating whether to stay enforcement of such a decision, the appellate court will (i) consider whether the moving party can demonstrate that debatable issues are presented on appeal and (ii) compare the injury that would be suffered by the moving party if stay were not imposed with the injury that would be suffered by the nonmoving party if a stay was imposed. *Id.*

2. *The Trial Court's Decision Directly Contravenes Established Washington Law on the Rights of Adjoining Landowners to Trees on a Neighbor's Property and Trees That are on the Common Boundary Line.*

It is long been established in this State that when a tree stands on a common property line, it is the common property of both parties and trespass will lie if one cuts or destroys it without the consent of the other. *Herring v. Pelayo*, 198 Wn. App. 828, 835, 397 P.3d 125 (2017). Here, MJD has an interest in the seventeen common boundary arborvitae trees proportionate to the percentage of their trunks growing on MJD's property. *Happy Bunch, LLC v. Grandview N., LLC*, 142 Wn. App. 81, 93, 173 P.3d 959, 965 (2007) ("The trees being owned in common, the trial court correctly ruled that Grandview had an interest in the trees proportionate to the percentage of their trunks growing on Grandview's property.") Here, because the seventeen arborvitae trees stand on the common property line, both MJD and Haley have undivided property interests in these trees. *Herring v. Pelavo*, 198 Wn. App. 828, 837, 397 P.3d 125 (2017). As tenants in common, both MJD and Haley are entitled to use, maintain, and possess the seventeen boundary trees, but not in a manner that "interferes with the coequal rights of the other

cotenants." *Id.* (citing *Butler v. Craft Eng. Const. Co., Inc.*, 67 Wn. App. 684, 694, 843 P.2d 1071 (1992). Under Washington law, where a tree stands on a common property line, the common owners of the tree may only trim vegetation overhanging their property but not in a manner that the common owner knows will kill the tree. *Herring*, 198 Wn. App. At 838-839, 397 P.3d 125 (2017).

In this case, the trial court ruled that Haley may top all seventeen of the common boundary trees. In addition to contravening established law regarding the duties owed to a cotenant of common property, the trial court's decision gives a co-tenant the unfettered right to cut the portions of a common boundary tree that stand on their neighbor's property, without any regard for their neighbor's consent, and renders the timber trespass statute inapplicable to neighbors sharing a common boundary tree. The trial court's decision has created an entirely new theory of the duty of a co-tenant of a common boundary tree

under Washington law, and sanctions a trespass of the common owner's interest in the tree.

The trial court's decision is even more egregious with respect to the four arborvitae trees that are located entirely on MJD's property. The trial court's decision sanctions a trespass by ruling that Haley has an unfettered right to top the four arborvitae trees located entirely on MJD's property. Under Washington law, a landowner has the legal authority to engage in self-help and trim the branches and roots of a neighbor's trees that overhang his or her property line. *Mustoe v. Ma*, 193 Wn. App. 161, 164, 371 P.3d 544 (2016). On the other hand, a landowner does not have the legal authority to top or cut down a neighbor's tree. *Gostina v. Ryland*, 116 Wn. 228, 234-36, 199 P. 298 (1921). Haley has a right to trim any portion of the four arborvitae trees that overhang the boundary line of his property. He is not permitted, however, to top or cut the trees, nor is he entitled to cross MJD's property line to trim the overhanging branches of his property. *Milner v. Carpenter Grp., LLC.*, 14 Wn. App. 2d

1063 (2020). The trial court's ruling contravenes Washington's law and actually sanctions a trespass on MJD's property.

3. *The Injury that MJD Will Suffer if a Stay is Not Imposed Far Outweighs Any Injury that Jeffrey Haley May Suffer.*

Jeffrey Haley has indicated that he has no intention on complying with the stay imposed under RAP 8.1(b)(2). Unless this Court grants an emergency stay and orders Jeffrey Haley to comply with the stay pending appeal, then Haley will cut several feet off the tops of all twenty-two arborvitae trees on November 4, 2022, which clearly violates MJD's property rights. Haley has previously found liable for timber trespass for topping several feet off MJD's weeping copper beach tree to gain a view. See *MJD Properties, LLC v. Haley*, 189 Wn. App. 963, 358 P.3d 476 (2015). Jeffrey Haley has no intention on complying with the stay. The minimum treble damages for MJD's interest in the trees proportionate to the percentage of their trunks growing on MJD's property, is nothing compared to the view that Haley will gain for years. The only party that will suffer any injury is MJD,

because Haley intends to cut and top all twenty-two arborvitae trees, including the four trees located solely on MJD's property, and MJD's proportionate share of the seventeen common boundary trees. Once Haley has topped these arborvitae trees, the damage will be permanent. These beautiful trees have been growing for over thirty years and simply cannot be replaced.

D. CONCLUSION

This Court should grant an emergency stay of the trial court's decision regarding the arborvitae trees, and order that Jeffrey Haley shall not top any of the arborvitae trees pending appeal and until a mandate has been issued.

DATED this 1st day of November, 2022.

Respectfully submitted,

SELMAN BREITMAN, LLP

By: */s/ Eileen I. McKillop*
Eileen I. McKillop, WSBA 21602
Attorneys for Appellants MJD Properties, LLC and John Pugh

No. 846035

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

MJD PROPERTIES, LLC, a Washington limited liability company; JOHN PUGH, an individual

Appellants,

v.

JEFFREY HALEY., an individual,

Respondent,

APPELLANT MJD PROPERTIES, LLC'S APPENDIX IN SUPPORT OF EMERGENCY RULE 8.1(b)(3) MOTION FOR STAY

Eileen I. McKillop, WSBA 21602
SELMAN BREITMAN, LLP
600 University Street, Suite 2305
Seattle, WA 98101-4129
Tel: 206-447-6461
Fax: 206-588-4185
emckillop@selmanlaw.com

Attorneys for Appellants MJD Properties, LLC and John Pugh

APPENDIX TABLE OF CONTENTS

Respectfully submitted,

By: *__/s/ Eileen I. McKillop__*
Eileen I. McKillop, WSBA 21602
Attorneys for Appellants MJD Properties, LLC and John Pugh

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on this day, I served a true and correct copy of Appellant MJD Properties, LLC's Emergency Rule 8.1(a)(3) Motion for Stay of Enforcement of Trial Court Decision on the following:

Washington State Court of Appeals, Division I One Union Square 600 University Street Seattle, WA 98101-1176	☑by **Efiling Portal** ☐by **Electronic Mail** ☐by **First Class Mail** ☐by **Hand Delivery** ☐by **Overnight Del.**
Attorneys for Respondent Jeffrey Haley John K. Welch, WSBA #26649 CARNEY BADLEY SPELLMAN, P.S. 701 Fifth Avenue, Suite 3600 Seattle, WA 98104 T: 206-622-8020 Email: welch@carneylaw.com	☑by **Efiling Portal** ☐by **Electronic Mail** ☐by **First Class Mail** ☐by **Hand Delivery** ☐by **Overnight Del.**

Signed at Seattle, Washington this 1st day of November, 2022.

/s/ Eileen I. McKillop
Eileen I. McKillop, WSBA 21602
E-mail: emckillop@selmanlaw.com

APPENDIX D

FILED
KING COUNTY, WASHINGTON

OCT 20 2022

SUPERIOR COURT CLERK

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
COUNTY OF KING

Haley Vs MJD Properties	NO: 21-2-06424-4SEA CASH BOND ($BR) Amount: $2,000.00

PERSON POSTING BOND PLEASE READ:

The bond may be exonerated and returned only upon Court order. You or an attorney must prepare the order and present it to the Court. If you are the bond payer, your name must be indicated on the order as the recipient of the bond money. The Court may order court costs or fees to be paid from bond proceeds. A $10.00 Trust Account Service fee will be deducted from the bond amount upon return.

PERSON POSTING BOND MONEY: (***Please print***)

Name ~~Eitan Hertz, Esq.~~ Selman Breitman

Address 600 University St Suite 2305

City / State / Zipcode: ~~Seattle~~ WA 98101

Signature: Messenger

L:\forms\cashiers\cash bonds

FILED
2022 OCT 20 11:05 AM
KING COUNTY
SUPERIOR COURT CLERK
E-FILED
CASE #: 21-2-06424-4 SEA

THE HONORABLE SAMUEL S. CHUNG

SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN THE COUNTY OF KING

JEFFREY HALEY,

Plaintiff/Counter-Defendant,

v.

MJD PROPERTIES, LLC, a Washington limited liability company; and JOHN PUGH, an individual,

Defendants/Counter-Plaintiffs.

No. 21-2-06424-4 SEA

NOTICE OF POSTING CASH DEPOSIT BOND AND STAY OF EXECUTION OF COURT'S DECISION AND FINAL JUDGMENT RE: ARBORVITAE TREES

Defendants/Counter-Plaintiffs MJD Properties, LLC and John Pugh (collectively "MJD") hereby notify all parties that pursuant to RAP 8.1(b)(2), on October 20, 2022, MJD filed a Notice of Appeal with the State of Washington Court of Appeals, Division I and deposited a $2,000.00 cash bond in the form of a cashier's check with the King County Superior Court Clerk to stay enforcement of the Court's Decisions and Findings of Fact and Conclusions of Law and Final Judgment Re: Arborvitaes.

A true and correct copy of the $2,000.00 cashier's check is attached hereto as Exhibit A.

DATED this 20th day of October, 2022.

SELMAN BREITMAN, LLP

By: */s Eileen I. McKillop*
Eileen I. McKillop, WSBA 21602
Attorneys for Defendants/Counter-Plaintiffs MJD Properties, LLC and John Pugh

SELMAN BREITMAN LLP
600 University Street, Suite 2315
Seattle, WA 98101-4129
206-812-0222

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury of the laws of the State of Washington that on the following date, I caused to be served a copy of the attached document to the following person(s) in the manner indicated below at the following address(es):

John R. Welch, WSBA 26649 Carney Bradley Spellman, P.S. 701 Fifth Avenue, Suite 3600 Seattle, WA 98101 Telephone: (425) 941-6887 Email: Kerry@pillar-law.com *Attorneys for Plaintiff*	☑ by CM/ECF ☑ by Electronic Mail ☐ by Facsimile Transmission ☐ by First Class Mail ☐ by Hand Delivery ☐ by Overnight Delivery

Signed at Seattle, Washington this 20th day of October, 2022.

/s/ Rhonda Faye Hodge
Rhonda Faye Hodge

SELMAN BREITMAN LLP
600 University Street, Suite 2305
Seattle, WA 98101-4129
206-812-0222

EXHIBIT A

VERIFY THE AUTHENTICITY OF THIS MULTI-TONE SECURITY DOCUMENT. CHECK BACKGROUND AREA CHANGES COLOR GRADUALLY FROM TOP TO BOTTOM

OFFICIAL CHECK

090107040 62-20/311

177 - Mercer Island
Mercer Island, Washington

Date 10/19/2022

Remitter JOHN F PUGH

$ 2,000.00 ***

Pay To The Order Of KING COUNTY SUPERIOR COURT CLERK

Pay: TWO THOUSAND DOLLARS AND 00 CENTS

Drawer: KeyBank

Issued by: Citibank N.A. One Penn's Way, New Castle, DE 19720
For information about this instrument, call: 1-888-556-5142

AUTHORIZED SIGNATURE

Memo: CAUSE NO. 21-2-06424-4SEA

⑈090107040⑈ ⑆031100209⑆ 38774212⑈

APPENDIX E

Eileen I. McKillop

Subject: FW: Hedge trimming

From: jeff@haley.net
Date: October 27, 2022 at 11:33:09 PM EDT
To: "John F. Pugh" <john@marinehardware.com>
Cc: Carol Glass <carol.glass@gmail.com>
Subject: RE: Hedge trimming

John:

I have scheduled Jose Brito to top the hedge and clean up all trimmings on Friday November 4. His estimate for this work is $2100, copy attached.

If you would rather use another crew, that is ok with me provided my share of the cost is not more than $1050 and that crew can do the work on Friday November 4.

If you want to delay this work until after the appeal, you can post a supersedeas bond in the amount I have requested, $20,000, or you can try to persuade the court set a different amount. If no approved bond is posted by November 3, the topping will proceed on November 4.

Jeff Haley
5220 Butterworth Rd
Mercer Island WA 98040
Cell 206 919 1798

From: jeff@haley.net <jeff@haley.net>
Sent: Thursday, September 29, 2022 9:33 AM
To: 'John F. Pugh' <john@marinehardware.com>
Cc: 'Carol Glass' <carol.glass@gmail.com>
Subject: RE: Hedge trimming

John:

The court order states that all of the trees ("A through V") may be trimmed or topped.
Are you saying that you will not cooperate to allow trees A-D to be topped along with the rest?

Jeff

From: John F. Pugh <john@marinehardware.com>
Sent: Wednesday, September 28, 2022 11:28 PM
To: jeff@haley.net
Cc: Carol Glass <carol.glass@gmail.com>; Eileen McKillop <emckillop@selmanlaw.com>
Subject: Re: Hedge trimming

Jeff

Jose Brito

5022 ne 24 st renton wa 98059
206 9450458
Britmvictor@gmail.com
britmvictor@gmail.com

ESTIMATE
EST0219

DATE
10/27/2022

TOTAL
USD $2,100.00

TO

Jeff Haley

5220 butterworth rd Mercer Island wa 98040
+1 206-919-1798
jeff@haley.net

DESCRIPTION	RATE	QTY	AMOUNT
Trees Trimming work. Trimming arborvitae alongside property line. 1= trees will be trimmed to the highest of the 15ft tall all across. 2= will be getting and walking on both sides of the property line, your property and neighbor property to have work completed and cleaned up all debris from work process. 3=we will need neighbor consent to be able to getting in and out from work area . 4= all debris collected from work process will be hauled away.	$2,100.00	1	$2,100.00

SUBTOTAL	$2,100.00
TAX (0%)	$0.00
TOTAL	USD $2,100.00

APPENDIX B

FILED
11/3/2022
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

JEFFREY HALEY,

Respondent,

v.

MJD PROPERTIES, LLC, a Washington limited liability company; and JOHN PUGH, an individual,

Appellants.

No. 84603-5-I

COMMISSIONER'S RULING GRANTING EMERGENCY MOTION TO STAY IN PART

This case involves a boundary dispute. The parties who own neighboring properties on Mercer Island dispute their rights regarding the arborvitae trees located along their boundary. Defendants MJD Properties, LLC and its member John Pugh (collectively MJD) appeal from the findings of fact, conclusions of law, and final judgment regarding the arborvitae trees entered after a five-day trial on October 19, 2022. MJD seeks an emergency stay of the trial court's decision pending review. The trial court balanced plaintiff Jeffrey Haley's right to enjoy the sunlight and grow vegetables affected by the trees against MJD's privacy interests in shielding its house from Haley's view. The court ordered that the trees be topped and maintained at a uniform height along the entire tree line, no lower than needed to "shield a person standing on MJD's driveway . . . from being seen from Mr. Haley's second floor living areas including the second floor balcony/deck." The court ordered the parties to equally bear the costs of trimming and maintaining the height of the trees.

MJD requests a stay under RAP 8.1(b)(2) and (b)(3). Under the former, a party may stay enforcement of "a decision affecting rights to possession, ownership or use of real property, or of tangible personal property, or of intangible personal property, by filing in the trial court a supersedeas bond or cash, or by alternate security approved by the trial court[.]" RAP 8.1(b)(2). The supersedeas amount for a stay of such a decision "*shall* be the amount of any money judgment, *plus* interest likely to accrue during the pendency of the appeal *and* attorney fees, costs and expenses likely to be awarded on appeal entered by the trial court *plus* the amount of the loss which the prevailing party in the trial court would incur as a result of the party's inability to enforce the judgment during review." RAP 8.1(c)(2) (emphasis added).

On October 20, 2022, MJD deposited a $2,000 cash bond in the trial court to stay the trial court's decision regarding the arborvitae trees. MJD argues because it filed a cash bond, it is entitled to a stay under RAP 8.1(b)(2). But it appears Haley filed a response challenging the amount of the bond.

A party may object to the amount of a supersedeas bond by filing a motion in the trial court within seven days after service of a copy of the bond. RAP 8.1(e). If the trial court determines that the amount of the bond is inadequate, "stay of enforcement of the trial court decision may be preserved only by furnishing a proper bond or supplemental bond or cash within 7 days after the entry of the order declaring the supersedeas deficient." RAP 8.1(e). Afterwards, a party may object to the trial court's supersedeas decision by filing a motion in the appellate court. RAP 8.1(h).

MJD argues Haley "did not file or serve MJD with a motion objecting to the sufficiency of the bond within seven days after being served with a copy of the bond on

October 20, 2022." Emergency Motion at 7. But Haley, appearing pro se in this Court, states he filed a response challenging the amount of the bond and electronically served his response on MJD within seven days. In reply, MJD states its counsel was not served with such response. The trial court docket indicates the filing of Haley's response to MJD's supersedeas bond with a supporting declaration on October 25, 2022. There appears to be a dispute regarding the service, but the trial court has yet to rule on the timeliness of Haley's response or the appropriate supersedeas amount.

MJD argues because the trial court granted equitable relief, this Court may stay enforcement of the decision under RAP 8.1(b)(3). MJD argues the trial court's decision does not affect Haley's loss of use of his land or property but only affects MJD's loss of use of its four trees located solely on its property. But the decision appears to affect the parties' rights regarding the use of their property, including the arborvitae trees. MJD's contrary argument appears to touch on the merits of this appeal.

RAP 8.1(b)(3) allows the appellate court to stay enforcement of a trial court decision "in *other* civil cases, including cases involving equitable relief ordered by the trial court, . . . upon such terms as are just." RAP 8.1(b)(3) (emphasis added). Under this rule, this Court may stay a trial court decision pending review if the party requesting relief shows (1) that its appeal raises a debatable issue and (2) that the harm without a stay outweighs the harm resulting from it. In balancing the parties' harm, this Court considers whether the requested relief is necessary to maintain the status quo and preserve the fruits of a successful appeal in light of the equities of the situation. See Purser v. Rahm, 104 Wn.2d 159, 177, 702 P.2d 1196 (1985). A stay under RAP 8.1(b)(3) ordinarily requires a supersedeas bond or cash. See RAP 8.1(b)(3) ("The

appellate court ordinarily will condition such relief from enforcement of the trial court decision on the furnishing of a supersedeas bond, cash or other security.").

As Haley's response to MJD's supersedeas bond amount is pending in the trial court, it makes sense for that court (not this Court) to determine in the first instance whether the response is timely and, if not, whether the time limit should be waived and whether MJD's $2,000 bond is adequate to stay the decision regarding the arborvitae trees. The trial court's supersedeas decision is subject to review under RAP 8.1(h).

Although the trial court has yet to rule on his response, Haley has threatened to top the trees on November 4, 2022 without MJD's consent. In his October 27, 2022 email to MJD, Haley stated he had scheduled a person to "top the hedge and clean up all trimmings on Friday November 4" for $2,100. Haley stated:

> If you want to delay this work until after the appeal, you can post a supersedeas bond in the amount I have requested, $20,000, or you can try to persuade the court set a different amount. If no approved bond is posted by November 3, the topping will proceed on November 4.

Emphasis added. Haley's attempt to enforce the trial court's decision is inappropriate and premature when MJD has posted a supersedeas bond, and the trial court has yet to rule on his response regarding the amount of the bond. If the supersedeas amount is appropriate, MJD is entitled to a stay under RAP 8.1(b)(2).

MJD argues once the trees are topped, the damage will have been done and cannot be undone. MJD states the trees have been growing for over 30 years. On the other hand, Haley asserts interests in maintaining the hedge at a reasonable height so his vegetable and flower gardens will not be excessively shaded. Balancing the parties' competing interests, I conclude a temporary stay is appropriate to maintain the status

quo while the trial court rules on Haley's response regarding the supersedeas.

MJD's emergency motion is granted in part as follows. A temporary stay of the trial court's decision regarding the arborvitae trees shall remain in effect until the trial court rules on Haley's response challenging the amount of the supersedeas bond posted by MJD. If the trial court rules in Haley's favor, and MJD wishes to challenge the supersedeas decision under RAP 8.1(h), MJD may file a motion under RAP 8.1(h) in this Court within seven days of the decision. Unless a RAP 8.1(h) motion is filed within seven days of the trial court's decision, the stay will be lifted at the end of the seventh day, without further notice of this Court. If the seventh day falls on a Saturday, Sunday, or Washington State holiday, the motion may be filed on the next day, which is not a Saturday, Sunday, or Washington State holiday. If such a motion is filed, the stay will remain in effect pending this Court's ruling on the motion.

Masako Hayama, Commissioner

APPENDIX C

FILED
2022 NOV 21
KING COUNTY
SUPERIOR COURT CLERK

CASE #: 21-2-06424-4 SEA

SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN THE COUNTY OF KING

JEFFREY HALEY, Plaintiff/Counter Defendant, v. MJD PROPERTIES, LLC, a Washington limited liability company; and JOHN PUGH, an individual, Defendants/Counter-Plaintiffs.	No. 21-2-06424-4SEA ORDER ON PLAINTIFF JEFFREY HALEY'S RESPONSE TO DEFENDANT MJD PROPERTIES, LLC'S PROPOSED SUPERSEDEAS BOND AMOUNT AND DEFENDANT'S MOTION TO STRIKE

THIS MATTER, having come before the Court upon Plaintiff Jeffrey Haley's Response by Judgment Creditor to Proposed Supersedeas Bond Amount and Defendant MJD Properties, LLC's Motions to Strike, and the court having considered the following records and files, it is hereby ORDERED, ADJUDGED AND DECREED that:

1. Defendant MJD Properties, LLC's Motion to Strike Plaintiff Jeffrey Haley's Response and Declaration as untimely and because it fails to comply with RAP 8.1(e) is DENIED.

2. However, the Court denies Haley's Response requesting that the Court increase the amount of MJD Properties, LLC's cash supersedeas bond to $20,000. Plaintiff has not met his burden of establishing any loss of use of any property during review. Plaintiff simply stating that the productivity and beauty of his gardens will be reduced by lack of sunlight pending review is

ORIGINAL

SELMAN BREITMAN LLP
[illegible] Street, Suite 2305
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206.[illegible]-0222

not supported by the evidence. Plaintiff continues to maintain his gardens in the same manner he has done for over 10 plus years, and these same arborvitae trees have been at least 20 feet in height since at least 2012. The Court finds that a supersedeas bond of $2,000 is reasonable to secure any potential loss of use damages in the event MJD Properties, LLC does not prevail on appeal.

DATED this 21st day of November, 2022.

The Honorable Samuel Chung

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206-812-0222

APPENDIX D

No. 846035

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

MJD PROPERTIES, LLC, a Washington limited liability company, and JOHN PUGH, an individual,

Appellants.

v.

JEFFREY HALEY, an individual

Respondent,

APPELLANT MJD PROPERTIES, LLC'S MOTION FOR AN EMERGENCY INJUNCTION AGAINST RESPONDENT JEFFREY HALEY

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Attorneys for Appellants MJD Properties, LLC, and John Pugh

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A. IDENTITY OF APPELLANT

Appellant MJD Properties, LLC ("MJD") respectfully asks this Court for an emergency order against Respondent Jeffrey Haley ("Haley"). The reason for this emergency motion is because on June 10, 2023, Haley threatened to cut the roots of all twenty-two arborvitae trees, which he knows will kill every plant. Haley's June 10, 2023 e-mail to John Pugh, President of MJD, states that unless he agrees to top all twenty-two arborvitae trees to 13 feet, Haley intends to cut the roots and branches of all twenty-two arborvitae trees which he admits "will surely kill every plant on the hedge."

The stay under RAP 8.1(b)(2) remains in place because this Court has not yet issued a mandate. Moreover, under Washington law, where a tree stands on a common property line, the common owners of the tree may only trim vegetation overhanging their property ***but not in a manner that the common owner knowns will kill the tree***. *Herring v. Pelavo*, 198 Wn. App. 828, 838-839, 397 P.3d 125 (2017).

Haley's threats to immediately cut the roots of all the arborvitae trees which he knows will kill the trees is a violation of the stay and also violates Washington law. Haley has no intention of complying with the stay, this Court's decision, or Washington law, and since he has no right to top the arborvitae trees to gain a view, he now intends to cut the roots of the arborvitae trees to kill every plant of the hedge. This Court should issue an order enforcing the stay pending appeal, and order that Haley may not cut the roots of any of the arborvitae trees, which he knows will kill the trees.

B. COPIES OF PARTS OF THE RECORD RELEVANT TO THIS MOTION

On October 20, 2022, MJD filed a Notice of Appeal of the trial court's decision regarding the arborvitae trees and deposited a $2,000.00 cash bond in the form of a cashier's check with the King County Superior Court Clerk to stay enforcement of the trial Court's decision and findings of fact and conclusions of law and final judgment Re: Arborvitaes. (See Attachment A).

On November 1, 2022, MJD filed in this Court an Emergency Rule 8.1(b)(3) Motion for Stay of Enforcement of Trial Court Decision. Despite MJD posting a cash supersedeas bond on October 20, 2022, Respondent Haley threatened to top all twenty-two arborvitae trees on November 4, 2022, without MJD's consent. (See Appendix B). MJD argued that once Haley has topped these arborvitae trees, the damage will be permanent.

On November 3, 2022, Commissioner Maseko Kanazawa issued a ruling Granting MJD's Emergency Motion to Stay in Part. The Commissioner granted a temporary stay of the trial court's decision regarding the arborvitae trees until the trial court rules on Haley's response challenging the amount of the supersedeas bond posted by MJD.

On November 21, 2022, the trial court issued its order denying Haley's request that the Court increase the amount of MJD's cash supersedeas bond, finding that the $2,000 supersedeas bond is reasonable to secure any potential loss of use

damages in the event MJD Properties, LLC does not prevail on appeal. (See Attachment C).

On April 24, 2023, this Court entered its unpublished opinion finding that Haley's counterclaims related to the arborvitae trees were fully litigated in the 2012 lawsuit and are barred by claim preclusion. This Court reversed the trial court's Final Order related to the arborvitae trees entered on September 20, 2022 and additional findings of fact and conclusions of law and Final Judgment entered on October 18, 2022, and remanded for dismissal of Haley's claims for declaratory judgment.

On May 15, 2023, Haley filed a Motion for Reconsideration of the Court's decision filed on April 24, 2023. On June 7, 2023, this Court issued its Order Denying Motion for Reconsideration. The thirty-day deadline for Haley to file a petition for review to the Supreme Court under RAP 13.4(a) is not until July 7, 2023.

On June 10, 2023, Haley sent an e-mail to John Pugh, President of MJD, again threatening MJD that unless it promptly

agrees to top all twenty-two arborvitae trees to 13 feet, he intends to cut the roots and branches of all twenty-two arborvitaes which he admits "will surely kill every plant of the hedge." (See Attachment D). Since a mandate has not been issued by this Court, MJD's stay under RAP 8.1(b)(2) remains in effect. Furthermore, Haley's threats to kill all twenty-two arborvitae trees is improper and violates Washington law. Haley should be enjoined from taking any action, including cutting the roots of the arborvitae trees, which he knows will kill the trees.

C. STATEMENT OF GROUNDS FOR RELIEF SOUGHT AND LEGAL ARGUMENT

This court has authority to stay enforcement of the trial court's decision upon such terms as are just. RAP 8.1(b)(3).

1. The Court should Enforce the Stay Under RAP 8.1(b)(2).

A supersedeas bond is a means of staying enforcement of a trial court judgment while on appeal. RAP 8.1. Thus, when a supersedeas bond is filed, the decision or judgment cannot be enforced. The supersedeas bond is intended to preserve the

"status quo between the parties." *Murphree v. Rawlings*, 3 Wn. App. 880, 882, 479 P.2d 139 (1970). After a party timely appeals and files, a supersedeas bond, the judgment is stayed and cannot be enforced until the appeal is resolved. *Guest v. Lange*, 195 Wn. App. 330, 338, 381 P.3d 130 (2016).

Here, MJD filed a supersedeas cash bond which stayed the trial court's decision under RAP 8.1(b)(2). This Court reversed the trial court's "Final Order" and its additional findings of fact and conclusions of law relating to the arborvitae trees and remanded the case for dismissal of Haley's claims for declaratory judgment. However, Haley filed a motion for reconsideration, which was denied on June 7, 2023. Under RAP 13.4, Haley has until July 7, 2023 to file a Petition for Review to the Supreme Court. Thus, this Court's opinion will not become final unless, in accordance with RAP 13.4, Haley files a petition for review by July 7, 2023.

Until a mandate is issued under RAP 12.5, this Court's opinion is not final. However, the stay under RAP 8.1(b)(2) is

still in effect. If Haley is allowed to cut the roots of the arborvitae trees, he will surely kill every tree and the damage cannot be undone. This Court should issue an order enjoining Haley from taking any action, including cutting the roots of the arborvitae trees, which will surely kill every arborvitae tree.

2. *Haley's Threats to Kill the Arborvitae Trees Violate Washington Law.*

It has long been established in this State that when a tree stands on a common property line, it is the common property of both parties and trespass will lie if one cuts or destroys it without the consent of the other. *Herring v. Pelayo*, 198 Wn. App. 828, 835, 397 P.3d 125 (2017). MJD has an interest in the eighteen common boundary arborvitae trees proportionate to the percentage of their trunks growing on MJD's property. *Happy Bunch, LLC v. Grandview N., LLC*, 142 Wn. App. 81, 93, 173 P.3d 959, 965 (2007) ("The trees being owned in common; the trial court correctly ruled that Grandview had an interest in the trees proportionate to the percentage of their trunks growing on

Grandview's property.") Here, because the eighteen arborvitae trees stand on the common property line, both MJD and Haley have undivided property interests in these trees. *Herring v. Pelavo*, 198 Wn. App. 828, 837, 397 P.3d 125 (2017). As tenants in common, both MJD and Haley are entitled to use, maintain, and possess the eighteen boundary trees, but not in a manner that "interferes with the coequal rights of the other cotenants." *Id.* (citing *Butler v. Craft Eng. Const. Co., Inc.*, 67 Wn. App. 684, 694, 843 P.2d 1071 (1992).

Under Washington law, where a tree stands on a common property line, the common owners of the tree may only trim vegetation overhanging their property ***but not in a manner that the common owner knows will kill the tree***. *Herring*, 198 Wn. App. at 838-839, 397 P.3d 125 (2017).

Haley is threatening to cut the roots of all twenty-two arborvitae trees, including the eighteen trees that are commonly owned, knowing that his actions will surely kill every plant. Unless this Court grants an emergency order requiring Jeffrey

Haley to comply with the stay pending the issuance of the mandate, then Haley will cut the roots of all twenty-two arborvitae trees, which will surely kill every plant. Jeffrey Haley has no intention on complying with the stay or Washington law. Haley's entire motivation for years has been to cut down or remove the arborvitae trees to gain a view over MJD's property. The minimum treble damages Haley would have to pay for killing these trees is nothing compared to the view that Haley will gain for years. The only party that will suffer any injury is MJD, because Haley will kill all twenty-two arborvitae trees. Once Haley has cut the roots of these arborvitae trees, the damage will be permanent. These beautiful trees simply cannot be replaced.

The Court should issue an emergency order preventing Haley from taking any action, including cutting the roots of any of the arborvitae trees, which he knows will surely kill every plant.

D. CONCLUSION

This Court should grant MJD's emergency motion and issue an order enforcing the stay and ordering that Jeffrey Haley shall not take any action, including cutting the roots of any of the arborvitae trees, which he knows will kill the arborvitae trees.

DATED this 12th day of June, 2023.

Respectfully submitted,

HAWKINS PARNELL & YOUNG, LLP

By: */s/ Eileen I. McKillop*
Eileen I. McKillop, WSBA 21602
Attorneys for Appellants MJD Properties, LLC, and John Pugh

No. 846035

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

MJD PROPERTIES, LLC, a Washington limited liability company, and JOHN PUGH, an individual,

Appellants.

v.

JEFFREY HALEY, an individual

Respondent,

APPELLANT MJD PROPERTIES, LLC'S APPENDIX IN SUPPORT OF MOTION FOR AN EMERGENCY INJUNCTION AGAINST RESPONDENT JEFFREY HALEY

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Respectfully submitted,

By: */s/ Eileen I. McKillop*
Eileen I. McKillop, WSBA 21602
Attorneys for Appellants MJD Properties, LLC, and John Pugh

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on this day, I served a true and correct copy of the foregoing pleading on the following:

Washington State Court of Appeals, Division I One Union Square 600 University Street Seattle, WA 98101-1176	☑by **Efiling Portal** ☐by **Electronic Mail** ☐by **First Class Mail** ☐by **Hand Delivery** ☐by **Overnight Del.**
Attorneys for Respondent Jeffrey Haley Gregory M. Miller, WSBA #14459 CARNEY BADLEY SPELLMAN, P.S. 701 Fifth Avenue, Suite 3600 Seattle, WA 98104 T: 206-622-8020 Email: miller@carneylaw.com	☑by **Efiling Portal** ☐by **Electronic Mail** ☐by **First Class Mail** ☐by **Hand Delivery** ☐by **Overnight Del.**

Signed at Seattle, Washington this 12th day of November, 2023.

/s/ Eileen I. McKillop
Eileen I. McKillop, WSBA 21602
E-mail: emckillop@hpylaw.com

APPENDIX D

McKillop, Eileen

From: jeff@haley.net
Sent: Saturday, June 10, 2023 7:12 AM
To: McKillop, Eileen; John Pugh; johnapple4ever@icloud.com
Subject: The disputed hedge - FOR SETTLEMENT PURPOSES

Eileen and John:

On this matter, given the present posture of the litigation, please communicate only with me and do not copy my sometimes attorney representatives.

The present posture of the litigation has created a surprising outcome. The Court of Appeals has ruled that I cannot obtain a declaration that the hedge is commonly owned and has reversed the declaration of the trial court to this effect.

However, if I am precluded from obtaining a declaration that the hedge is commonly owned, MJD is likewise precluded from obtaining the same declaration. Although I did not ask in the 2012 litigation for a declaration regarding rights in the hedge, MJD did ask for such a declaration.

The consequence is that, according to Gostina v. Ryland and Mustoe v. Ma, either of us may trim roots and branches at the property line even if that will kill any plant of the hedge. The courts will not help either of us reach a contrary result. Provided neither of us trespasses, the courts are done with our dispute about the hedge.

I would rather have this hedge maintained at about 13 feet than kill it. But I would rather kill it than have this hedge grow to 33 feet. If MJD would rather have this hedge maintained at about 13 feet than have it dead and partly fallen over, we should make an agreement.

If we do not promptly reach an agreement, I will begin cutting roots and branches at the property line which will surely kill every plant of the hedge.

Jeff Haley
5220 Butterworth Rd
Mercer Island WA 98040
Cell 206 919 1798

APPENDIX E

LEA ENNIS
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington

DIVISION I
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June 13, 2023

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Case #: 846035
Jeffrey Haley, Res. v. MJD Properties, LLC and John Pugh, Apps.
King County Superior Court No. 21-2-06424-4

Counsel:

The following notation ruling by Commissioner Masako Kanazawa of the Court was entered on June 13, 2023, regarding Appellant's Emergency Injunction Against Respondent Jeffrey Haley:

> This ruling confirms that the stay of the trial court's decision remains in effect to preserve the status quo until mandate, subject to further order of this Court (or the Supreme Court if respondent Jeffrey Haley files a petition for review of this Court's opinion to that court).
>
> To the extent appellant MJD Properties, LLC requests further relief based on new set of facts, the issue is not before this Court.

Sincerely,

Lea Ennis
Court Administrator/Clerk

khn

c: Hon. Samuel S. Chung

HAWKINS PARNELL & YOUNG, LLP

July 13, 2023 - 2:28 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	102,162-3
Appellate Court Case Title:	Jeffrey Haley v. MJD Properties, LLC and John Pugh

The following documents have been uploaded:

- 1021623_Answer_Reply_20230713142239SC627259_0049.pdf
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Sender Name: Eileen McKillop - Email: emckillop@hpylaw.com
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