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No. 81199-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
FOR THE FIRST DIVISION

Sherri A. Urann
Respondent,
v.
Wilson Luu
Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF KING COUNTY
CASE NO. 19-2-05452-2 SEA
Judge Susan Craighead

APPELLANT'S MOTION FOR RECONSIDERATION OF DECISION TERMINATING REVIEW (R.A.P. 12.4)

TREATED AS A PETITION FOR REVIEW

DICKSON FROHLICH, PS

Kerry P. Zeiler, WSBA #56524
Thomas L. Dickson, WSBA #11802
1200 East D Street
Tacoma, WA 98421
Telephone: (253) 572-1000
Facsimile: (253) 572-1300
Attorneys for Appellant

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I. IDENTITY OF PETITIONER

Petitioner Wilson Luu seeks review of the decision of the Court of Appeals denying motion for reconsideration. Petitioner was the Appellant before Division One of the Court of Appeals and the Defendant before the trial court. The court issued its decision terminating review on June 8, 2021.

II. COURT OF APPEALS DECISION

On February 11, 2020, the trial court issued a decision denying Petitioner's motion for summary judgment and granting Respondent's cross-motion for summary judgment. On April 26, 2021, the Court of Appeals, Division I, affirmed the trial court's decision denying Petitioner's motion for summary judgment and granting Respondent's cross-motion for summary judgment. On June 8, 2021, the Court of Appeals, Division I, denied Petitioner's Motion for Reconsideration of Decision Terminating Review (R.A.P. 12.4).

I. ISSUES PRESENTED FOR REVIEW

Did the Court of Appeals err in this case? This appeal presents two questions:

1. If two reasonable judicial officers came to two different conclusions on the same summary judgment motion, is it error to sustain it?
2. If the Court of Appeals claims they weighed no facts, but then weighed facts in place of a jury, is it error?

II. STATEMENT OF THE CASE

A. Background Facts

This case involves a dispute between two neighbors concerning ownership and removal of English laurel hedges between their properties, with Respondent having asserted timber trespass for the hedge removal, and Luu having asserted adverse possession of the disputed tract upon which the laurels rested based upon the long existence of a fence between their properties on Respondent's side of the hedges, and Luu's predecessor's maintenance of the disputed hedges for a 30-year period.

Appellant, Wilson Luu's property, located at 14020 Courtland Place N, Seattle, Washington 98133 was first developed in 1985. This property lies adjacent to Respondent, Sherri A. Urann's property located at 14014 Courtland Place N, Seattle, Washington 98133. The

dispute involves the border, and hedges along the short border, between the two residential properties.

B. Procedural History

On February 26, 2019, Respondent filed this case in King County Superior Court. On September 6, 2019, Judge Rosen denied Respondent's motion for summary judgment. In December 2019, the case was transferred to Judge Craighead of King County Superior Court. Petitioner filed a motion for summary judgment and Respondent filed a cross motion for summary judgment. Respondent's cross motion presented the identical motion for summary judgment in which Judge Rosen has previously denied without disclosing it was the identical motion in accordance with King County Local Rule 7(b). Despite Respondent's non-compliance with King County Local Rule 7(b), the trial court granted summary judgment to Respondent and denied summary judgment for Petitioner on January 27, 2020.

On January 29, 2020, Petitioner filed a Motion for Reconsideration with the King County Superior Court. On February 11, 2020, the trial court denied Petitioner's Motion for Reconsideration and entered a judgment in favor of Respondent on March 2, 2020. Petitioner

timely filed a Notice of Appeal to the Court of Appeals, Division I, on March 3, 2020.

On April 26, 2021, the Court of Appeals, Division I, affirmed the trial court's findings. On May 10, 2021, Petitioner filed a Motion for Reconsideration pursuant to R.A.P. 12.4. On June 8, 2021, the Court of Appeals, Division I, denied Petitioner's Motion for Reconsideration. Now, Petitioner seeks this court for review pursuant to R.A.P. 13.4.

III. ARGUMENT WHY REVIEW SHOULD BE GRANTED

A. Summary Judgment Is Inappropriate When Two Different Judicial Officers Reach Two Different Conclusions on The Same Motion for Summary Judgment.

Courts are certainly allowed to deviate from their own rules – that is their inherent power. (*Ashely v. Superior Court*, 83 Wn.2d 630, 636, 521 P.2d 711 (1974).) This inherent power is not limitless and must be weighed against the effect of such waiver. (Id.) When the waiver defeats the very purpose of that same rule, then surely the waiver must be disallowed.

In this case, the Court of Appeals affirmed the lower court's waiver of King County Local Rule 7(b)(7), which disallows refiling "the same motion to a different judge or commissioner without showing

by declaration the motion previously made, when and to which judge or commissioner, what the order or decision waws, and any new facts or other circumstances that would justify seeking a different ruling from another judge or commissioner."

Again, waiving this rule is completely within a court's inherent power but only to the extent that its effect does not defeat the rule's very purpose. That is, arguably, to prevent two judges of identical positions from reaching two different conclusions. But, that's **exactly** what happened in this case.

The first trial court judge denied Respondent's summary judgment motion, finding sufficient issues of material fact to require a trial. The Respondent presented the identical motion for summary judgment a second time to a second judicial officer, without either disclosing it had previously done so, or identifying what was different about the first denied motion. The second trial court judge subsequently granted Respondent's summary judgment motion and found there were no issues of material fact. The trial court's waiver of King County Local Rule 7(b) led to the current predicament where two different trial court judges reached two different conclusions on the same summary judgment motion. The very outcome the rule was enacted to avoid has

occurred. If two judges of identical positions do reach different conclusions on the same legal issue, then reasonable persons cannot be said to only be able to reach one conclusion. It stands to reason that summary judgment would then be inappropriate when (1) the case presents genuine issues of fact, and (2) the moving party is not entitled to a judgement as a matter of law. (CR 56(c).) There is nothing on point prohibiting this result despite the King County local rule, which is designed to prevent it. There are some out of state decisions on point, derived from the premises that no appeal lies from the decision of one superior court judge to another – a question of supremacy. A series of North Carolina cases is right on point and offered as persuasive – the courts there have ruled "[a] decision on summary judgment is a decision on a matter of law and may not be overruled by a second trial judge on the same legal issue. (*Taylorsville Fed. Sav. & Loan Ass'n v. Keen*, 110 N.C. App. 784, 785, 431 S.E.2d 484, 484-85 (1993) (citing *American Travel Corp. v. Central Carolina Bank*, 57 N.C.App. 437, 440, 291 S.E.2d 892, 894, *cert. denied*, 306 N.C. 555, 294 S.E.2d 369 (1982)). This is juxtaposed by the treatment of summary judgment in Washington State, where courts have stressed the language of CR 56(c) suggests that a summary judgment motion is interlocutory.

CR 56 (c) says, in pertinent part:

> A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

It is a question of statutory construction, but since a summary judgment motion is dispositive, that would suggest the language of the statue means what it says with its qualifier – an interlocutory summary judgment order may be rendered on the issue of liability alone even while damages are at issue. But, where a court has made findings of fact and conclusions of law, as required by CR 56(d), to have another judge rule differently on the same motion is nothing but having one superior court judge overrule another. Again, a supremacy issue.

This was part of Mr. Luu's appeal, but Court of Appeals was unpersuaded that a rule deviation would impact the result and ruled that a trial court may waive its own rules. For the reasons stated herein, respectfully, Petitioner respectfully requests that this court consider the substantial public interest of the effect of such waiver as anything but a harmless deviation.

In fact, by allowing a moving party to waive King County Local Rule 7 and subsequently bring an identical summary judgment motion to a second trial court sets a precedence that authorizes judges of

identical positions to overrule one another In turn, this encourages parties to forum shop and skews the public perception of judicial fairness dependent on which judicial officer is assigned to its case. This ultimately defeats the very purpose of a summary judgment procedure, which is to determine in an expeditious manner whether a genuine issue of material fact exists and whether the movant is entitled to judgment on the issue presented as a matter of law. (CR 56).

In fact, Respondent's failure to notify the second trial court judge that she had already brought an identical motion to a previous trial court judge can note be called a harmless deviation as it clearly demonstrates the principal of law this court has set down that mandates reversal: summary judgment should ONLY be granted if, from all of the evidence, reasonable persons could reach but **one conclusion**. (*Wilson v. Steinbach* 98 Wn. 2d 434, 437, 656 P.2d 1030, 1031 (1982)) (emphasis added). Quite obviously, reasonable persons could not reach but one conclusion in this case. Given that two reasonable persons reached two different conclusions, summary judgment is not appropriate and the disputed material facts should be held at trial.

The Court of Appeals erred by not applying this precedential *maxim* and not vacating the trial court's grant of summary judgment and remand the case for further proceedings.

B. Summary Judgment is Inappropriate When the Appellate Courts Weigh and Value Disputed Facts.

The standard of review for summary judgment motions has long been well established: when there are multiple possible interpretations of disputed materials facts then summary judgment must be denied and the case must proceed to a trier of fact. Further, all facts and inferences must be construed in favor of the nonmoving party. (*Wilson v. Steinbach* 98 Wn. 2d 434, 437.)

The trial court's rulings in this case simply flies in the face of the summary judgment standard. Not only did two different judges interpret the material facts differently, but the appellate court weighed and valued the disputed material facts in favor of the Respondent, the moving party. In construing summary judgment, the appellate court may not deviate from legal standards and make factual determinations. It is of substantial public interest that this court definitively rule that weighing and judging disputed facts is for a trier of fact to resolve. Disputed questions of material facts are for trials, and juries, to resolve.

A summary judgment motion on appeal is reviewed *de novo*. (*Strauss v. Premera Blue Cross*, 194 Wn.2d 296, 300, 449 P.3d 640 (2019).) A summary judgment motion on appeal is also reviewed with "the evidence and all reasonable inferences from the evidence in the light most favorable to the nonmoving party." (*Keck v. Collins*, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015).) Where there are multiple possible interpretations of disputed materials facts, summary judgment must be denied, and the case must proceed to a trier of facts. (*Wilson v. Steinbach* 98 Wn. 2d 434, 437.)

Here, the Court of Appeals erred by departing from these rules, and making factual determinations as if it were a fact finder by weighing evidence against Petitioner to find "inadequate motivation" and affirming a grant of summary judgment in favor of Respondent. In so doing, the Court of Appeal identified multiple material disputed facts – such as the source of the infestation and the fence.

Specifically at page 9 footnote 3, of its opinion, the court states that:

> We note that the record is lacking in evidence that would establish the hedge was a nuisance – it includes two pest control receipts for yellow jacket and spider extermination and two vet receipts referring to treating

> Luu's dog for bee stings. None of these records reference the hedge. Luu's only declaration simply states that he "had been experiencing issues since moving in which [he] believed to be caused by the hedges." (*Opinion*, pgs. 9 – 10, fn. 3.)

That is the Court of Appeals weighing Petitioner's evidence and determining its value – a role that should be done in trial. If an appellate court questions whether the submitted evidence is sufficient to establish a claim and then proceeds to determine that it is not, then there is a genuine issue as to a material fact and the moving party is not entitled to summary judgment.

Appellate courts do not weigh evidence and dismiss its value. This is **error**. Disputed questions of material fact are for trials and juries to resolve. (*Babcock v. State*, 116 Wn.2d 596, 598-99, 809 P.2d 143 (1991).) The trial court may not replace the jury by weighing facts or deciding factual issues in ruling on a motion for summary judgment. (*Hemenway v. Miller*, 116 Wn.2d 725, 731(1991).) The Court of Appeals errs where it improperly weighs Petitioner's evidence and subsequently makes a conclusion that the evidence is lacking.

The above-cited footnote 3 is also evidence of a disputed material fact which is entitled to all reasonable inferences in the light most favorable to Petitioner as the nonmoving party. In *contra* point,

Petitioner's declaration that he believed the hedges were the source of infestation of yellow jackets and spiders is to be accepted as true since Petitioner did in fact take action upon his belief, is entitled to do so, and provided sufficient supporting proof. Petitioner's belief, supported by evidence as submitted, is sufficient to show that there is a dispute over a material fact.

Despite the requirement to construe all inferences and factual interpretations in favor of Petitioner, the Court of Appeals declined to do so. The decision states that the court so applied the rule, but if it were applying it uniformly then there would be no need for footnote 3 to be weighing evidence. One should look beyond what someone says and examine what he/she does to determine their true intention. After all, had the Court of Appeal uniformly applied these rules, then they identified an item of material fact that should be tried to a jury. It is a jury that makes decisions of motivation and veracity – not this court which has heard no testimony.

IV. CONCLUSION

The unforeseen effect of one judge overruling the conclusion of another judge of identical positions is of substantial public interest.

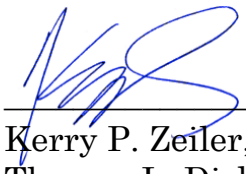
First, parties will be motivated to forum shop for a judge that is likely to rule in its favor. Second, parties will file an unending series of summary judgment motions until they reach a favorable conclusion. Lastly, the role of the appellate court will become a fact finder instead of a reviewer. This is error.

It is of paramount importance that this court definitively rule that summary judgment is inappropriate if two judicial officers disagree on their conclusions, and emphasize that the role of weighing and valuing facts is for judges and juries, not the appellate courts. Trial courts are setting a dangerous precedence of arbitrarily making summary judgment determinations. We urge this court to set clear and defined limits on a court's authority to disregard the decisions of another judicial officer and overrule them on an already decided matter.

Respectfully,

Submitted this 8th day of July 2021

DICKSON FROHLICH PS



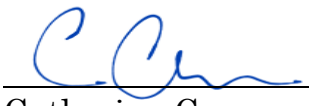
Kerry P. Zeiler, WSBA 56524
Thomas L. Dickson, WSBA 11807
Attorneys for Appellant

CERTIFICATE OF SERVICE

Under penalty of perjury of the laws of the State of Washington, I hereby certify that I served the foregoing Appellant's *Motion for Reconsideration (RAP 12.4)* to counsel of record as follows:

PARTY/COUNSEL	DELIVERY INSTRUCTIONS
David Ruzumna Law Office of David Ruzumna PLLC 2442 NW Market St Seattle, WA 98107-4137 druzumna@gmail.com *Attorney for Appellee*	☐U.S. MAIL POSTAGE PREPAID & CERTIFIED MAIL ☒EMAIL ☐EXPRESS DELIVERY ☐FACSIMILE ☐CM/ECF

Dated this 8th day of July 2021.



Catherine Carver

FILED
4/26/2021
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

SHERRI A. URANN, an unmarried individual, Respondent, v. WILSON LUU, an unmarried individual, Appellant.	No. 81199-1-I DIVISION ONE UNPUBLISHED OPINION

SMITH, J. — Wilson Luu appeals the trial court's summary judgment order holding him liable for timber trespass after he cut down the hedge separating his property from his neighbor Sherri Urann's property. Luu acknowledges that Urann was the title holder of the hedge but alleges that he acquired the hedge through adverse possession. Alternatively, he alleges that the court erred by granting summary judgment because Urann failed to comply with a local court rule, erred by failing to find that Luu's actions were justified because the hedge constituted a nuisance, and erred by trebling damages on the basis that the trespass was willful. The parties also request attorney fees on appeal.

We hold that Luu has not met his burden to establish adverse possession or that his trespass was not willful. We decline to find that the court erred by waiving the court rule or by not entering findings about nuisance, and we decline to grant attorney fees on appeal. We affirm.

FACTS

Sherri Urann moved into her north Seattle home in 2008. The north side of her property was lined with a mature English laurel hedge. In February 2018, Luu purchased and moved into the neighboring home on the north side of the hedge. At some point, he decided to remove the hedge. On August 6, 2018, he e-mailed the previous owner of his property, Sharon Bitcon, to ask if she knew where the hedge was relative to the property line. She answered the same day to tell him that she did not know the answer, but had "had them maintained so the property would look nicer." Two days later, without notice to Urann, Luu hired a tree service to cut down the hedge.

After the hedge was removed, Urann and Luu each commissioned a survey. Both surveys indicated that the hedge was south of the recorded property line. Luu's survey also identified iron pipes at the south corners of his property and railroad ties approximately marking the south line of his property. Urann sued Luu for timber trespass, and Luu counterclaimed to quiet title on the basis that he and his predecessors in interest had acquired the hedge through adverse possession.

The parties presented considerable evidence concerning a fence on the south side of the hedge. Viewing the facts and inferences in the light most favorable to Luu, from at least 1985 to 2007, there was a white fence running along the south side of at least the portion of the hedge toward the front of Luu's

and Urann's homes.[1] The hedge was initially slightly taller than the fence and by 2007 was some feet taller. By 2006, the backyard of the Urann property was fully fenced, although it is unknown whether this was through an extension of the white fence or not. At some point, the white fence was removed, and when Luu moved in in 2018, there was a wire fence running down the length of the hedge. This fence was significantly shorter than the hedge and was often obscured by laurel branches growing through it.

The parties also presented evidence regarding maintenance of the hedge. Bitcon declared that she had owned Luu's property from 1988 to 2018 and lived there from 1988 to 1992. She indicated that she did not recall her neighbors discussing or maintaining the hedge during the time she lived there and that at some point after she moved out, she hired a property management company which arranged for maintenance and yard work. She provided three of the property manager's records from 2013 and 2016 which referenced payment for yard work including "hedge trimming" or "south hedge trim." Former and current residents of the Urann property variously stated that they did not recall having the hedge trimmed, that they trimmed the hedge up to the fence, or that they would sometimes permit Bitcon's landscapers to access the Urann property to trim the south side of the hedge.

[1] The evidence supporting this inference is limited to a 1985 King County record card that appears to show a white fence post at the end of the hedge, although the rest of the fence is not visible, the statement of Sharon Bitcon that when she owned the Luu property from 1988 to 2018, she believed the hedge was hers because of a fence on the south side of the hedge, and a 2007 Google street view image showing a white fence running along the hedge in the front of the Urann property.

In August 2019, Urann moved for summary judgment, and the court denied the motion. In December 2019, the case was transferred to a different King County Superior Court judge. Luu then filed a motion for summary judgment before the new judge, and Urann filed a cross motion for summary judgment. The court granted summary judgment to Urann and awarded her treble damages for timber trespass.

Luu appeals.

ANALYSIS

Luu contends that the court erred by granting summary judgment for Urann and by awarding treble damages. We hold that Luu has not met his burden to establish adverse possession or that he had a basis to believe the hedge was his, and that the court did not err by waiving a local court rule or by failing to make findings about the hedge as a nuisance. Finally, we decline to award attorney fees on appeal.

Standard of Review

We review an order on summary judgment de novo. Strauss v. Premera Blue Cross, 194 Wn.2d 296, 300, 449 P.3d 640 (2019). We consider "the evidence and all reasonable inferences from the evidence in the light most favorable to the nonmoving party." Keck v. Collins, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015). "Summary judgment is appropriate only when no genuine issue exists as to any material fact and the moving party is entitled to judgment as a matter of law." Keck, 184 Wn.2d at 370 (footnote omitted).

Timber Trespass/Adverse Possession

Luu claims that he is not liable for timber trespass, which provides a cause of action "[w]henever any person shall cut down . . . any tree, . . . timber, or shrub on the land of another person . . . without lawful authority." RCW 64.12.030. While the surveys commissioned by the parties indicate that the hedge was on Urann's property, Luu alleges that he and his predecessors in interest acquired the hedge through adverse possession. We disagree that Luu has met his burden to establish adverse possession.

"In order to establish a claim of adverse possession, there must be possession that is: (1) open and notorious, (2) actual and uninterrupted, (3) exclusive, and (4) hostile." ITT Rayonier, Inc. v. Bell, 112 Wn.2d 754, 757, 774 P.2d 6 (1989). Each of these elements must exist concurrently for 10 years. Rayonier, 112 Wn.2d at 757; RCW 4.16.020(1). Because there is a presumption in favor of the holder of legal title, "the party claiming to have adversely possessed the property has the burden of establishing the existence of each element." Rayonier, 112 Wn.2d at 757.

To establish hostility, the claimant must "treat the land as his own as against the world throughout the statutory period." Chaplin v. Sanders, 100 Wn.2d 853, 860-61, 676 P.2d 431 (1984). The characterization of the possession "will be determined solely on the basis of the manner in which he treats the property," without regard to any subjective belief about the ownership of the land. Chaplin, 100 Wn.2d at 861. Furthermore, "[w]here a fence purports to be a line fence, rather than a random one, and when it is effective in excluding

an abutting owner from the unused part of a tract otherwise generally in use, it constitutes prima facie evidence of hostile possession up to the fence." Wood v. Nelson, 57 Wn.2d 539, 541, 358 P.2d 312 (1961).

Here, viewing the facts in the light most favorable to Luu, they do not establish hostility. Luu points to the existence of the fence and the parties' and their predecessors' maintenance of the hedge as evidence of hostility. We address both in turn.

First, the fence cannot properly be considered to establish hostility. The fence was not a straight line, but instead jumped south or north at points, such that it would not "purport[ ] to be a line fence." See Wood, 57 Wn.2d at 541; Lindberg v. Davis, 164 Wash. 680, 684, 4 P.2d 501 (1931) (approving trial court's finding that fence, which was "'not straight, but varie[d] to a marked degree in its direction at different places,'" was not a boundary line fence). There is no evidence that the fence ever served the purpose of "excluding" Urann from the other side, because from even the earliest records, the hedge served as a taller and more significant boundary than the fence. The evidence indicates that in 1985, the hedge was an effective boundary all the way down the property line, but there is no indication that the white fence was similarly effective because it is unknown whether the white fence spanned the length of the hedge. In recent years, the hedge was growing high over the wire fence, and visibility of the fence was obscured by laurel branches growing through it. Furthermore, while there was no evidence regarding the origin of the fence, Urann and her predecessor both stated that the fence enclosed the yard to contain their pets. Thus, the

evidence establishes that the hedge, rather than the fence, is what was "excluding . . . abutting owners." See Wood, 57 Wn.2d at 541. This conclusion is bolstered by the fact that a "hedge" is "a *fence or boundary* formed by a row of shrubs or low trees." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1048 (2002) (emphasis added). Given this context, we cannot conclude that the fence establishes hostility.

The only other evidence here that could tend to establish hostility is the maintenance of the hedge. The evidence shows that from 1988 to 1992, the occupant of the Luu property does not remember her neighbors maintaining the hedge, and that from 2006 to 2008, the occupant of the Urann property does not remember maintaining the hedge. At some point between 1992 and 2013, the owner of the Luu property hired a property management company which arranged for yard maintenance, including hedge trimming. The extent of this trimming is unknown, but on some occasions, Urann permitted the landscapers access to her backyard to trim the south side of the laurels. There is no evidence regarding whether Bitcon, the then-owner of the Luu property, ever directly communicated with the landscapers or directed them with respect to hedge maintenance. Finally, Urann's ex-husband stated that from 2008 to 2013, he performed "routine maintenance" by trimming the south side of the hedge up to the fence, which he thought was the boundary between the properties.

We cannot say, based solely on "the manner in which" Luu and his predecessor "treat[ed] the property," that this possession was hostile. Chaplin, 100 Wn.2d 861. The evidence shows that neighbors each tended to their side of

the hedge, at least to some extent. Maintenance on the north side of the hedge does not indicate hostility because "a landowner has the legal authority to 'engage in self-help and trim the branches and roots of a neighbor's tree that encroach onto his or her property.'" Herring v. Pelayo, 198 Wn. App. 828, 835, 397 P.3d 125 (2017) (quoting Mustoe v. Ma, 193 Wn. App. 161, 164, 371 P.3d 544 (2016)). No evidence establishes that Luu's predecessor routinely maintained the hedge south of the property line, let alone for 10 years continuously. Accordingly, even viewing the evidence in the light most favorable to Luu, he has not established hostility and therefore has not met his burden to show adverse possession of the hedge.

Luu disagrees and contends that he at least established adverse possession of the hedge at the front of the property due to the existence of the white fence. However, as we have concluded, the white fence did not establish hostility because the hedge, not the fence, excluded abutting owners. Thus, the court did not err by granting summary judgment for Urann on the issue of timber trespass, because Luu did not overcome the presumption that the hedge was on Urann's property.

Compliance with LCR 7(b)(7)

Luu next contends that the court erred by granting Urann's summary judgment motion because she did not comply with the local rules in filing her cross motion for summary judgment. We disagree.

King County Superior Court's local rules provide that "[n]o party shall remake the same motion to a different judge . . . without showing by declaration

the motion previously made, when and to which judge . . . , what the order or decision was, and any new facts or other circumstances that would justify seeking a different ruling from another judge." KING COUNTY SUPER. CT. LOCAL CIV. R. 7(b)(7). In this case, Urann did not include such a declaration in her cross motion for summary judgment. However, she did discuss the original motion and new evidence in a declaration. Furthermore, in his response to Urann's motion, Luu raised the issue of her first summary judgment motion and pointed out the differences between the two motions. The court chose to rule on the cross motion anyway. Because "[t]he court has inherent power to waive its rules," we find no basis to reverse the court's determination. Ashley v. Superior Court, 83 Wn.2d 630, 636, 521 P.2d 711 (1974).

Nuisance

Luu claims that the court erred by failing to find that the hedge constituted a nuisance and that therefore Luu's trespass was excused or, alternatively, Luu was entitled to an offset in damages.[2] Although Luu's summary judgment pleadings discussed the negative impacts that he purportedly suffered as a result of the hedge, he did not ask the court to make any determination on nuisance, either as excusing or mitigating Luu's trespass. In support of his contention on appeal, Luu makes no citations to the record or to any source of law.[3] In

[2] Luu contends that he was entitled to an offset for the damages he purportedly suffered from the hedge in two separate sections of his opening brief. Both of these sections suffer from the same defects, and we decline to address either issue.

[3] We note that the record is lacking in evidence that would establish the hedge was a nuisance—it includes two pest control receipts for yellow jacket and spider extermination and two vet receipts referring to treating Luu's dog for bee

reviewing an order on summary judgment, we consider only "issues called to the attention of the trial court." RAP 9.12. Furthermore, "[w]e do not consider conclusory arguments that are unsupported by citation to authority." Brownfield v. City of Yakima, 178 Wn. App. 850, 876, 316 P.3d 520 (2014). Therefore, we decline to address this issue.

Damages

Luu claims that the court erred by trebling damages, which is only permitted where the timber trespass is "willful," and by failing to provide an offset for damages due to the "overgrowth and intrusion" of the hedge.

RCW 64.12.030 provides that in a timber trespass case, "any judgment for the plaintiff shall be for treble the amount of damages claimed or assessed." However, "there must be an 'element of willfulness' on the part of the trespasser to support treble damages." Blake v. Grant, 65 Wn.2d 410, 412, 397 P.2d 843 (1964). Accordingly, if the trespasser establishes that the trespass was "casual or involuntary" or that the "defendant had probable cause to believe that the land on which such trespass was committed was his or her own," damages should not be trebled. RCW 64.12.040; Herring, 198 Wn. App. at 834.

We hold that Luu has not established that he had probable cause to believe the hedge was on his property. The only basis to support such a belief was the small wire fence on the south side of the hedge, which was barely visible and not a straight line. He has not claimed that anyone told him the hedge was

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stings. None of these records reference the hedge. Luu's only declaration simply states that he "had been experiencing issues since moving in which [he] believed to be caused by the hedges."

on his property, and indeed the former owner told him that she did not know where the property line was two days before he had the hedge cut down. He did not ask his neighbor where the property line was. He did not see the pipes or railroad ties that more accurately represented the true property line. He commissioned a survey after the hedge was cut down, again indicating that he was not sure where the property line was. Under these facts, we hold that Luu did not have probable cause to believe the hedge was on his property. See Blake, 65 Wn.2d at 412 (circumstantial evidence that trespasser did not locate starting point for determining boundary line, did not ask neighbors where the line was, and did not see previously blazed boundary line was sufficient to establish willfulness and support treble damages).

Attorney Fees

Both parties request attorney fees on appeal, and Luu appears to challenge the award of attorney fees below only on the basis that he should have prevailed. RAP 18.1 requires parties to request attorney fees in a section of their brief. "Argument and citation to authority are required under the rule to advise the court of the appropriate grounds for an award of attorney fees as costs." Stiles v. Kearney, 168 Wn. App. 250, 267, 277 P.3d 9 (2012). Here, Urann failed to cite any authority for an award of fees. Accordingly, we decline to grant her fees on appeal but affirm the award below.

We affirm.

WE CONCUR:

DICKSON FROHLICH PS

July 08, 2021 - 4:40 PM

Transmittal Information

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Appellate Court Case Number:	81199-1
Appellate Court Case Title:	Sherri A. Urann, Respondent v. Wilson Luu, Appellant

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- klampman@dicksonlegal.com
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TACOMA, WA, 98421-1710
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