Supreme Court No. 102162-3

SUPREME COURT
OF THE STATE OF WASHINGTON

JEFFREY HALEY,

Petitioner,

v.

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

Respondents.

REPLY IN RESPONSE TO, OR MOTION TO STRIKE, NEW ISSUES RAISED IN MJD'S ANSWER TO HALEY'S PETITION

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TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Washington Cases

Constitutional Provisions, Statutes and Court Rules

TABLE OF AUTHORITIES

Other Authorities

I. INTRODUCTION

Respondents MJD Properties, LLC, and John Pugh's ("MJD") Answer to Petitioner Jeff Haley's ("Petitioner" or "Haley") petition for review ("Petition") raised a new issue by its RAP 18.1(j) fee request, though fees were not awarded at the Court of Appeals. A reply is allowed on that issue. RAP 13.4(d).

The Answer also specifically asks the Court to review two issues not raised in the Petition, issues which are predicated on ignoring the settled record. These new issues require either allowing a reply under the rule, or a motion to strike those new arguments as not responsive to the issues raised in the Petition, particularly because the Answer's new arguments ignore the findings of the trial court which were not challenged by MJD in its appeal. Under settled principles they are verities on appeal.

MJD's key assertion is that the boundary is not a hedge but individual trees so to assert the law pertaining to invasive trees in both its new issues. But the trial court found as a matter of fact on that contested issue that the arborvitae trees

"together…form a single line of barrier trees between the two lots." Finding of Fact 2, CP 1395:12-14, PRV App. 23.[1] That is a hedge.[2] These findings make the law of invasive trees argued by MJD in its new issues inapplicable. This and other erroneous assertions in the Answer as to its new issues requires a reply per RAP 13.4(d) to ensure fair consideration of the Petition and pertinent issues on the record, or a motion to strike them.

II. ERRORS IN MJD'S ANSWER RELATED TO ITS NEW ISSUES WHICH REQUIRE CORRECTION OR STRIKING THE ARGUMENTS

A summary of the errors in MJD's Answer, not including the fee request, allowing a reply or that they be stricken, include:

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[1] *Accord,* FOF 8, CP 1396:20-21, PRV App. 24 ("Evidence at trial showed that these trees A through V form a single common barrier/shield between the two lots."); COL 7, CP 1400:21-24, PRV App. 28 ("all of the arborvitae trees identified as Trees A through V…form ***a single inseparable common unit barrier between Lot B [Haley] and Lot C [MJD]… all of the arborvitae trees were intended to form a single barrier along the property line.***") (emphasis added). *See* PRV at 14.

[2] *See, e.g.,* MERRIAM-WEBSTER DICTIONARY, "hedge" defined as "a fence or ***boundary formed by a dense row of*** shrubs or ***low trees***" https://www.merriam-webster.com/dictionary/hedge (last visited 9/06/23).

1. MJD asserts that the plants in question are simply trees and not a hedge.

The trial court found as a matter of fact that all 22 arborvitae trees form a single hedge, that the original owner and planter intended to form, and did create, the "single common barrier" between the two lots – a hedge. CP 1395:12-14; CP 1396:20-21; CP 1400:21-24. MJD did not appeal any findings of fact and, as noted *infra*, cannot now dispute them.

2. MJD says "The prior lawsuit established that Haley had no right to top the twenty-two arborvitae trees".

That is not true, as the trial court's rulings make clear. The prior suit only established Haley does not have an implied view easement over the hedge and that, at the height of the hedge in 2012, it did not constitute a nuisance. CP 1237-1238. The trial court's ruling constitute findings of fact as to the prior lawsuit.

3. MJD says the second suit relied on the same underlying facts.

The trial court specifically found otherwise in ruling that the 2012 suit involved different facts and different theories. *See*

CP 1237-1238. This ruling is a finding of fact as to what was at issue in the earlier matter and in this case. Since no findings were challenged by MJD, these findings also cannot be disputed.

4. MJD claims that the trial court order gives Haley the right to trespass to top the hedge.

MJD's claim that Haley is given the right to trespass on MJD"s property is not true. Judge Chung's ruling says that the hedge "shall be topped uniformly together and then maintained at a height that protects the privacy of each party" as further specified in the order, and the parties shall split the cost. COL 8, CP 1401, PRV App. 29. As the text of the order shows, it is carefully drawn to respect the privacy rights of ***both*** parties.

5. A boundary hedge is not a boundary tree under the rule of *Herring v. Pelayo.*

That the plants that make up a hedge are commonly called "trees" when standing alone does not bring the hedge under *Herring v. Pelayo*, 198 Wn.App. 828, 397 P.3d 125 (2017). As the dictionary definition *supra* confirms, hedges are commonly made up of small trees as well as bushes.

6. The four trees whose trunks now are wholly on one property or the other should not be treated differently because they are part of one boundary-hedge.

Although the trunks of four of the trees making up the hedge do not presently straddle the line will, they should not and will not be treated differently than the rest under Judge Chung's ruling, which is carefully written to keep the boundary hedge uniform. Regardless of where the trunks are located, the trial court found that they constitute part of "a single line of barrier trees between the two lots" (FOF 2 & 4, CP 1395), and that all the trees together "form a single common barrier/shield between the two lots." FOF 8, CP 1396.

Trial exhibits 61 and MJD's Ex. 171, copied below, illustrate the hedge and how it could look if properly maintained. The first photo, Ex. 61, shows a typical, properly trimmed arborvitae hedge. The second MJD's Ex. 171, page 5, shows the northern portion of arborvitae hedge taken from the MJD property and shows the boundary hedge at issue, standing a full 23-feet tall, far beyond the 14-foot height in 2012.

III. HALEY'S REPLY TO THE NEW ISSUES RAISED IN MJD'S ANSWER AND FUNCTIONAL CROSS-PETITION

A. Misrepresentations In MJD's Fee Request.

One new issue that MJD's Answer asserts is that it is "entitled" to fees under RAP 18.1(j) for responding to Haley's Petition for Review if review is denied. Answer at 27-28. This seemingly innocuous fee request knowingly misrepresents the law and ignores known facts. It therefore calls into question MJD's other factual and legal assertions.

RAP 18.1(j) states (emphasis added):

> **(j) Fees for Answering Petition for Review. 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 the timely answer to the petition for review. A party seeking attorney fees and expenses should request them in the answer to the petition for review.

MJD's Answer paraphrases the rule, including the underlined portion that fees are contingent on an award of fees at the Court of Appeals in the decision subject to review. Answer

at 27. It then states, ***contrary*** to the second underlined part of the rule and to the undisputed facts that "MJD is ***entitled*** to an award of fees and costs if the Court denies Haley's Petition for Review." *Id.* at 27-28. That is false on two bases.

First, the rule does not "entitle" MJD, or any respondent, to fees when review is denied. The rule states "may" not "shall."

Second, the rule's factual predicate for granting fees is missing. MJD was ***not*** awarded fees by the Court of Appeals in the merits decision. *See* Decision at 13, Petition App. A-13. Nor were fees awarded on the denial of reconsideration. *See* Petition at Appendix p. 14. The part of the order adding a denial of MJD's request for fees was added at MJD's specific request. MJD thus had to know there was no factual or legal basis for requesting fees under RAP 18.1(j). The request in the Answer is knowingly frivolous and, thus, legally improper. *See* CR 11. More pertinent here, it calls into question the other factual and legal assertions made on MJD's behalf.

1. Errors And Misrepresentations Flowing From MJD's Ignoring The Settled Rule That The Failure Of A Party To Challenge The Trial Court's Findings Renders Them Verities On Appeal: MJD Misrepresents The Operative Facts By Ignoring The Unchallenged Findings.

MJD's Answer is an exercise in ignoring the trial court rulings and simply stating its own version of the 2012 litigation and the circumstances in the current litigation, especially as to a line of trees rather than a border hedge, despite the detailed findings and rulings by the trial court to the contrary. This might be appropriate in a situation where the findings had been challenged and found unsupported by the Court of Appeals. Instead, it is made in the face of MJD's failure to challenge one single finding of fact. But unchallenged findings of fact are verities on appeal. *Seven Hills, LLC v. Chelan Cnty.*, 198 Wn.2d 371, 384, 495 P.3d 778 (2021) ("Unchallenged findings of fact are verities on appeal."); *State v. Gaines,* 154 Wn.2d 711, 716, 116 P.3d 993 (2005) (same). Nevertheless, MJD's Answer ignores that principle and the findings which undercut its factual and legal arguments.

For example, MJD asserts that the case is about arborvitae trees, not a hedge that constitutes the border between the properties, and that Judge Chung erroneously denied summary judgment because of triable issues of fact. *See* Answer at 4-12, esp. 7-8. MJD's arguments are all couched terms of rights as to "boundary trees." *E.g.,* Answer, p. 8 ("MJD argued that Haley's claims for declaratory relief…contravene well established Washington law prohibiting a neighbor from interfering with MJD's rights ***to the common boundary trees*** without his consent."). All of MJD's arguments, in its "statement of the case" and in its legal arguments are predicated on the hedge being determined to be "boundary trees" that straddled the property line. But as noted *supra,* the trial court expressly found as a matter of fact that the trees formed "a single line barrier along the property line," (*e.g.,* COL 7, CP 1400:21-24, quoted *supra* fn. 1). Judge Chung also determined as a matter of fact that the original owner of the properties who planted all the arborvitae trees and testified at trial, intended that they form that

boundary hedge between the properties. Those findings, binding on appeal, precludes MJD's argument and the cases it relies on for support which are based on boundary trees, not a hedge.

B. MJD's Argument That The Trial Court Decision "Directly Contravenes Established Washington Law and Sanctions a Trespass" Is Incorrect But Arguably Asserts A Cross-Petition To Address The Claimed Conflict In Appellate Authority Between Property Owners With Border Trees Or A Border Hedge Regarding Their Relative Rights To Trim And Maintain The Hedge, Or To Trim Overhanging Trees And Vegetation. This Makes Review Appropriate Under RAP 13.4(b)(1), (2).

Relying primarily on Division II's decision *Herring v. Pelayo,* 198 Wn.App. 828 (2017), MJD asserts Haley has a very limited right to address "a tree that stands on a common property line" and, in particular, cannot do any trimming or removal that will harm or kill the boundary trees because that "clearly violates Washington law." Answer at 24-25, citing *Herring* at 838-839. At best for MJD, this argument only establishes a conflict in appellate cases. At minimum, under *Gostina v. Ryland*, 116 Wash. 228, 234 (1921) and *Mustoe v. Ma*, 193 Wn.App. 161, 164 (2016), established Washington law holds, consistent with the

majority view in the country, that Haley has the right to trim invading trees and shrubs, including their roots, and irrespective of the ultimate effect on them. *See* Petition at 9-10.

This new issue is only potentially reached if review is accepted and the Decision applying preclusion principles is vacated. In that event, this Court could also entertain the issues not addressed by Division I, including the propriety of Judge Chung's substantive decision after immersing himself in all the underlying facts and circumstances, or remand it to Division I to address those issues.

But they should not be reached because MJD's Answer did not expressly assert them as a cross-petition, nor assert them on "contingent cross-appeal" in the event review was granted. Perhaps that is why the Deputy Clerk determined the Answer raised no new issues, precluding a reply. Perhaps this point of procedure needs to be clarified in a decision or with a clarified rule.

To help conclude this long-running dispute, the Court should accept review of the preclusion issue and the propriety of the trial court decision to resolve the conflict in authorities noted *supra*. In short, the Answer establishes that review is proper under RAP 13.4(b)(1) and (2) because, to the extent the Decision follows Division II's published decision in *Herring*, it conflicts with this Court's decision in *Gostina* as well as Division I's published decision in *Mustoe*. Review should be granted to clarify the law. RAP 13.4(b)(4).

C. Where a boundary line hedge is continuously growing taller and becomes tall enough to infringe the rights of one of the two property owners who wants the hedge to be trimmed on top, there is no statute of limitations to bring an action to declare the right to top the hedge or forever lose the right to seek such a declaration.

MJD claims that the three-year limitations statute, RCW 4.16.080, applies to this case. The statute includes a list of six types of actions to which it applies. None of declaratory relief claims nor claims in equity are listed. The statute does not include a broad category that might be construed to cover this case. The statute does not apply.

The purpose of statutes of limitations is to shield defendants and the judicial system from stale claims. When plaintiffs sleep on their rights, evidence may be lost and memories may fade. *Crisman v. Crisman*, 85 Wn.App. 15, 19, 931 P.2d 163 (1997). This purpose does not apply to an ongoing infringement of a party's rights. Thus, if an ongoing condition causing damage to land is reasonably abatable, the statute of limitations does not bar an action for abatement. So long as the intrusion continues, the statute of limitation serves only to limit damages to those incurred in the three-year period before the suit was filed. *Fradkin v. Northshore Util. Dist.*, 96 Wn. App. 118, 119–20, 977 P.2d 1265, 1267 (1999). In this case, infringement of Haley's rights is ongoing and Haley is only seeking abatement, not damages.

There is an age-old principle that the bar of the statute of limitations cannot be used as a means for acquiring affirmative relief. *Pac. Nw. Bell Tel. Co. v. Dep't of Revenue*, 78 Wn.2d 961, 967, 481 P.2d 556, 560 (1971). In this case, MJD is attempting

to use a statute of limitations argument to continue Mr. Pugh's malicious affirmative blockage of trimming the hedge.

If the Court decides that the proper legal rule is not as clear as Haley argues above, nevertheless it was not an abuse of discretion for the trial court to grant the requested declaratory relief based on its unchallenged finding and review need not be granted on this issue.

D. The trial court did not sanction a trespass but simply ordered that the hedge shall be trimmed on top and the cost split equally. Where a boundary line row of trees in the form of a single inseparable hedge includes some trunks not in the middle, Washington law allows a court to rule that the cost of maintaining the height of all parts of the hedge shall be equally born by the two parties and any subsequent owners of their properties.

RCW 7.24.010 provides: "Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed."

Where a hedge straddles a property line and is therefore co-owned, the trial court's declaration that the costs of maintaining the top shall be equally split is justified by good

reason. This gives both parties an incentive to cooperate and get the job done efficiently rather than one party trying to make it difficult or expensive for the other party. This gives each party an efficiency incentive to allow the hedge to be topped as low as possible while still providing privacy to thereby delay the date when it must be topped again. If one party proposes use of a landscaper whose price is high, this gives the other party an incentive to find a lower cost landscaper.

MJD seems to argue that each party should trim its half of the top and neither party should be compelled to participate in trimming by the other. This is highly impractical. Once a worker is in position to trim on top, it is easier to trim the entire top than to try to determine the center line. With MJD's approach, at minimum not only will the top never look well-trimmed, but the hedge will continue to grow unbounded, casting more and more shadow onto Haley's property far beyond the intent of the original planter.

If the Court decides that the proper legal rule to be applied is not as clear as Haley argues above, nevertheless, it was not an abuse of discretion for the trial court to grant the requested declaration of rights on this issue and grant the relief it specified. There was no basis under the law and facts to vacate that ruling.

IV. ALTERNATIVELY, THE COURT SHOULD STRIKE THE PARTS OF MJD'S ANSWER WHICH ARGUE THE NEW ISSUES, INCLUDING THE ERONEOUS PREDICATES BASED ON IGNORING THE TRIAL COURT'S UNCHALLENGED FINDINGS.

If the Court determines that a reply is not merited under RAP 13.4(d) other than as to MJD's baseless claim for fees, the Court should strike the new arguments and erroneous predicates in the Answer.

Specifically, if no reply is permitted, the Court should strike the issues MJD identified and recognized were not addressed by the Court of Appeals or in Haley's Petition, which the Answer states and argues at pages 1 and 23 (declaratory relief claims are barred by the statute of limitations); and at pages 2 and 24-27 (trial court decision contravenes established

Washington law and allows a trespass). And if no reply is deemed warranted, Haley requests the Court also strike MJD's request for fees at pp 27-28.

Further, as demonstrated *supra,* MJD's arguments are based on ignoring the unchallenged findings of the trial court. MJD did not assign error to a single finding of the trial court. *See* Opening Brief at pp. 6-8, setting out four assignments of error, none of which challenge any specific findings of fact. No specific challenge was made as to any of the trial court's findings of fact made after the trial by number, as is required by RAP 10.3(g). Nor were any findings set out verbatim or appended to the opening brief showing what facts found were being challenged (since there were none), as is required by RAP 10.4(c).

Findings that are not challenged are verities on appeal. *E.g., Seven Hills, LLC v. Chelan Cnty.*, 198 Wn.2d 371, 384, 495 P.3d 778 (2021) ("Unchallenged findings of fact are verities on appeal."); *State v. Gaines,* 154 Wn.2d 711, 716, 116 P.3d 993

(2005) (same). All of MJD's arguments of their new issues are predicated on ignoring the trial court's detailed findings, which were appended to Haley's Petition. In these circumstances, and where no reply is permitted to MJD's baseless argument of new issues, those factual predicates and legal assertions in MJD's Answer which ignore the trial court's findings should be stricken.

V. CONCLUSION

Petitioner Jeff Haley respectfully asks the Court to grant review and, based on the trial court's unchallenged findings and the applicable law, reverse the Court of Appeals on the preemption issue, affirm the trial court's resolution of the long-standing dispute over the boundary hedge reached after being fully immersed and informed of all the circumstances, and clarify the rules for property-owners' rights to address and protect their property interests from invasive and over-hanging shrubs, hedges, and trees which each present their own unique issues.

Alternatively, Haley asks the Court to strike the portions of the Answer specified herein and grant review solely on the issues specified by Haley in his Petition.

This document contains 3,393 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Dated this 8th day of September, 2023.

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

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DATED this 8th day of September, 2023.

/s/ Elizabeth C. Fuhrmann
Elizabeth C. Fuhrmann, Legal Assistant

CARNEY BADLEY SPELLMAN

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