No. 42557-7-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.

BRIEF OF RESPONDENTS

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I. INTRODUCTION

The Appellants complained that the Respondents' outboard motor maintenance and repair business was a nuisance and violated the Shorelines Management Act.

The Appellants evidence consisted of the testimony of two witnesses: Betty Krueger and Melanie Moore, along with some documents from Mason County that were at best ambiguous on whether the Respondents had or even needed any kind of Shorelines Management permit. Harold Moore and Lester Krueger, husbands of Melanie and Betty respectively, did not testify.

Respondents' evidence was the testimony of several people who live right next door to the Appellants and several customers, all of whom agreed that the outboard motor repair business was run in a safe, unobtrusive and unobjectionable manner, with no problems with noise, fumes, or traffic safety.

In the end, the trial court found the Respondents' witnesses more credible than the Appellants'; it was not persuaded that the Appellants suffered sufficient impact from the business that would constitute a nuisance under any of the legal theories put forth by the Appellants.

II. ANSWERS TO ASSIGNMENTS OF ERROR

A. The trial court did not err in entering its final decision. No violations of law were proven. The trial court was not persuaded that the Appellants suffered any harm.

B. The trial court did not err in its decision in any "apparent" conclusion. It was not proved that any necessary permits were not issued or that a Shorelines Development permit was required. In any case, the Appellants did not prove injury.

C. The trial court did not err in concluding that the Appellants failed to prove nuisance by the preponderance of the evidence.

D. The trial court's Judgment was not error.

E. The trial court's Findings of Fact and Conclusions of Law and Decision after Trial were not error; they were sufficiently specific under applicable law. The Appellants have waived any claimed error by not objecting in the trial court. RAP 2.5.

F. All of the trial court's findings of fact are supported by the record. There was no error.

1. Finding of Fact #1 in Appellant's brief is supported by the record. (RP 206, 209 -213, 229 -230, 292, 317-320, 328).

2. Finding of Fact #2 in Appellant's brief is supported by the record. (RP 51-52, 66-67, 124, 126, 140, 149, 151, 163, 203, 208, 265, 292).

3. Finding of Fact #3 in Appellant's brief is supported by the record. (RP 207, 209, 271, 279, 321, 323-331, 353).

4. Finding of Fact #4 in Appellant's brief is supported by the record. (RP 16, 51-51, 124, 146, 151, 208, 212-213, 229-230, 265, 277-78, 292, 312, 317-318, 328).

5. Finding of Fact #5 in Appellant's brief is supported by the record. (RP 15, 51-53, 63, 67-68, 99, 124, 140, 149, 151, 156, 177, 208, 226-227, 290, 305).

6. Finding of Fact #6 in Appellant's brief is supported by the record. (RP 72-73, 148-153, 156, 199-219).

7. Finding of Fact #7 in Appellant's brief is supported by the record. (RP 353, 235-245).

8. Finding of Fact #8 is supported by the record. (RP 155, 238-245, 253-254, 263-266, 270-272, 285-286, 310, 313, 342-346).

9. Finding of Fact #9 is supported by the record. (RP 308-317, 337, 346, 350-351).

10. Finding of Fact #10 is supported by the record. (Entire record).

G. Appellants assign error to any other language in the Trial Court's Decision of September 22, 2010 construed as outcome determinative facts unsupported by the record. There was no error, and this is a blanket assignment of error without specificity.

H. The trial court did not conclude that noise testing was required to demonstrate a violation of a county noise ordinance; the trial court simply concluded that the Appellants had not proved a violation of the ordinance. There is no error.

I. The trial court did not err in determining that a nuisance was not proved by a preponderance of the evidence.

J. The trial court did not err in concluding that the Appellants pursued an action for damages or injunctive relief under the Shorelines Management Act. The Appellants pled it and argued it. They cannot have it both ways and avoid attorney's fees by requesting damages on the one hand and having a witness testify that she did not necessarily want damages.

K. The trial court did not err in awarding attorney's fees; statutory authority exists in the Shorelines Management Act.

L. The trial court did not err in setting the amount of attorney's fees. The award was consistent with applicable authority.

M. The trial court did not err in entering judgment in favor of Respondents against Appellants in the amount of $36,034.69.

III. COUNTERSTATEMENT OF ISSUES

A. Did the Appellants prove nuisance, nuisance per se, or a violation of the Shorelines Management Act against Respondents for operating a one-man outboard motor maintenance and repair shop in a mixed use neighborhood consisting of residences and small businesses where the witness testimony was conflicting, credibility of witnesses is for the trier of fact, and the trial court found that the Appellants did not suffer from harm sufficient to establish any of their claims?

B. Did the trial court err in awarding attorney's fees to Respondents where Respondent prevailed on all of the issues and specific statutory authority exists for the award and the amount of the award is supported by authority and evidence?

IV. COUNTERSTATEMENT OF THE CASE

Steve and Mary Lou Love live beside Highway 106 in Mason County, across the highway from Hood Canal. Their property extends across Highway 106 to the shore of the canal. (RP 12). Steve operates a boat motor maintenance and repair service called SOS out of his home on the upland side of the highway; no work is done on the water side of the highway. (RP 348). SOS is a one-man operation; Steve is the sole technician; there are no employees. (RP 65, 297, 309).

The Loves purchased the property from Appellants Lester and Betty Krueger in 1986. (RP pg. 86). Steve has repaired outboard motors from his home since 1990, including repairing motors for Les Krueger. (RP 336). No complaints were made to the Loves about any of the problems alleged by the Appellants prior to the filing of this lawsuit in 2006, nor have any other neighbors ever complained about the business, except for one complaint by Hal Moore in an unusual circumstance where Steve ran a motor longer than normal. (RP 322-323, 387). Nor have any of the guests who have stayed in the guest house right next door to the Loves ever complained. (RP 125).

Across the highway from the Loves, on a narrow strip of land between the highway and the water, in order from east to west, are the houses of Betty and Lester Krueger, Bill Jacobs, Jim David, a small undeveloped lot owned by the Loves with a dock, Hal and Melanie Moore, and Larry Gordon. (RP 135, 149, 347). All of the houses on the canal side of the highway are quite close to the highway. (RP 68).

Bill Jacobs, Jim David and Larry Gordon all testified for the Loves. Mr. Gordon is a full-time resident on the canal and a retired police officer; (RP 149); Mr. David and Mr. Jacobs are part-time residents. (RP 123, 139). Bill Jacobs is Chairman of the Board of the non-profit Middleton Foundation for Ethical Studies, Chair Emeritus of the Western

Institutional Review Board, was previously a trade executive for a statewide forest products organization, Chief of Staff for a United States Senator, and Chief of Staff for the Governor and Director of the Department of Labor and Industries. (RP 138).

Also testifying for the Loves were customers Thom Adams, who is a police officer for the City of Shelton and a collector of old outboard motors; (RP 199); George Carr, a retired naval officer of thirty plus years with nuclear safety and submarine experience; (RP 235); Anne Holt; BettyKay Anderson; Dennis R. Olson, a retired principal in an employee benefit consulting business; (RP 270); Robert Sigley, a retired surgeon who has a cabin about one-third of a mile from the Loves' property; (RP 275-276); Richard Wantoch, a retired non-nuclear coordinator for the overhaul of submarines at the Puget Sound Naval Shipyard; (RP 284-285); and Brad Carey, a businessman who also lives on the canal. (RP 289).

From one-quarter mile to one mile from the Love's home along Highway 106, there are numerous businesses of various sizes. These include K & L Oyster Company, Sunset Grocery, Caughie's (pronounced Kay-hee's), Happy Hollow Grocery Store and Candy's Art Gallery. (RP 70-71, 154-155). These businesses range in size. Caughie's operates out of a large barn-type building, selling fishing tackle, "junk" in the words of Ms. Kruger, (RP 70), seafood, wood, trailers and various other items. (RP

70-71). The businesses produce a varying amount of customer and delivery traffic and esthetic impacts. (RP 154-155). Pete Merrill ran a chain-saw carving business out of his home. (RP 85). The Alderbrook Resort complex and Twanoh State Park are situated on the canal not far from the parties' properties. (RP 302). Steve Love occasionally uses the state park to launch boats that require testing in the open water. (RP 349).

Highway 106 is a state highway that runs along the shore of Hood Canal. Highway 106 is traveled daily by passenger cars and trucks and a wide range of commercial vehicles including delivery vehicles, diesel trucks including log trucks, motorcycles, and vehicles pulling trailers. (RP 151). The great weight of the testimony was that the traffic noise from the highway is significantly greater than any noise from Steve's one-man repair business and that the Kruegers' leaf blowers were every bit as loud as anything Steve did and the leaf blowers were run more frequently than Steve Love ran outboard motors. (RP 52, 67, 73, 99, 124-126, 141-143, 145-147, 151, 163, 203, 208-210, 265, 292, 317-320, 322-323)

Bill Jacobs, James David and Larry Gordon all live as close as or closer to the Loves than do the Moores and Kruegers. They all testified consistently that they experience no problems or nuisance from Steve Love's repair of boat motors; no fumes or noise or traffic problems. (RP 124-125, 140-142, 151).

Thom Adams testified that he has been a friend and customer of Steve Love's for 10 years. Thom collects old outboard motors and has more than 100 of them on his own lakefront property. (RP 199-202). He testified that Steve runs boat motors infrequently; mostly at idle in a tank of water in his shop; and although he throttles up the motors in order to troubleshoot problems, this is done for less than a minute so that the motor does not overheat, and it is a rare occurrence. He also testified that the highway noise is louder than the noise when Steve is running a boat motor. (RP 208-213; 229, 230). Officer Adams testified that he was at the Loves' property about 240 times in the past ten years, but only heard Steve throttle up motors two times. (RP 231-232). Mrs. Krueger herself testified that 'revving' of motors is only done periodically. (RP 15-17).

Steve Love testified that he runs boat motors infrequently. The majority of the time, motors are not running at all. He estimated that during a typical job, the boat engine would run for ten minutes at the most, on a dynamometer, and in the infrequent instances where he needs to throttle a motor up to full speed, he will run it for thirty seconds or less to avoid overheating of the motor; the other nine and one-half minutes are run at idle. (RP 317-319).

Witnesses including Thom Adams, George Carr, and Robert Sigley testified that Steve Love performs a valuable service for the local boating community. (RP 232-234; 251; 277).

The Loves keep their property clean and go to great lengths to prevent traffic problems; one witness described Steve's drop-off instructions as similar to a Navy nuclear safety briefing. (RP 214-218; RP 238-245); (RP 253-54); (RP 259-65); (RP 279).

The Loves' property is residential in appearance; some witnesses did not even know there was a business there despite passing it many times, even on foot or bicycle. (RP 140, 155, 214). Retired surgeon Robert Sigley drove, bicycled and ran by the Loves' property without knowing there was a business there until he finally figured out where the boat repair place was; the property was well kept and attractive and appeared entirely residential in character. Mr. Sigley has never observed noise, traffic, or pollution problems caused by SOS. (RP 277-279).

Witnesses overwhelmingly described the appearance of the Loves' place as residential in character such that a person would not know it is a business; it is a well kept, nice looking place. (RP 155, 214, 271-272, 279, 299, 340-341). There is no commercial-type parking lot, although Steve does maintain a portion of his property that is gated that customers can pull into from the highway. (RP 375). The only signs consist of two

wooden oars or paddles affixed to the shop building that say "SOS" and nothing else; that were hand-carved for Steve by Pete Merrill. (RP 156, 214, 347).

According to Mr. Gordon, who lives next door to the Moores, (RP 149), motorcycles on the highway are the largest source of noise, (RP 151), and Mr. Kruegers' leaf blowers give off about the same noise level as Steve Love does when running a boat motor, but the Kruegers run their leaf blowers more often than Steve runs a boat motor. (RP 164). Ms. Krueger said her full-time caretaker uses leaf blowers and pressure washers with gas engines that "make a certain amount of noise." (RP 66-67). Mr. Gordon testified that SOS does not affect the value of his property, (RP 150); he does not get fumes or odor of fumes but once in a while when he's outside he will hear the sound of a boat motor from SOS. (RP 151).

Yet, Ms. Moore and Ms. Krueger testified that the noise from Steve's business severely affects their enjoyment of their properties. Mr. Moore and Mr. Krueger did not testify, and the Appellants called no other witnesses.

V. ARGUMENT

Appellants argue that the trial court did not produce sufficiently specific findings of fact and conclusions of law by its Memorandum

Decision and Court's Decision After Trial. (CP 104). But, they waived that argument by not bringing it to the attention of the trial court. RAP 2.5.

If the appellant has valid objections, he must raise them in the trial court. Where no objection is made, an appellate court will give the findings a liberal construction rather than overturn the judgment based thereon. "Inasmuch as no exception was taken by appellant to the findings, they must be held as binding against him." Lauridsen v. Lewis, 50 Wash. 605, 608-609, 97 P. 663 (1908); In re Anderson, 39 Wn.2d 356, 363, 235 P.2d 303 (1951) ("The record does not disclose that appellant presented to the trial court any contention that the court's findings were conclusions of law rather than findings of fact. No such question may be presented here.").

A trial court must make findings of fact and conclusions of law sufficient to suggest the factual basis for the ultimate conclusions. Inadequate findings may be supplemented by the trial court's oral decision or statements in the record. Lawrence v. Lawrence, 105 Wn. App. 683, 686, 20 P.3d 972 (2001); In re Labelle, 107 Wn.2d 196, 219, 728 P.2d 138 (1986); State v. Holland, 98 Wn.2d 507, 518, 656 P.2d 1056 (1983) (carefully reasoned oral opinion provided adequate record for review despite inadequacy of boilerplate, generalized check-the-box findings of

fact and conclusions of law; court may look to complete record for support even where statute requires written findings); State v. M.A., 106 Wn. App. 493, 511-512, 23 P.3d 508 (2001) (court will examine entire record including trial court's oral opinion to determine sufficiency of reasons for declining juvenile into adult court).

The trial court's Memorandum Opinion is careful and detailed. It accurately reflects the facts found by the court and states the court's conclusion of law. It is sufficient.

A. Nuisance Claims. 'Nuisance' is an obstruction to the free use of property, so as to essentially interfere with the comfortable enjoyment of life and property. In order to recover for nuisance, a plaintiff must show substantial interference with the use and enjoyment of his land. RCW 7.48.010; City of Moses Lake v. United States, 430 F.Supp. 2d 1164, 1184 (2006).

For an actionable nuisance, the interference must be material and substantial, and also unreasonable, and redress may not be had for every slight discomfort or inconvenience. Brady v. City of Tacoma, 145 Wash. 351, 360, 259 P. 1089 (1927).

The Appellants' testimony centered on the noise of outboard motors being run at high speed, exhaust fumes, and the speculation that a traffic accident might occur while SOS' customers were picking up or

dropping off boats, although no such accident had ever occurred, nor could the plaintiffs point to any instance where there was a close call. (RP 72-73). Moreover, both Ms. Krueger and Ms. Moore receive regular deliveries at their canal homes by delivery vehicle, including UPS, Fed-Ex and propane truck deliveries. The Kruegers use propane to heat their house and swimming pool, and the propane truck sometimes has to park partially in the roadway. (RP 28, 63, 67, 99, 156).

Ms. Krueger's testimony was somewhat vague, but seemed to be centered on her desire to not have a business in her neighborhood. (RP 18-22) (RP 57-58). She said "I don't think anybody should be operating a commercial business in our area. This is a high-end residential district and we pay a premium in property taxes;" (RP 15); "And I don't like seeing a commercial business in a residential area. I think this is a high-end residential area and I don't know that a commercial business should be operating here." (RP 39). Also, "I mean, I don't think that a commercial business should be run in our area. I mean, I think it's a residential area. I mean, our property taxes are what, $5,000 a year." (RP 49). She stated that she knew there was road noise when she and her husband purchased their property. (RP 17). She said that she notices boat motor noise more in the summer, and it is periodic, as is the smell from exhaust fumes. (RP 16-17).

Ms. Moore testified that Steve Love produces so much noise that she cannot even watch TV in her own living room. (RP 96-97). That testimony is frankly absurd; all of the other neighbors testified that the highway is louder than Steve's business and nothing that Steve does interferes with their own use and enjoyment of their properties; even though some of them live closer to the Loves than do the Moores. The Loves' witnesses testified that Steve and SOS are assets to their lives and properties. They also testified that Mr. Krueger's caretaker runs a leaf blower more often than Steve runs outboard motors, and that the greatest noise of all is from motorcycles on the highway. These witnesses include Larry Gordon, Bill Jacobs, and Jim David.

Mr. David, a retired business executive, lives between the Moores and the Kruegers, (RP 122), but testified he experiences no disruption from SOS. He stated that everyone who lives on the canal side of the highway spends their time on the water side of their homes, because the state highway is right there on the road side, with a lot of traffic noise, especially motorcycles. He does not experience fumes at all, and Steve only runs boat motors that he can hear for minutes at a time. (RP 124). Neither he nor his guests have ever been bothered by anything from the Loves' property. (RP 125). Mr. David said that motorcycles on the highway are the loudest, then a tie between the Kruegers' leaf blowers and

SOS' outboard motors, but outboard motor noise is very infrequent. He said that Mr. Krueger's caretaker keeps the Kruegers' place impeccable and runs leaf blowers frequently. (RP 126).

Mr. Jacobs' home is right next door to the Kruegers, between the Kruegers and the Moores, and next to Mr. David's home. His home is nearer to the Loves' property than is the home of the Kruegers. (RP 139). He stated that it took him a while after he moved in to learn that the "SOS" sign meant; it was not apparent. (RP 140). Nothing that the Loves do is detrimental to his enjoyment of his property and he is not bothered by noise, odors, fumes, or smoke. (RP 141). He testified that the Kruegers' leaf blowers operate daily during leaf season; the noise is obvious no matter where he is in his house, and that he rarely hears engines from the Loves. He says that Steve Love does a lot of work that does not make any noise, and once in a while he'll hear an engine "rev" up, he'll be kind of startled and then remember what SOS stands for. But that is a rare occurrence and it does not bother him when it happens. (RP 142). Mr. Jacobs said that the highway noise is constant, he agreed with the other witnesses about motorcycle noise, and the only comments his guests have ever made have been about the highway noise. He has never seen or experienced traffic safety problems caused by the Loves' business. (RP 142-143).

Additionally, the Kruegers, Moores, Gordons, Jacobs, and Davids all live on the canal side of the highway; the Loves live on the upland side. The canal is regularly used by recreational boaters with motorboats, jet skis, and other watercraft, even a hydroplane type boat. Anyone living on the narrow strip of land between the canal and the highway reasonably expects noise, odors, and fumes from cars, trucks, boats, jet-skis, motorcycles, lawn mowers, leaf blowers, and other large and small gasoline and diesel engine powered vehicles, watercraft and tools. (RP 124, 163, 203-204).

Based upon all of the testimony, the trial court plainly did not believe that the Appellants suffered the significant invasions of noise, fumes, and traffic that they claimed. They suffered no unreasonable harm; therefore, there was no nuisance. An appellate court defers to the trier of fact on conflicting testimony, witness credibility, and the persuasiveness of the evidence. Morse v. Antonellis, 149 Wn.2d 572, 574, 70 P.3d 125 (2003).

Further, where the acts complained of cause some interference with property, but do not cause interference that would be considered unreasonable by persons of normal and ordinary sensibilities under all the facts and circumstances, nuisance is not proved. This is an objective test

rather than a subjective test. Riblet v. Ideal Cement Co., 57 Wn.2d 619, 622, 358 P.2d 975 (1961).

In Riblet, neighbors in the same proximity to a cement plant as the plaintiffs testified that they did not find the small amount of cement dust deposited on their properties after the cement plant made improvements to be offensive. The court held that it was proper to instruct the jury on whether the plaintiffs were persons of normal and ordinary sensibilities and upheld the verdict for the cement company defendant. Riblet, at 622-24.

B. Shorelines Management Act. The Appellants claim that the Loves did not obtain proper permits for their business. The Appellants did not call any witness from the County to testify, but submitted into evidence County records that showed that the County had ruled that the Loves were not in violation of law. The County is the permitting agency under state law, including building codes and shorelines permits. Mason County is the entity charged with issuing permits and prosecuting violations under the Shorelines Management Act. RCW 90.58.050; 90.58.140. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 810, 824, 828 P.2d 549 (1992).

Moreover, since the Appellants did not convince the trial court that they suffered harm, whether the Loves had a permit or not is irrelevant.

Either a private citizen or the government may base an action for damages on the Shorelines Management Act (SMA), RCW 90.58.230, but only a governmental entity may base an action for injunctive relief on the SMA. RCW 90.58.210. Thus, even where the SMA is violated, a private citizen must prove damages to sustain a claim under the SMA. Hedlund v. White, 67 Wn. App. 409, 414, 836 P.2d 250 (1992).

Here, the Appellants did not convince the court that they suffered damages, or that they suffered intrusions that would be considered unreasonable by persons of normal and ordinary sensibilities. Thus, they did not prove a claim of nuisance under the SMA or any other legal theory.

The Appellants argue at length that they proved nuisance per se, by violating the SMA, a Mason County noise ordinance, and a highway access permit. But, they did not plead a claim under nuisance per se. Appellant's Complaint, (CP 2), sets forth three causes of action: (1) Continuing Public Nuisance; (2) Continuing Nuisance; and (3) Violation of the Shoreline Management Act. (CP 2). None of those claims references nuisance per se.

Even if they did adequately plead nuisance per se, they still have to prove damages of a significant and material kind; of a kind that would offend persons of normal and ordinary sensibilities. An actionable

nuisance is "whatever is injurious to health or indecent or offensive to the senses, or an obstruction to the free use of property, so as to essentially interfere with the comfortable enjoyment of the life and property." RCW 7.48.010.

The Appellants' opening brief at page 20 claims that it was conceded at trial (RP, pg. 390) that the Loves did not have the necessary permits. (Opening Brief of Appellants, page 20). But, no such concession was made. Steve Love testified that he personally was not aware whether a permit had been issued; that all applications had been submitted; that county officials had visited the site numerous times; and that no one had ever told him that he was doing anything wrong. (RP 387-397).

Moreover, Appellant's Brief, page 23 argues that "Because Love alleged without proof that the County could not locate the planning files, Respondent guessed "it is entirely possible that those files contain all necessary permits."" However, Love did not produce the Mason County files as evidence; the Appellants did. Love simply argued that the Appellants' proof was insufficient to prove either a lack of necessary permits or nuisance. The County either issued a Shorelines permit, or it determined that no Shorelines permit was needed. The Appellants did not prove otherwise. Their claim that an SMA permit or a conditional use permit was proved is belied by Gill v. LDI, 19 F.Supp.2d 1188, 1199-1200

(W.D.Wash.1998), where the county hearing officer issued an ambiguous order whether LDI needed a conditional use permit, there was no proof that LDI violated the terms of the order, and Snohomish County refused to prosecute for operating without a conditional use permit.

Here, the county records are ambiguous, the county determined that Mr. Love is not in violation, and the county refused to prosecute. (Ex. 1-5).

In 1994, the Loves applied to Mason County to build a large 30' by 45' metal building on their property for Steve to use to repair boat motors. (Ex. 1). But the Moores and Kruegers complained, so the Loves decided not to build the large building. Instead, they simply replaced the existing carport, in place, with a 300 square foot carport-type building. (Ex. 1-5).

In approximately 1995, Mr. Krueger asked Steve Love to write a letter to Mason County in support of Mr. Krueger's plan to develop two nearby lots owned by the Kruegers for a duplex and a single-family residence. Although Mr. Love was not against the project, he declined to take a position in the matter because he knew that some of the neighbors objected. That decision began a years' long campaign of harassment that included complaints to several government agencies and numerous site visits by those agencies to the Love property. It was also the last time that Mr. Krueger ever spoke to Steve Love. All of the agencies'

representatives told Mr. Love that they found no violations of any kind with his business or property. (RP 333-337).

Mr. Krueger told Mr. Gordon that he intended to develop the two properties in retaliation for Mr. Gordon's successful lawsuit against Mr. Krueger's son, and that he had better get used to cars coming and going at all hours of the day and night. (RP 167-168, 181).

Hal Moore asked Jim David to join the Moore/Krueger lawsuit against Steve and MaryLou Love. When Mr. David declined, Mr. Moore said he would sue Mr. David as well. (RP 129, 134).

The fact that the Kruegers wanted to increase the residential density of the neighborhood to retaliate against Mr. Gordon certainly argues against their claim of nuisance. There is no evidence that anyone objected to the Loves' carport replacement until 2003, almost nine years after the permitting process, and thirteen years after Steve Love began repairing boat motors at his home part time; nine years after Steve was working full-time from his home. (Ex. 7); (RP 336).

In 2003, the Appellants, through counsel, complained to Mason County about the Loves' business. (Ex. 7). But, the County determined that there were no violations. The County documents are somewhat ambiguous, but the reasonable inferences from the evidence are that the Loves either had all needed permits, or that the carport replacement did

not need a permit under the SMA. In any event, for any of their theories, Appellants must prove injury. That they did not do.

Exhibit #5 is a Mason County Building Permit Application dated May 18, 1994 to replace a carport; this is the carport that Mr. Love currently works out of. Exhibit #6 is a Building Permit Application to re-roof a storage shed/pumphouse, dated August 15, 1994; this building has nothing to do with the current lawsuit. Exhibit #7 is a document entitled "Case Activity Listing", and is dated 7/22/2005 in the upper right hand corner. That document recites that the County received a complaint about the Loves' property in 2003. Under date heading 1/28/03 (almost 9 years after the permit application and improvement projects) appears the following entry:

> "legal (sic) file research completed. Determined that SHR94-00018 and SEP94-00115 were issued for a proposed 30' x 45' metal building for boat motor repair shop. Subsequently, BLD94-00750 and BLD94-01263 were approved. Regarding BLD94-00750, planner Don Brush made notes advising that change in size of structure was approved. Unable to locate the actual physical records associated with SEP and SHR cases, I have to assume that the planner who reviewed the revised BLD application determined that the structure was of equal or lesser intensity to that of the structure proposed in the SEP and SHP cases, and approved the BLD application. The boat motor repair operations, as a use, have existed since at least 1994. According to the complainant's attorney and the property owner, no substantial changes have taken place since that time. With lack of evidence to support the fact that a violation has occurred, the operations can continue as an existing cottage industry. It should be noted that the structures permitted pursuant to BLD94-00750 and BLD94-01263

were approved (under the older UBC) as M-1 structures (PRIVATE garages, carports, sheds and agricultural buildings). A copy of these notes will be forwarded to the Building Department (TLG on 1/28/03) for compliance review. Klf."

The final heading is "ENFC003 Complaint Invalid." It is dated 1/29/03 and states only "see misc. notes. klf."

Below on the document are some handwritten notes; they state that BLD94-01263 was issued 8/94 for an addition to a storage shed, and BLD94-00750 was issued 6/94 for a carport.

The statement that "Regarding BLD94-00750, planner Don Brush made notes advising that change in size of structure was approved" indicates a change in plan from a larger structure to a smaller one, which is consistent with the Love's abandonment of the 30' by 45' metal building for the 300 square foot carport replacement. The carport replacement was approved and permitted many years ago. No appeal was made of the permit to replace the carport; failure to appeal a decision to issue a building permit under the Land Use Petition Act (LUPA) within twenty-one days of the issuance of the building permit bars a later nuisance suit based on the permit decision. Asche v. Bloomquist, 132 Wn. App. 784, 788, 133 P.3d 475 (2006). The SMA also contains a 21 day deadline to appeal a decision to issue or deny a permit. RCW 90.58.180.

It appears from the evidence that the County determined that the Loves did not need any shorelines permits, neither a substantial development permit nor a conditional use permit. This decision is entirely supportable under the Shoreline Management code.

The County's Shoreline Management code purpose section states in part that:

> The master program provides for the management of the shorelines by fostering all reasonable and appropriate uses. . . alterations of the natural condition of the shorelines of the state, in those limited instances when authorized, shall be given priority for single family residences, ports, shoreline recreational uses, including but not limited to parks, marinas, piers, and other improvements facilitating public access to shorelines of the state, industrial and commercial development which are particularly dependent on their location on or use of the shorelines of the state and other development that will provide an opportunity for substantial numbers of people to enjoy the shorelines of the state.

Mason County Ordinance 7.04.020, which is similar to the policy statement of the SMA, RCW 90.58.020.

The Loves' use of their property is an appropriate use. It is both a single family residence and small business that facilitates peoples' use of the shorelines of the state and especially of Hood Canal. Mr. Love needs occasionally to water-test a boat in open water; his nearness to the Canal is valuable for that purpose and for the convenience of customers who live on or use the Canal. He did not alter the natural shorelines; he replaced an existing carport.

Mason County Ordinance 7.04.032 states that "a use or development which is to some extent inconsistent with a policy plan may not be unlawful, ..." This is consistent with the SMA and the rest of the County code; it indicates that the County has some discretion in approving or denying permits or granting exceptions. The Appellants point to no authority for a court to review a discretionary decision by a County after the appeal period has passed for the permitting decision.

The SMA requires a substantial development permit for substantial development. RCW 90.58.140. The SMA recognizes that certain projects are consistent with the policies of the Act and do not require a substantial development permit. The carport replacement may or may not be "development", which means:

> a use consisting of the construction or exterior alteration of structures; dredging; drilling; dumping; filling; removal of any sand, gravel or minerals; bulkheading; driving of piling; placing of obstructions; or any project of a permanent or temporary nature which interferes with the normal public use of the surface of the waters overlying lands subject to this chapter at any state of water level.

RCW 90.58.030(3)(a). "Substantial development" means any development of which the total cost or fair market value exceeds $5,000. RCW 90.58.030(3)(e). Obviously, Mr. Love's carport does not interfere with public use of waters; no case was found discussing whether it would

yet be "development" due to an exterior alteration of a structure. Regardless, no evidence was presented of the cost or value of the carport; thus it was not shown to be a "substantial development".

The Loves' carport replacement qualifies as a "home occupation", which requires neither a substantial development permit nor a conditional use permit, as follows:

> "Home occupation" means a business conducted within a dwelling which is the residence of the principal practitioner. A home occupation may be reviewed as a residential use provided it complies with all applicable county ordinances and no alteration is made to the exterior of the residence or site which would alter the character of the site as residential property including parking and signs. Home occupations do not require a substantial development permit if they require less than $2,500 ($5,000 in section 7.16.040(1)) in exterior development costs.

Mason County Code 7.08 (Definitions). Both Mason County Code 7.08 and 7.16.040(1) define "home occupation", but they conflict in the amount of improvement costs. 7.08 states $2,500 but 7.16.040 states $5,000, as does the SMA definition for "substantial development." The Appellants submitted no evidence on the cost of the Loves' carport replacement.

Further, the Appellants' argument that the Loves erected two carports is a red herring. The smaller carport-type structure is temporary and movable; it does not require any type of permit.

The definition of home occupation fits the Loves' property; they erected no parking lot and there are no commercial signs. The property "appears to be a well kept, nice looking residence." (RP 279). There are boats there from time to time, but there are boats all up and down the canal parked in driveways and carports; (RP 279); there are "lots" of boats up and down the canal on Highway 106 parked in yards and on the highway shoulder. (RP 290). Mr. Wantoch said he occasionally sees another boat at the Loves', but very rarely. (RP 286). Mr. Carey said he's never been there when Mr. Love had another customer; it is like his own personal boat shop. He described the appearance of the property as "quaint", and as a "hobby" rather than a commercial boat operation. (RP 298).

The carport replacement is clearly an appurtenant structure to the residence. Mason County Code 7.08 (Definitions). A permit reviewer or planner would necessarily have to exercise some discretion in applying these definitions to the facts of a case. A decision to classify the Loves' carport under the home occupation definition is not arbitrary or capricious. That the Appellants may disagree with it does not make it arbitrary or capricious, or actionable, and they did not appeal it.

Moreover, Mason County Code 7.16.005's "Project Classification Table" shows that any "development" involving a single-family residence is exempt from a substantial development permit or a conditional use

permit under the SMA. Single-family use is the category that Exhibit 7 shows that the County classified the Loves' carport project under, despite that document's use of the phrase "cottage industry". This is a legal, valid, and defensible decision by the County under the Code. The Loves are not in violation.

At page 24 of their Opening Brief of Appellants, Appellants argue misleadingly that "The County specifically informed Respondents that shoreline permits ***were*** required for their proposal." (Emphasis in original). But, the County informed the Loves that they needed an SMA permit for the 30' by 45' metal building, which they did not build; not for the 300 square foot carport replacement. (Ex. 1-5).

Appellants claim that the Love's carport replacement could not come under the "home occupation" exemption because there is no letter of exemption under WAC 173-27-050; but, that rule only applies to projects requiring federal permits and it has no counterpart in the County Code. They claim that development costs must be less than $2,500; but as shown above the correct figure is $5,000. RCW 90.58.030(3)(e); Mason County Code 7.16.040(1); WAC 173-27-040 (2). Further, they intentionally ignore the "appurtenant structure" definition in arguing that the Loves do not repair boat motors in their house; the carport is an "appurtenant

structure" to the house under both the County Code and WAC 173-27-040(2)(g) and in no way disqualifies the "home occupation" classification.

Appellants argue in passing that the Loves violated a state Department of Transportation permit, which was issued to allow them to place a culvert in a roadside ditch and construct an entryway onto their property. They claim the Loves' use violated provision 9 of that permit; which states that "All buildings and appurtenances shall be so located at a distance from the right of way line of any State Highway that none of the right of way therefore is required for use of the patrons or customers of any such establishment." (Ex. 12). The State inspected the property and approved the permit.

The Loves do not require their customers to use the right of way; they have an area for the customers to pull completely off the highway. (RP 375). Further, it is legal for anyone to park on the shoulder of a highway, except a limited access highway. RCW 47.52.120; RCW 46.04.197. Moreover, people park their vehicles and boats and trailers on both sides of the highway all up and down the canal. (RP 290). Finally, the Appellants do not explain how a violation of a DOT construction permit would constitute a nuisance per se, and cite no authority on point for that position. The trial court plainly did not credit the Appellants'

testimony that they feared traffic accidents due to the Loves' business; particularly since there had never been one.

Appellants also claim that the Loves' business violates a Mason County Noise ordinance. But, they presented no evidence other than the testimony of Ms. Krueger and Ms. Moore that they could hear boat motors running occasionally. Mason County Code 9.36.060 sets maximum noise levels in terms of measured decibel levels; no evidence was presented in that regard. Mason County Code section 9.36.120(3) states that noise shall not "unreasonably disturb or interfere with the peace, comfort and repose of the community." The trial court was not persuaded that the community was disturbed unreasonably, as discussed above. 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).

The Appellants' claim that Respondents' property is "very small and burdened by steep slopes" cites only to Exhibit 14, which is an overhead photograph of the general area from which it is impossible to make that conclusion; no other evidence was elicited to support this, and the other exhibits contradict that claim.

It seems that the Appellants were unhappy with the County's determination of no violation. But unhappiness is not evidence. The

Court will recall Mr. Love's testimony that he refused to agree to Mr. Krueger's plan to develop two separate properties – one next to the Moore house and a duplex across the street – and that is when state agencies began visiting Mr. Love's home, including Air Quality, Environmental Health, and of course numerous visits by the building department of the county. No violations were ever found. No traffic violations have ever been cited or claimed in the vicinity of SOS and the Love home, either. If the business was fractionally as dangerous and intrusive as the plaintiffs' claim, it seems highly likely that one of these agencies would have taken enforcement action. That they did not indicates that the Appellants are greatly exaggerating their claims for motives of their own.

The Court should review the photographs that purport to show fumes or exhaust and vehicles and boats parked on the highway shoulder. Neither Appellants' witness could accurately date virtually any of the photographs; the ones showing smoke or exhaust also show a pickup truck in Mr. Loves driveway that he has not owned since well before the statute of limitations deadline declared in the summary judgment order. They produced no recent photographs; no sound studies or sound recordings; no expert witnesses to testify to safety, noise or air pollution; only their own vague testimony. There is not even any evidence that the haze shown in

some of the photos was caused by SOS; it could easily be from the Kruegers' woodstoves.

An analytic problem arises for the Appellants by reason that witnesses living in the same relative proximity to SOS disagreed whether SOS interfered with their use of their properties. Ms. Moore and Ms. Krueger said yes; Mr. Jacobs, Mr. David, and Mr. Gordon all said no.

To constitute a nuisance, "the enjoyment of one's premises must be sensibly diminished, either by actual tangible injury to the property itself, or by the promotion of such physical discomforts as detract sensibly from the ordinary enjoyment of life. It is not enough that the business sought to be enjoined is productive of inconvenience, or shocks the taste, or diminishes the value of the property in the vicinity, or causes a reduction in rentals. Every person has a right to do with his own property as he sees fit so long as he does not invade the rights of his neighbor unreasonably, judged by the ordinary standards of life, according to the notions and habits of people of ordinary sensibilities and simple tastes." Crawford v. Central Steam Laundry, 78 Wash. 355, 357-58, 139 P. 56 (1914).

In Crawford, 10 persons had joined to complain that the steam laundry was a nuisance. The complaints included offensive odors, smoke blowing through doors and windows, falling rental value, and danger to

the health of the community. Other residents in the same neighborhood, some of whom were nearer the laundry than the plaintiffs, testified that they were not affected by the things described by the plaintiffs, and were not inconvenienced by the laundry. The court held that nuisance was not proved. Crawford, at 356-58.

In Morin v. Johnson, plaintiffs operated an apartment building since 1945. Nine years later the defendants purchased the adjoining property and began a tire-recapping business on it. Some of the apartment tenants complained of noise and odors from the plant, while other tenants as well as adjoining property owners testified that they either did not notice the noise and odors or found them to be unobjectionable. The appellate court upheld the trial court's decision that nuisance was not proved, citing the Crawford case and noting that diminishment of property values by itself is not sufficient for a finding of nuisance. 49 Wn.2d 275, 300 P.2d 569 (1956).

The Crawford and Morin and present case all concern conflicting testimony; some witnesses testified that the businesses were offensive and some testified they were not. The standard is along the lines of the reasonable person standard – and the trial court determined that reasonable person of ordinary sensibilities would not find SOS objectionable or offensive.

Some of the cases state that whether a particular business constitutes a nuisance depends in part on the character of the area where it is located. For example, a slaughterhouse or a rendering plant could be a nuisance in an exclusively residential district, but may not be in other areas. On the other hand, many small businesses fit in well with residential neighbors, as demonstrated by the facts of the present case. For an actionable nuisance, the interference must be material and substantial, and also unreasonable, and redress may not be had for every slight discomfort or inconvenience. Brady v. City of Tacoma, 145 Wash. 351, 360, 259 P. 1089 (1927).

Here, the plaintiffs testified that SOS is located in a high-end residential neighborhood. (RP 15, 39, 49). In fact, this is a mixed-use area; there are numerous businesses of varying sizes as well as residences all along the road; many within ¼ to 1 mile of the plaintiffs' properties. (RP 70-71; 154-155).

Jones v. Rumford is an example where nuisance was sustained. There, the defendant operated a chicken raising business in a two-story, 89' by 154' building that housed 5,000 to 7,000 chickens, with two dropping pits running the length of the building. The odor of chicken manure and noise of that many chickens is far greater than anything in the present case. 64 Wn.2d 559, 392 P.2d 808 (1964).

Tarr v. Hopewell Community Club involved a nuisance claim by a property owner across the street from the community club. The plaintiff owned a farm and the community club was located in a prosperous, rural area. The claim was denied; nuisance was not found. The plaintiff complained of frequent night meetings at the hall, accompanied by much noise of a very annoying character, particularly at the termination of the meetings, including the noise and fumes from the starting of a large number of automobiles, loud talking and calling from car to car by the occupants, blowing of automobile horns, as well as the drinking of intoxicating liquor during monthly dances. "Appellant is of an eccentric disposition, and, we think, is inclined to entertain an exaggerated view of the annoying character of what occurred incident to the holding of the night meetings and dances at the hall. We do not mean to suggest that, because of his eccentric disposition, he is not entitled to all the protection that the law gives to any citizen." Tarr, 153 Wash. 214, 216-17, 279 P. 594 (1929), citing with approval Crawford's discussion of what might constitute a nuisance.

In Brady v. City of Tacoma, the court discussed the level of impact necessary to prove an actionable claim for noise produced by a business. The case involved a city electric power substation with a large building and numerous high steel towers carrying steel transmission lines. The

plaintiffs testified that the substation emitted a loud humming or buzzing noise that continued all hours of the day and night, entering their homes, causing constant annoyance and discomfort and lessening their property values. The court found the situation was not actionable, and reasoned as follows:

> "It would seem that, in the use of the words 'material' and 'substantial', Judge Bridges was endeavoring to reach the point we feel we must here discuss. Respondents have argued that the humming sound penetrating to their property was a physical invasion, and perhaps, in a sense it was. In the same sense, if the average householder in any urban community stands on his lawn and speaks to his child, calls his dog, or addresses a friend passing on the sidewalk, the sound of his voice will also invade his neighbors' property. But if these things be done in an ordinary and reasonable way, who will contend that they are actionable? So that all commercial and industrial businesses. Certain sounds of the activity conducted will penetrate adjoining property. It now seems to us that as to such sounds, before they can be held to be actionable, it must appear that they are material and substantial, and also unreasonable, and that redress may not be had for every slight discomfort or inconvenience."

Brady v. City of Tacoma, 145 Wash. 351, 359, 360, 259 P. 1089 (1927) (citing and quoting Bartel v. Ridgefield Lumber Co., 131 Wash. 183, 229 P. 306, 37 A.L.R. 683, where the operation of a sawmill did unreasonably interfere).

An example of facts that clearly constitute nuisance is Tinsley v. Monson & Sons Cattle Co., 2 Wn. App. 675, 472 P.2d 546 (1970). There, a neighbor operated a high density cattle feed-lot operation, one of the 9

pens was only 40' from the plaintiffs' home, and manure was allowed to remain and putrify in the pens, with noxious odors, flies and resulting nausea.

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). Even a violation of a statute cannot constitute nuisance 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).

Appellants cite Bruskland v. Oak Theater, Inc., 42 Wn.2d 346, 349, 254 P.2d 1035 (1953), for the holding that "the question of liability does not depend upon how respondents themselves were affected, but upon how ordinary persons occupying the home or premises of respondents would have been affected by the acts of appellants." This is clearly an objective standard; in the case at bar, the trial court was not persuaded that ordinary persons would have been affected or that the Appellants suffered any more injury than did their neighbors Mr. David, Mr. Jacob, and Mr. Gordon.

In conclusion, the Appellants did not persuade the trial court that they suffered any particular injury from Steve Love's one man boat motor repair and maintenance operation. They did not prove nuisance under any theory. SOS is simply not comparable to a cement plant, a cattle feed lot, or the other things found to be nuisances by the case law. There are no cases cited or found where nuisance was found on facts similar to the case at bar.

C. Request for Attorney's Fees in the Trial Court

Appellants claim that they did not present their case as a suit for damages under the Shorelines Management Act, and that both Mrs. Krueger and Mrs. Moore testified that they were not seeking damages. But, if that is relevant, it is not plain from their pleadings, evidence, or arguments; and is in fact contradicted by them.

The Complaint, at page 6, lines 19 and on, (CP 2), clearly sets forth a cause of action for a violation of the Shorelines Management Act, and is titled, "Third Cause of Action – Violation of Shoreline Management Act." The Appellants even included a request for recovery of costs and attorney's fees pursuant to RCW 90.58.230 of the SMA, at page 9 of their Complaint for Damages and Injunctive Relief. (CP 2). At no time did the Plaintiffs move to dismiss that claim.

Plaintiffs' written Closing Argument in the trial court, at page 2, lines 10-15, states as follows:

> Because Love's commercial business lacks required permits it is a nuisance *per se*. Plaintiffs seek injunctive relief requiring Love's commercial business immediately cease. While the plaintiffs are not necessarily seeking damages, damages are allowed both under the nuisance statute and state "Shoreline Management Act" and should be considered by the court.

It is difficult to characterize this as anything but a request for damages under both nuisance and Shorelines Management Act claims. The Plaintiffs' Closing Argument extensively argued and briefed both causes of action, combining them in some areas. The final sentence at page 19, lines 11-14 requests damages, as follows: "Plaintiffs also seek damages for the significant loss and enjoyment of their properties from 2004 to the present." Appellants cannot have it both ways. They cannot request damages should they prevail in both causes of action, but limit their exposure to the Respondents' attorneys' fees should Respondents prevail. Appellants' argument that they abandoned the Shorelines Management Act claim prior to trial is not supportable, and it is abundantly clear from their own pleadings that they would have requested all available relief under the Shorelines Management Act if they had prevailed.

D. Request for Attorney's Fees in the Court of Appeals

In their Answer to the Plaintiffs' Complaint, (CP 12), the Respondents requested "an award of Defendants' costs and attorney fees necessary in defending this action pursuant to RCW 90.58.230." (CP 12, pg. 2, lines 21-22).

RCW 90.58.230 provides as follows, emphasis added to the relevant portion:

> Any person subject to the regulatory program of this chapter who violates any provision of this chapter or permit issued pursuant thereto shall be liable for all damage to public or private property arising from such violation, including the cost of restoring the affected area to its condition prior to violation. The attorney general or local government attorney shall bring suit for damages under this section on behalf of the state of local governments. Private persons shall have the right to bring suit fro damages under this section on their own behalf and on the behalf of all persons similarly situated. If liability has been established for the cost of restoring an area affected by a violation the court shall make provision to assure that restoration will be accomplished within a reasonable time at the expense of the violator. ***In addition to such relief, including money damages, the court in its discretion may award attorney's fees and costs of the suit to the prevailing party.***

Attorney's fees may be awarded under RCW 90.58.230 to a prevailing defendant. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 823, 828 P.2d 549 (1992).

Respondents are requesting attorney's fees on appeal as well. Attorney's fees on appeal are discretionary with the appellate court, which has inherent jurisdiction to award attorney's fees on appeal if a statute

allows attorney's fees at trial. Cowiche Canyon Conservancy, at 825, (attorney's fees awarded to defendants in trial court and on appeal in Shorelines Management Act case).

E. Argument for Attorney's Fees in the Trial Court and at the Court of Appeals

An award of attorney's fees is reviewed for abuse of discretion. In order to reverse an attorney's fee award, an appellate court must find that the trial court manifestly abused its discretion. That is, the trial court must have exercised its discretion on untenable grounds or for untenable reasons. Chuon Van Pham v. City of Seattle, 159 Wn.2d 527, 538, 151 P.3d 976 (2007).

Appellants argue that the trial court was required to enter written findings of fact and conclusions of law for the award of attorney's fees, or remand is automatic. But, the Appellants overstate the authority for this claim and waived it by failing to raise it in the trial court. RAP 2.5(a); Unifund CRR Partners v. Sunde, ___ Wn. App. ___, ___ P.3d ___, WL2811335 (Div. II, 2011) (attorney's fee award upheld despite lack of findings and conclusions).

The comments to RAP 2.5 indicate that the purpose of the rule is to avoid the time and expense of unnecessary appeals and to give the trial court the opportunity to correct errors by requiring the parties to either

point them out or waive them. Comment 2 states that the rule is "nearly universal"; none of the few exceptions to the rule apply in this case.

Failure to make findings will not be considered in the appellate court in the absence of a request for it in the trial court. Dyer v. Dyer, 65 Wash. 535, 538, 118 P. 634 (1911); Ach v. Carter, 21 Wash. 140, 142, 57 P. 344 (1899). The general rule is that a party must bring an alleged error to the attention of the trial court at a time that will afford the trial court an opportunity to correct it. In re Welfare of Young, 24 Wn. App. 392, 397, 600 P.2d 1312 (1979); State v. I.K.C., 160 Wn. App. 660, 664, 248 P.3d 145 (2011); State v. Wicke, 91 Wn.2d 638, 642-43, 591 P.2d 452 (1979) (under most circumstances, we are simply unwilling to go to trial before a trier of fact acceptable to him, speculate on the outcome, and upon receiving an adverse result, claim error for the first time on appeal); Sun Life Assur. Co. of Canada v. Cushman, 22 Wn.2d 930, 944, 158 P.2d 101 (1958) (not sufficient to simply call alleged error to trial court' attention; counsel must demand affirmative relief).

In re Dependency of O.J. involved termination of parental rights. The trial court neglected to appoint a guardian ad litem despite a statute's requirement that it either do so or state good cause for not appointing a guardian ad litem. The trial court's findings of fact and conclusions of law did not address the issue or state good cause for not appointing a guardian

ad litem. "Had May drawn the court's attention to its failure to make a finding of good cause not to appoint a guardian ad litem and the court still failed to act or relied for its finding on something other than good cause, there might well be reversible error. ***But a party may not be delinquent in raising such an issue and expect to obtain relief.***" 88 Wn. App. 690, 696, 947 P.2d 252 (1997) (emphasis added); State v. Roggenkamp, 115 Wn. App. 927, 949, 64 P.3d 92 (2003) (failure to raise issue in trial court of trial court's failure to produce findings of fact precludes review).

The Appellants raised no objection in the trial court to the lack of findings and conclusions; indeed they did not even appear when the judgment was entered. (CP 130).

Inadequate findings may be supplemented by the entire record, including the trial court's oral decision. State v. M.A., 106 Wn. App. 493, 511-512, 23 P.3d 508 (2001). But, the Appellants have not designated the transcript of the judge's oral decision as part of the record for review. An appellate court need not consider alleged error when the need for additional record is obvious, but has not been provided. The appellate court has the discretion to either decline to consider the claimed error, or to direct that the record be supplemented. State v. Wade, 138 Wn.2d 460, 464-65, 979 P.2d 850 (1999); In re Marriage of Ochsner, 47 Wn. App.

520, 528, 736 P.2d 292 (1987); Heilman v. Wentworth, 18 Wn. App. 751, 753-54, 571 P.2d 963 (1977); RAP 9.10.

Appellants next argue that Defendants cannot recover attorneys' fees because Defendants' attorney charged a flat fee. There is no authority cited for that proposition, and it would seem to be contrary to public policy if there was. Indeed, case law shows that even public interest and pro-bono attorneys can recover attorney's fees. 25 Washington Practice s. 14:20; Frank Colucio Constr. Co., Inc. v. King County, 136 Wn. App. 751, 780, 150 P.3d 1147 (2007); Blair v. Washington State Univ., 108 Wn.2d 558, 570-72, 740 P.2d 1379 (1987) (trial court may award fees even where attorney proceeded pro bono or voluntarily without a fee agreement); Blum v. Stenson, 465 U.S. 886, 896-98, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984) (trial court may allow upward adjustment of attorneys fees).

In Blum v. Stenson, the United States Supreme Court held that an award of attorneys' fees was appropriate where the prevailing party was represented by a public interest law firm, The Legal Aid Society of New York, a private nonprofit law office dedicated to the representation of persons who cannot afford a lawyer. The proper standard for computing those fees was the prevailing market rate on an hourly basis for each lawyer's skill and experience. The Court did not uphold the lower court's

upward adjustment of 50%, but stated that an upward adjustment would be proper in some cases. 465 U.S. 886.

When reviewing an award of attorney's fees, the first inquiry is whether the prevailing party was entitled to attorney's fees, and second, was the award reasonable. The first inquiry is de novo; the second is abuse of discretion. A trial judge has broad discretion in determining the reasonableness of an attorney's fee award, and, in order to reverse that award the appellant must show that the trial court manifestly abused its discretion. Unifund CCR Partners v. Sunde, ___ Wn. App. ___, ___ P.3d ___ (2011) (holding that the record on review was sufficient to uphold the attorney's fee award despite the lack of findings of fact and conclusions of law from the trial court on that issue, in a case that had been pending since 2006).

Here, the Loves prevailed. They could not afford to continue on at an hourly rate; they were fortunate to locate a single attorney willing to take the case for a flat, capped fee. (CP 107). They had valid defenses, but would be left with no remedy if they could not afford an attorney. Public policy supports adequate awards where litigants would not otherwise be able to afford the costs of litigation. Louisiana-Pacific Corp. v. Asarco, Inc., 131 Wn.2d 587, 602-603, 934 P.2d 685 (1997), citing

Blair v. Washington State University, 108 Wn.2d 558; accord, Martinez v. City of Tacoma, 81 Wn. App. 228, 914 P.2d 86 (1996).

The record on review does not contain formal findings of fact and conclusions of law on the attorney's fee award. It does contain the motions for attorney's fees and accompanying declarations that were considered by the trial court. The Appellants did not object to a lack of findings and conclusions; they did not designate the trial judge's oral ruling for the record on review; RAP 9.10, and they waited until appeal to raise this issue. This case has been pending since 2006. The Court of Appeals should find that the record is sufficient to review the fee award and uphold it under a manifest abuse of discretion standard.

Where attorney's fees for successful and unsuccessful claims are inseparable, the trial court may award the prevailing party all its fees. Blair v. Washington State University, 108 Wn.2d at 572; Bloor v. Fritz, 143 Wn. App. 718, 747, 180 P.3d 805 (2008) (trial court properly refused to segregate fees from claims where it felt it would be virtually impossible to do so).

Here, the defendants have had to defend against a many years' effort by the Appellants to put him out of business for motives of their own. The Appellants put forth a nuisance claim, a Shorelines Management Act claim, and a hybrid claim of nuisance *per se* by way of

violation of the Shorelines Management Act. It is impossible to segregate out the time involved in defending these highly interrelated claims. They all depend on the same set of facts and over-lapping theories of liability.

The Plaintiffs' objections to the request for attorneys' fees on the basis that there are no hourly billings from Mr. Finlay are not well taken. There would also be no hourly billings from a pro bono representation. The Appellants cite to Washington State Democratic Party v. Reed, 343 F.3d 1198 (9th Cir. 2003) without a pinpoint cite, for the proposition that "block billing practices are usually insufficient to show a right to attorney's fees." (Opening Brief of Appellants, pg. 48). But, that case has not a single mention of attorney's fees or billing practices and Appellants' reliance on it is inexplicable. Nor do Appellants explain or analyze this issue.

Appellants also argue that the trial court erred by including amounts spent responding to a citation from the Department of Fish and Wildlife for a dock extension. (Opening Brief of Appellants, pg. 48). But, as argued to the trial court, (CP 107-108), it was impossible to segregate that time out of the total time spent; that matter was instigated by Appellants Moore and Krueger, through counsel, and they repeatedly attempted to bring it into the trial in this case. (RP 45, 101-103); (Ex. 21) (admitted over defense objection). This Court should decline to consider

the issue of attorney's fees due to the Appellants failure to object below and their failure to designate the trial court's oral decision for the record for review. In the alternative, the Respondents request that the Court remand the issue of attorney's fees to the trial court for entry of findings of fact and conclusions of law. Mahler v. Szucs, 135 Wn.2d 398, 957 P.2d 632 (1998).

VI. CONCLUSION

For the trial court to have ruled in favor of the Appellants, it would have had to believe Mrs. Krueger and Mrs. Moore over the Respondent's witnesses, and it would have had to find that the interference was material and substantial, and also unreasonable; redress may not be had for every slight discomfort or inconvenience. It is clear from the trial court's detailed memorandum decision that it did not find that any interference was material and substantial or that reasonable people of ordinary sensibilities would have found SOS to be offensive or objectionable. Therefore, nuisance cannot lie under any theory. The Court should affirm the decision of the trial court.

The Appellants have not provided a record of the trial court's oral decision on attorney's fees, they did not appear when the order was entered, and they did not object to the lack of findings and conclusions in the trial court when the matter could readily be resolved. The record for

review contains all of the motions and declarations that the trial court considered. The Court should decline review on that issue and uphold the award or accept review and uphold the award. If the Court declines either of those options, it should remand the case to the trial court for entry of findings of fact and conclusions of law.

Respectfully submitted this 29th day of July, 2011.

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I hereby certify that on this 29th day of July, 2011, 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 29th day of July, 2011, 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 29th day of July, 2011.

Bruce J. Finlay
Attorney for Respondents