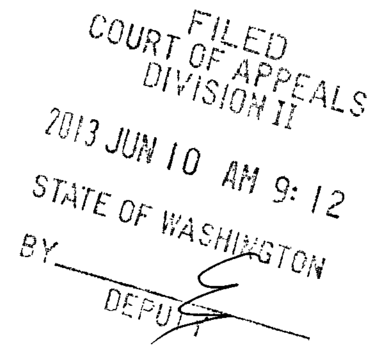

No. 41557-7-II

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.

RESPONDENTS SUPPLEMENTAL BRIEF RE: DENIAL OF MOTION TO REOPEN

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RAP 7.2..1

I. ANSWER TO ASSIGNMENT OF ERROR

The trial court did not err in denying the Appellant's Motion to Reopen Case to Introduce Evidence on Remand, where the trial court found that the Appellants' had not proved they were injured by any action of the Respondents, even if the one-man boat motor repair shop was in violation of the Shorelines Management Act.

II. ANSWER TO ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

The trial court was not persuaded that the Appellants' suffered any unreasonable or actionable injury caused by the Respondents. Without injury, the Appellants could not prevail on any of their causes of action, including violation of the Shorelines Management Act or nuisance per se.

III. STATEMENT OF THE CASE

Respondents factual statement of the case is contained in detail in their previous briefs to this Court, so will not be repeated here.

IV. ARGUMENT

The Appellants asked the trial court to re-open the case, to admit new evidence not submitted at trial, and to make certain documents part of the record. The Appellants' motions were essentially to retry the case, or to re-open the case for new evidence.

RAP 7.2 limits a trial court's authority to certain designated actions after appeal has been accepted. None of the designated actions apply in this case.

If the Appellants wished to argue for a new trial or to re-open the case, they would have had to do so under the court rules. CR 59 and 60 allow post-trial motions in the trial court in certain circumstances, but none of those circumstances apply here and none of them have been argued or alleged by the Appellants. CR 59 requires that a

motion for new trial or reconsideration be filed within 10 days of the judgment or verdict. The rule means exactly what it says, no more and no less, and it is strictly enforced. *Kaech v. Lewis County Public Utility Dist. No. 1*, 106 Wn. App. 260, 268, 23 P.3d 529 (2001). CR 59(g) allows a court to reopen a nonjury trial case and take new evidence, but the motion must be filed within 10 days of judgment. CR 60 would allow a motion to vacate a judgment for certain reasons including newly discovered evidence which could not have been discovered by due diligence prior to trial. But the Plaintiffs have proffered no such newly discovered evidence nor have they alleged any grounds under which the rule would apply. All of the evidence proposed under the motion to reopen the case was available prior to the trial.

Much of the Appellant's brief simply re-argues the issues on appeal and therefore will not be responded to in depth in this response.

The Appellants' brief at page 4 states that the trial court erred in denying the motion to reopen "on the erroneous basis that the evidence was irrelevant". The trial court's Order Denying Plaintiff's Motion to Reopen Case to Introduce Evidence on Remand (CP 181) nowhere states that the trial court found the evidence to be irrelevant, and the Respondents did not argue that the evidence was irrelevant. They simply argued that there was no basis in law to reopen the trial.

However, Respondents will note that a substantial development permit is not required to run a business; it is required for substantial development, such as construction of a building. The Appellants did not appeal the decision to authorize a permit to erect the replacement carport. The Respondents did not change the nature of their activities on the property; they simply erected a new building in place of the old one.

The Appellants cite several cases for the proposition that the trial court erred in refusing to reopen the case for additional evidence. However, all of those cases are distinguishable and not on point with the case at bar. *Sweeney v. Sweeny*, 52 Wn.2d 337, 324 P.2d 1096 (1958) involved a remand from the appellate court where the appellate court set aside the judgment and the conclusions of law and remanded to the trial court "for further proceedings". *Sweeney*, at 339. *Rochester v. Tulp*, 54 Wn.2d 71, 74, 337 P.2d 1062 (1959), did not involve a motion to reopen after remand from the appellate court at all. It involved a motion to reopen before the case was appealed.

The Appellants cite *Moreman v. Butcher*, 126 Wn.2d 36, 40, 891 P.2d 725 (1995) for the proposition that a trial court's denial of a motion to reopen is reversible for abuse of discretion. However, *Moreman* did not involve a motion to reopen a trial for additional evidence. It was an appeal of a trial court's order holding the defendant in contempt.

The Appellants argue that this Court's remand order permitted the trial court to reopen the trial for additional evidence. (Appellant's Brief pg. 12). However, there is simply no language in the remand order either directing the trial court to reopen the trial or indicating that in any way. As previously stated, *Sweeney* is not on point because the remand order in that case was much broader than the remand order in the case at bar. In any event, the *Sweeney* case indicated that a motion to reopen was within the discretion of the trial court.

Here, the trial court was well within its discretion to refuse to reopen the case for additional testimony. The case was filed in 2006 and has now been litigated for 7 years. Trial was held in June of 2010; the Appellants had four years to martial their evidence.

They have not provided any reason that would excuse their failure to produce the evidence during trial.

The Appellants argue that the trial court was required to reopen the trial to receive new evidence because it would answer the question whether the Love's business operated legally. However, the trial court found that the Appellants did not suffer any injury that would constitute nuisance. For example, Finding of Fact 15 (SCP 211) states that "Mr. Love's business does not encroach upon Plaintiff's properties"; Finding of Fact 16 (SCP 211) states that "Mr. Love's business has not caused any actual tangible injury to Plaintiff's properties"; and Finding of Fact 23 (SCP 212-13) states in part that "Mrs. Moore's testimony as to the frequency and volume of the noise produced by Mr. Love's business is not credible."

In the trial court's Conclusion of Law 16.9 (SCP 235), the trial court stated as follows: "The noise, odor and obstruction of the free use of Plaintiff's properties resulting from Mr. Love's business are not of a magnitude that they shock the taste or detract in any unreasonable way from Plaintiff's enjoyment of their properties." Conclusion of Law 17.2 (SCP 236) states that "Plaintiffs have not met their burden of proving there are any traffic safety impairments due to the operation of Mr. Love's business." Conclusion 19 (SCP 237) states that "Plaintiffs have not met their burden of proving the use of Mr. Love's property for a boat motor repair business has injured their properties. The inconvenience and interference with the use of Plaintiffs' properties are not, on balance, found to be unreasonable considering the rights, interests, and conveniences of the parties." Conclusion of Law 24 (SCP 239) states in regard to whether the plaintiffs proved nuisance per se by a violation of the Shorelines Management Act as follows:

"Ours is a stronger factual situation than the incidental, *de minimis* increase in silt deposits found in *Hedlund v. White, id.* Plaintiffs here have failed to prove any damages." Conclusion 25 (SCP 239) states that "As in *Hedlund v. White, id.*, Plaintiffs have no Shoreline Management Act cause of action even if Mr. Love violated the Shoreline Management Act. Plantiffs have no Shoreline Management act right to damages because they failed to prove damages."

Thus, it is clear from the trial court's findings of fact and conclusions of law, that the trial court found that regardless of whether any permit violation occurred the Appellants suffered no damages from which they could recover. Therefore, it was not required for the trial court to determine whether or not the Respondents were in violation of the Shorelines Management Act or any other requirement, and there was no abuse of discretion in the trial court's decision to deny the motion to reopen the case for additional evidence.

As argued in the Respondent's Second Supplemental Brief on Appeal, as an example, assume a homeowner builds a shed in his backyard without a required building permit. Could a person residing across town sue for nuisance? The answer is obviously no; there must be some injury to the plaintiff. Mere violation of permit requirements cannot be the proximate cause of injuries; there yet must be something that injures the plaintiff. Tiegs v. Watts, 135 Wn.2d 1, 15, 954 P.2d 877 (1998).

A nuisance per se is a thing that is a nuisance under all times and conditions. A violation of a statute cannot constitute nuisance per se unless there is persuasive proof that the plaintiffs suffered interference with the comfortable enjoyment of life or property, based on an objective standard. Motor Car Dealers Assoc. of Seattle v. Fred S.

Haines Co., 128 Wash. 267, 273-74, 222 P. 611 (1924) (Car dealer open on Sunday in violation of statute not a nuisance per se, because not acts that constitute a nuisance at all times and conditions).

In other words, a nuisance per se is an act, thing, omission, or use of property which of itself is a nuisance, and hence is not permissible or excusable under any circumstance. Tiegs v. Watts, at 13. Thus, in order to prevail, a plaintiff pursuing a nuisance per se cause of action must prove that he has suffered injury of the kind needed to prove nuisance.

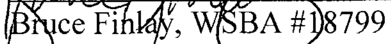
Here, the trial court was not persuaded that the Moores and Kruegers suffered any particular injury, and that is fatal to all their causes of action. Appellants misconstrue the holding of Tiegs v. Boise Cascade Corp., 83 Wn. App. 411, 922 P.2d 126 (1996), as holding that any failure to comply with the law renders a defendant strictly liable for nuisance per se. But, in that case, the defendants' actions had poisoned the plaintiff farmers' water wells, causing crop damage. The plaintiffs were significantly injured.

V. CONCLUSION

The Moores and Kruegers did not persuade the trial court that they suffered any significant injury, or injury that would be objectionable to a person of reasonable sensibilities. Even if the Loves' one-man boat motor repair and maintenance business did violate the SMA, the Moores and Kruegers cannot prevail unless they persuaded the trial court that they suffered injury.

Therefore, the trial court did not err in denying the Appellant's motion to reopen the case for additional evidence.

Respectfully submitted June 6, 2013.



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I hereby certify that on this 6th 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 U.S. Mail to:

Clerk of Court
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402
(253) 593-2970, tel

I further certify that on this 6th day of June, 2013, I caused a copy of the document to which this certificate is attached to be delivered to the following via U.S. mail:

Dennis D. Reynolds, Attorney at Law
200 Winslow Way W; Suite 300
Bainbridge Island, WA 98110

Declared under penalty of perjury under the laws of the State of Washington at Shelton, Washington this 6th day of June, 2013.

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