No. 41557-7-II (consol. w/44377-5-II)

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

HAL MOORE and MELANIE MOORE; and
LESTER KRUEGER and BETTY KRUEGER,

Appellants,

v.

STEVE'S OUTBOARD SERVICE, and
STEVEN LOVE and MARY LOU LOVE,

Respondents.

APPELLANTS' REPLY BRIEF
RE: DENIAL OF MOTION TO REOPEN

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Without a shoreline permit, Steve's Outboard Service ("SOS") operates illegally. Appellants submitted certifications from the two agencies with jurisdiction, Mason County and the State of Washington Department of Ecology, with attached administrative files specific to Respondents. These public records show that SOS does not have the required approvals to conduct business on property subject to regulation under the Shoreline Management Act, RCW 90.58.[1] However, based on no tenable basis (and in contravention of the objective to decide this case on the merits), the trial court failed to re-open the case to admit this key – but minimal – evidence required to answer one of the four inquiries directed by this Court.

Contrary to Respondents' arguments, this Court in no way circumscribed the trial court's discretion to re-open the case. This Court in fact directed the lower tribunal to conduct additional fact-finding and to address "whether SOS operates lawfully, including its compliance with the Shoreline Management Act (ch. 90.58 RCW), the Mason County Code, and any other relevant law." To Appellants' prejudice, the trial court failed to do this. The trial court offered only one justification for its refusal: it considered the issue irrelevant. SCP 242-43. Because this

[1] *See* SCP 991-1090 (Ecology records); SCP 328-546547-687 (Mason County records).

justification is patently incorrect, this Court should reverse and consider the evidence.

Through reference to Civil Rules ("CR") 59 and 60, Respondents attempt to undermine the trial court's authority to comply with the remand order. The Court should reject the argument that CR 59 and CR 60 apply. The Supreme Court cases discussed in Appellants' opening brief (*Sweeny v. Sweeny*, 52 Wn.2d 337, 324 P.2d 1096 (1958), and *Rochester v. Tulp,* 54 Wn.2d 71, 337 P.2d 1062 (1959)) demonstrate that the trial court had authority to admit the proffered evidence during the remand. Respondents cannot, and do not, overcome this authority in their failed effort to defend the trial court's order on grounds that the trial court never even relied upon. This Court specifically directed on remand the creation of a record sufficient for review of specific issues. The proffered evidence related to the remanded issues. The trial court should have considered it at the hearing that it set to comply with this Court's remand order. Because the only articulated basis for denial of the Motion to Reopen fails, the denial is an abuse of discretion.

II. REPLY ARGUMENT

Appellants sought to admit certifications and public records from Mason County and the State of Washington Department of Ecology on

remand, pursuant to RCW 5.44.040,[2] that demonstrate Respondents never obtained a shoreline permit and, in fact, withdrew their shoreline permit applications. This evidence is probative of the remanded issue whether the engine repair shop is a lawful operation. The proffer was fully consistent with the letter and spirit of the Remand Order. The trial court refused the evidence, stating that it did not matter whether or not the Loves operated their shop lawfully. SCP 242-43. This ruling directly contradicts this Court's instructions for remand and demonstrates the trial court's continued misunderstanding of the law on nuisance.[3]

A. The Trial Court Abused Its Discretion When It Denied Admission of the Proffered Evidence for No Tenable Reason, and Failed to Comply With the Remand Order.

Respondents vainly defend the trial court order based on two fundamentally flawed premises: (1) that Mason County's decision approving a *residential building* permit somehow forecloses a claim for nuisance based on the Loves' failure to obtain a *shoreline* permit to allow the operation of an intensive business on the shores of Hood Canal; and

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[2] Records admissible under RCW 5.44.040 must contain facts, not conclusions or opinions. *Steel v. Johnson*, 9 Wn.2d 347, 358, 115 P.2d 145 (1941). The proffered certifications and public records comply with the statutory requirements.

[3] As this Court recognized in its Remand Order, resolution of Appellants' claims requires evaluation whether the engine repair shop is a lawful operation. No shoreline approvals are found or of record. Because SOS is not a lawful operation (and its operation interferes with Appellants' use and enjoyment of their properties), it is a nuisance *per se*. It is a nuisance in fact because Respondents have no "right" to operate their illegal business against which a court might balance Appellants' legal rights to enjoy their properties. Appellants' Supplemental Br. at pp. 18-19; Appellants' Supplemental Reply Br. at pp. 8-9.

(2) that the Moores and Kruegers cannot establish nuisance without proof of real property damages, notwithstanding the evidence of their personal discomfort, anguish and loss of their peace of mind detailed in the record. Both arguments are contrary to law. Neither supports the trial court ruling.

The trial court gave no tenable reason to reject the proffered evidence. Respondents fail to offer one in their brief. Further, the rejection of the evidence frustrated the Remand Order and this Court's directions for additional fact-finding to make a record sufficient to resolve the issues on appeal. As the Supreme Court stated in *Rochester*, a trial court's objective on remand should be to reach a decision on the merits. *See Rochester v. Tulp, supra*. The denial foreclosed that opportunity and prejudiced Appellants.

1. The Parties Agree That an Abuse of Discretion Standard Applies.

Respondents appear to agree that denial of the motion to reopen is reviewed for abuse of discretion. *Resp. Br.* at 3 ("the Sweeney case indicated that a motion to reopen was within the discretion of the trial court."), 5 ("there was no abuse of discretion in the trial court's decision to deny the motion to reopen"). Respondents do not argue that any other standard is applicable. Thus, Respondents' attempt to distinguish

Appellants' authorities regarding the standard of review is not on point. See *Resp. Br.* at p. 3. *See also, Fuller v. Ostruske,* 48 Wn.2d 802, 808, 296 P.2d 996 (1956) (abuse of discretion proper standard for denial of motion to reopen); *Finley v. Finley,* 1955, 47 Wn.2d 307, 313, 287 P.2d 475 (1955) (same); *In Re Ott,* 37 Wn. App. 234, 679 P.2d 372 (1984) (same), citing *Estes v. Hopp,* 73 Wn.2d 263, 270, 438 P.2d 205 (1968) (appellate court has authority to reverse denial of motion to reopen a case for the taking of additional evidence where abuse of discretion is shown, and prejudice to the complaining party).

Respondents also do not dispute that errors of law justify reversal for abuse of discretion. *State v. Rohrich,* 149 Wn.2d 647, 654, 71 P.3d 638 (2003).

This Court should reject Respondents' argument that the timing of a motion to reopen – whether before or after an appeal – is relevant. *See* Resp. Br. at p. 3 (citing *Rochester v. Tulp, supra*, at 74). *Sweeny* demonstrates that the proper focus is whether the trial court's ruling on a motion to reopen was a proper exercise of discretion. *See Sweeny, supra,* at 339. There is no other standard. Respondents cite none. In short, timing of a motion to reopen is not a factor for consideration.

The issue in *Sweeny* – as here – was whether the trial court ruling on a motion to reopen conflicted with the appellate court's directives. In

Sweeny, the appellate court in a prior resolution had directed that, "The conclusions of law and the judgment * * * are set aside, and the case remanded to the trial court for further proceedings." *Sweeny v. Sweeny*, 48 Wn.2d 872, 878, 297 P.2d 610 (1956). Several years later, the *Sweeny* court noted that the original remand had contained "no direction that new findings be entered upon the evidence contained in the appeal record, or that the 'further proceedings' be limited to the trial court's consideration of that record only." *Sweeny*, 52 Wn.2d at 339. The *Sweeny* court concluded the trial court had authority to take new evidence. *Id.* The same observation applies to this Court's Remand Order, which also directs new findings to be entered without a limitation to the existing record. *Remand Order.*

2. A Motion to Reopen is Not a CR 59 or CR 60 Motion, Nor Did the Trial Court Cite These Rules as a Basis for the Denial.

The straight-forward issue in this appeal is whether the trial court abused its discretion and contravened the Remand Order when it refused to reopen the case for introduction of competent evidence on the issue of whether the SOS engine shop operates lawfully. CR 59 and CR 60 are irrelevant. Further, the Civil Rules were not a basis for denial cited by the trial court.

Appellant's Motion to Reopen was premised on the authority of *Sweeny* and *Rochester*, and did not seek relief under CR 59 or CR 60. *See*

SCP 1091-1104. Accordingly, Respondents citations to CR 59 and CR 60 case law such as *Kaech v. Lewis County Public Utility Dist. No. 1*, 106 Wn. App. 260, 268, 23 P.3d 529 (2001) (concerning CR 59), are unavailing. As discussed in *Henery v. Robinson*, 67 Wn. App. 277, 287, 834 P.2d 1091 (1992), a decision on a motion to reopen a case for the taking of additional evidence is separate and distinct from a decision on a CR 60 motion for a new trial. *See also Taliesen Corp. v. Razore Land Co.*, 135 Wn. App. 106, 147, 144 P.3d 1185 (2006).

Respondents cite no authority to support their argument that a motion to reopen, particularly one made on remand from an appellate court, must be made within any specific time period post-judgment. See *Resp Br.*, 3-4. None exists. *See Sweeny v. Sweeny,* 52 Wn.2d at 339.

Moreover, the trial court's ruling shows that it did not deny the motion to reopen for the reasons argued by Respondents, nor did it rule that the evidence was available prior to trial, nor that equitable grounds prevented consideration of the evidence. Respondents' attempt to justify the trial court's order on such grounds is misplaced if not outright fabricated. Given the scope and directive of the Remand Order, the precedent discussed by both parties, and the record, such grounds also would have been unjustified.

3. The Remand Order Authorizes Additional Fact-Finding.

The trial court abused its discretion when it ignored without any articulated basis this Court's directive to create a record sufficient for review on remand of the specified issues including whether the shop operated lawfully. The trial court's conclusion that the issue was irrelevant not only contravenes this Court's directive, it is error of law.

As observed in *Deep Water Brewing, LLC v. Fairway Resources, Ltd.*, the trial court should have read the Remand Order as a whole and complied with it:

> We hold that when construing an opinion for purposes of determining the scope of remand, it must be read in its entirety without any particular emphasis. This requirement ensures that the opinion is taken as a whole rather than selectively interpreted.

170 Wn. App. 1, 9, 282 P.3d 146 (2012). The Remand Order directed the trial court to "determine" whether SOS operates lawfully, including its compliance with the Shoreline Management Act." *Remand Order* at p.2. Use of the term "determine" clearly authorized the trial court to enter new findings and exercise discretion. *Fisher Props., Inc. v. Arden-Mayfair, Inc.*, 115 Wn.2d 364, 374, 798 P.2d 799 (1990). *See also Sweeny*, 52

Wn.2d at 339 (Trial court could have taken new evidence where remand order was not limited to evidence contained in the appeal record).

Respondents urge an overly restrictive reading of the Remand Order, particularly given this Court's use of the term "determine." This Court should conclude that the trial court had discretion to admit new evidence to make the required determination of the legality of the Loves' engine repair shop in the shoreline environment, and that the trial court articulated no tenable basis for refusing to do so.

The limited scope of Appellants' motion also demonstrates that the trial court's denial was untenable. Appellants' motion was limited to minimal evidence directly responsive to and probative of the remanded issues. Contrary to Respondents' mischaracterizations, Appellants did not request a broad-based reopening of the trial, nor did they seek to introduce new testimony. Consistent with the Remand Order, Appellants sought to introduce public documents that definitively answered the remanded question whether the SOS engine shop operates lawfully, including in compliance with the Shoreline Management Act. *Remand Order* at p.2. The trial court articulated no valid reason to reject this evidence. Reversal is justified.

Further, the evidence corroborated a finding the trial court made. The trial court agreed that "Mason County mistakenly determined that

shoreline permits had been issued" for the building in which the SOS engine shop operations take place. SCP 223 (Amended and Supplemental Findings of Fact and Conclusions of Law, FF 86). This finding implies that, in fact, such permits never had issued. The trial court should have (1) admitted the evidence; (2) concluded that the required permits were lacking; and (3) found that the shop did not operate legally. This Court should reverse, and reach these conclusions.

B. The Trial Court's Findings Regarding "Injury" are Inconsistent and Contrary to Law, and Do Not Support Denial of the Motion to Reopen.

Unable to justify the denial at issue, Respondents resort to repeating their incorrect arguments on the merits concerning liability for nuisance in fact and nuisance per se. *See* Resp. Br. at pp. 4-6. Here, Respondents finally engage the single reason that the trial court offered for denial of the motion to reopen: that it does not matter whether or not Love's business operates legally because there was no "injury" to constitute nuisance. This conclusion is legally wrong. Therefore, the trial court's only basis for denying the motion to reopen fails.

As fully set forth in Appellants' prior briefing, the trial court is incorrect that it does not matter whether or not Love's business operates

legally because there was no "injury" to constitute nuisance.[4] If the issue whether Love's business operates legally was irrelevant, this Court would not have included it in the remanded issues.

Moreover, as detailed at length in Appellants' Supplemental Brief, filed January 4, 2013, Respondents' interference with Appellants' use and enjoyment of their properties is established. While the trial court's findings and conclusions regarding "injury" suffered by the Moores and Kruegers are inconsistent, the Supplemental Findings of Fact and Conclusions of Law show that the first part of the nuisance test (interference with use and enjoyment) was met.[5] The Trial Court found that Respondents' illegal commercial activities resulted in noise and fumes which prevent Moore and Krueger from enjoying their residential waterfront property "in the normal manner." *See infra,* p.3. The statutory definition of nuisance is not limited to physical "tangible" injury, but is more expansive, including acts that "annoy," or "in any way render[] other persons insecure in life or in the use of property." RCW 7.48.120.[6]

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[4] *See* Appellants' Supp. Br. at p.17; Appellants' Suppl. Reply Br. at pp.5-6.
[5] Resp. Second Supp. Br. at p. 2. *See* FF 22, 23, 29, 30, 35, 36; CL 16.1, 16.3; SCP 212-25; 233.
[6] Further, RCW 7.48.020 permits an action for nuisance "by any person whose property is, or whose patrons or employees are, injuriously affected ***or whose personal enjoyment is lessened by the nuisance***." (Emphasis added). Respondents' argument conflicts with the italicized portion of the statute.

Respondents have never offered authority requiring a showing of physical harm to property or economic loss.

Additionally, this Court should conclude that issuance of a *building* permit for a residential structure does not satisfy the requirement for a *shoreline substantial development* permit and/or a *shoreline conditional use* permit for a commercial use.[7] Because Respondents never obtained the latter required permits, they had no legal right to operate their business. Respondents prefer not to focus on the two-pronged test to establish nuisance per se, which is whether the SOS business: (1) is being conducted unlawfully, and/or without all required permits, and (2) "*interferes with the use and enjoyment of property. . . .*" *Gill v. LDI*, 19 F.Supp.2d 1188, 1198-99 (W.D. Wash. 1998); *Tiegs v. Watts*, 135 Wn.2d 1, 14-15, 954 P.2d 877 (1998); *State v. Boren*, 42 Wn.2d 155, 163, 253 P.2d 939 (1953). The record shows that both of these standards are met, so a nuisance *per se* has been established. Instead, Respondents ask the irrelevant questions whether Appellants contested issuance of a residential

[7] As set forth in Appellants' Opening Brief at pp. 23-29, Respondent's commercial operation requires a shoreline CUP or SSDP, under the Shoreline Management Act ("SMA") and the Mason County Shoreline Master Program ("SMP"). *See* RCW 90.58.140 (development on shorelines is prohibited unless consistent with SMA and County Shoreline Master Program); MCC § 7.04.032 (development undertaken without applicable shoreline permits is unlawful); MCC § 7.16.005 (requiring shoreline substantial development permit for all commercial development in urban or rural shoreline environments); MCC § 7.16.040 (requiring shoreline conditional use permit for certain uses).

building permit and whether Appellants have suffered "injury" as a result of the illegal business operations. *See Resp. Br.*, 4-6.

Finally, on remand the trial court agreed that "Mason County mistakenly determined that shoreline permits had been issued" for the building in which the SOS engine shop operations take place. SCP 223 (Amended and Supplemental Findings of Fact and Conclusions of Law, FF 86). It then ruled (without any legal basis) that the lack of any enforcement action by the County or any other governmental entity was, in effect, an "approval." SCP 224; 240-41 (FF 88-90; CL 28-29). That a governmental authority tolerates a nuisance is not a defense if adjoining properties are injured. *Tiegs*, 135 Wn.2d at 14.[8] In addition, compliance with the SMA is mandatory. *See, e.g., Samson v. City of Bainbridge Island*, 149 Wn. App. 33, 39-40, 202 P.3d 334 (2009); *Citizens for Rational Shoreline Planning v. Whatcom County*, 155 Wn. App. 937, 943, 230 P.3d 1074 (2012). The goals and objectives of the SMA, including the public's general rights and personal property rights protected by shoreline permit review processes, are severely compromised if parties fail to comply with

[8] As discussed in Appellants' Supplemental Reply Brief at p. 1, the term "injury" includes "distress" or "impairment," not just physical or economic harm. *See Rettkowski v. Department of Ecology*, 128 Wn.2d 508, 518, 910 P.2d 462 (1996) ("The common law definition of "injury" is '[t]he invasion of any legally protected interest of another.'") (Citing Black's Law Dictionary 785 (6th ed. 1990).

shoreline permit requirements. *Department of Ecology v. City of Spokane Valley*, 167 Wn.App. 952, 962-63, 275 P.3d 367 (2012).

The trial court's decision to deny the admission of evidence showing no shoreline permit was ever issued to Respondents was based on the erroneous conclusion that it mattered not whether the SOS engine shop operates in violation of the SMA. It is abuse of discretion to deny the Motion to Reopen based on that error of law.

III. CONCLUSION

This Court should conclude that the trial court abused its discretion in denying Appellants' Motion to Reopen Case on Remand to Introduce Evidence. This Court should consider that evidence properly to resolve this case on the merits.

RESPECTFULLY SUBMITTED this 20th day of June, 2013.

By _____

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of June, 2013, I caused the original and one copy of the document to which this certificate is attached to be delivered for filing via overnight mail to:

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I further certify that on this 20th day of June, 2013, I caused a copy of the document to which this certificate is attached to be delivered to the following via email and Priority U.S. Mail:

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