

NO. 69513-4-I

COURT OF APPEALS, DIVISION ONE  
OF THE STATE OF WASHINGTON

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DEVON JAMES,

Appellant,

v.

TERESA ANN WRIGHT and THOMAS LEE  
CARTWRIGHT,

Respondents.

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BRIEF OF APPELLANT  
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## I. ASSIGNMENTS OF ERROR AND ISSUES

### A. Assignments of Error

1. The trial court erred in entering its order of 4/22/11 requiring appellant Devon James to return the rockery at issue to its previous condition (CP 1001-03).

2. The trial court erred in entering its order of 4/12/12 raising three additional rockery questions for an independent expert to answer, essentially asking whether James had done anything to destabilize the slope upon which the rockery sat (CP 1670-71).

3. The trial court erred in entering its order of 6/28/12 repeating the same three rockery questions (CP 1894-95).

4. The trial court erred in entering its order of 9/7/12 (CP 2023-25) regarding attorney's fees, expert fees, and the final report of Kurt Merriman, the independent geo-technical expert appointed by the trial court, whose report concluded that the *reconfiguration of the James rockery performed by or on behalf of Mr. James has not destabilized the Wright-Cartwright property in any way*, yet the trial court imposed fees against James (CP 1907).

5. The trial court erred in entering its order of 10/17/12 requiring James to complete "final remediation" of the top of the slope of the rockery, in spite of the fact that the independent geo-technical

expert specifically concluded that James had done nothing to destabilize the slope (CP 2232-33).

6. The trial court erred in entering its order of 12/6/12 awarding attorney's fees to the Cartwrights based on the rockery and view easement issues, upon which the defendant Cartwrights did not prevail (CP 2432-41).

7. The trial court erred in entering its judgment of 12/20/12 requiring James to pay the Cartwrights \$55,441.50 in attorney's fees and expert fees, the majority of which fees involved the rockery and view easement issues (CP 2481-83).

8. The trial court erred in entering its order of 1/10/13 granting additional attorney's fees to the Cartwrights in the amount of \$19,737.58, primarily for the litigation regarding the entitlement to and the amount of fees arising from the meritless rockery and view easement claims (CP 2503-06).

9. The trial court erred in entering its judgment of 2/1/13 in the amount of \$75,179.08 (CP 2547-49), and its subsequent *nunc pro tunc* judgment of 3/13/13 in the same amount, the \$75,179.08 judgment being the sum of \$55,441.50 and \$19,737.58 (CP2561-62).

10. The trial court erred in exercising the limited jurisdiction it retained in its Permanent Injunction issued following a bench trial,

over post-trial issues raised by the Cartwrights concerning James's rockery/slope stabilization, which issues did not arise at trial, which issues were not addressed in the Permanent Injunction, which issues were not encompassed within the trial court's order retaining limited jurisdiction to enforce the Permanent Injunction, and which issues were not addressed in any pleadings.

11. The trial court erred in granting respondent Cartwrights' motions for attorney's fees and expert fees for work relating to rockery/slope destabilization issues, over which the trial court did not retain jurisdiction, and work relating to other issues, such as the Cartwrights repeated requests for a view easement over the James property, issues upon which the Cartwrights did not prevail.

12. The trial court erred in entering Finding 2.5 in its order dated December 6, 2012, to the effect that "neither party prevailed in the final death throes of this litigation—the battle over how to accomplish the final remediation, and who should pay what for it" (CP 2437, ¶ 2.5).

13. The trial court erred in concluding that there was substantial evidence to support its finding that James was responsible for or required to do any remediation of his rockery or slope.

14. The trial court erred in finding that plaintiff "removed

portions of the rockery, which provides lateral support for the Cartwright pool and failed to return it to its prior condition” (CP 1002, ¶ 2.5).

15. The trial court erred in entering Finding 1.4 to the effect that “[i]n 2011, the defendants sought relief from plaintiff’s bamboo encroaching and his systematic removal of their rockery in the course of building additional structures to support additional plantings [footnote omitted] (CP 2434, ¶ 1.4).

16. The trial court erred in entering Finding 2.3 to the effect that “. . . the parties hired competing experts to opine on the subject of the appropriate way to restore the rockery as required by the Contempt Order[,] the Court held a hearing on March 30, 2012[,] the result of which was a court order for a mutually agreed upon geotechnical expert to determine the scope of the project” (CP 2436, ¶ 2.3).

17. The trial court erred in entering finding #1 in its order dated September 7, 2012 to the effect that “Plaintiff’s post trial reconfiguration of his rockery removed subjacent support of some of the soils on defendant’s [sic] property” (CP 2023).

18. The trial court erred in its order dated 4/12/12 (CP 1670) *sua sponte* striking one or both declarations of Jennifer James dated

3/28/12 (CP 1503-1517 and CP 1520-1531).

19. The trial court erred in excusing the Cartwrights' failure to sufficiently investigate their false allegations concerning James's undermining of the lateral support for their swimming pool, on account of the "course of this litigation and the length of it" (RP 3/30/12 at 58).

**B. Issues Pertaining to Assignments of Error**

1. Where the trial court following a bench trial has issued a Permanent Injunction regarding bamboo being maintained at a certain height and not being allowed to spread to a neighbor's property, and the trial court retains limited jurisdiction *solely* to enforce the injunction, does the trial court's limited subject matter jurisdiction preclude its ruling on collateral issues not arising at trial and not related to enforcement of the Permanent Injunction? (Assignments 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 13, 14, 15, 16 and 17.)

2. When a trial court rules on issues outside its limited retained jurisdiction, does it also exceed its limited jurisdiction in awarding attorney's fees and expert witness fees to the party raising those collateral issues? (Assignments 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11.)

3. When a trial court issues a subsequent order outside the scope of its previous Permanent Injunction, and there is no attorney

fees clause in such subsequent order, does the trial court lack the authority to award attorney's fees against the party allegedly violating the subsequent order? (Assignments 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11.)

4. Did the trial court abuse its discretion in awarding attorney's fees relating to efforts to enforce the Permanent Injunction, when the attorney's fees related to an issue over which the trial court did not retain subject matter jurisdiction, and which efforts did not relate to an issue over which that party prevailed? (Assignments 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11.)

5. Were James's property rights, due process rights and right to a jury trial on contested factual issues violated when the trial court summarily ruled, based solely on inadequate evidence, that James had to return the rockery to its previous condition? (Assignments 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 13, 14, 15, 16, 17 and 19.)

6. Is there a lack of substantial evidence that James's rockery actually did provide any lateral support for the Cartwright pool, or that James had done anything to the rockery that would compromise the lateral support for the Cartwright pool, or that James was required to do any remediation work on the rockery or slope? (Assignments 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 14, 15, 16, 17 and 19.)

7. Even if the trial court properly awarded attorney fees to the

Cartwrights for their efforts to enforce the rockery and view easement issues, did the trial court abuse its discretion in awarding excessive fees based on block billing, and “disbursements” for copy charges and other items to which the Cartwrights were not entitled? (Assignments 6, 7, 8, 9, 11 and 12.)

8. Did the trial court abuse its discretion in awarding to the Cartwrights fees for matters upon which the Cartwrights did not objectively prevail, such as their claim for a view easement over the James property and their pursuit of the amorphous claim that James had undermined the lateral support for their swimming pool? (Assignments 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17.)

9. Where a declaration contains both admissible and inadmissible matters, should the court *sua sponte* strike only the inadmissible matter rather than the entire declaration? (Assignment 18.)

## II. STATEMENT OF THE CASE

Appellant Devon James, a licensed real estate broker for twenty years (RP 3/2/09 at 63), purchased his home on Puget Sound in late 2001 (CP 683, ¶ 8). His adjacent and uphill neighbors were Thomas Cartwright and Teresa Wright (collectively, the “Cartwrights”) (CP 683, ¶ 7). The Cartwrights’ living room window looks out over the James property (CP 1085). The Cartwright property also had a view of the sound, but had no view easement to protect the view (RP 3/2/09 at 36; 3/15/09 at 160). James’s house had an unobstructed view of the sound (RP 3/2/09 at 76).

Shortly after James purchased his property from the previous owners, the Cartwrights began constructing a shelter on their property along the beach using 16-foot 6" by 6" beams (RP 3/3/09 at 66-68). James complained that the shelter was too close to the James property, i.e., within the five-foot setback (*id.* at 70). Cartwright refused to modify the location of the structure (*id.* at 71). James complained to the City of Burien (*id.*). The City put a stop-work order on the project (*id.* at 72). Cartwright was required to move the location to comply with the five-foot setback (*id.* at 73). Cartwright then cut the posts and roof off the structure he had built and extended the height of the building to sixteen feet (*id.* at 74-75), which was

visible from several parts of the James property (*id.* at 75). James objected to the height, but the city eventually permitted the Cartwrights to build the structure (*id.*). The Cartwrights later planted some willow trees near the structure (*id.* at 78). The trees rapidly grew and blocked part of James's view of the water (*id.* at 78-80). James testified, and Cartwright agreed, that Cartwright offered to lower the height of the Cartwright structure if James would cut his bamboo (RP 3/10/09 at 50-51; 3/9/09 at 138).

The Cartwright house is uphill from the James house, and before James planted bamboo, James could see people walking inside the Cartwright home and see their television screen (RP 3/3/09 at 205-6). James testified that he planted the bamboo for privacy from the Indian Trail and the Cartwright windows (*id.* at 204-5). James had planted bamboo for privacy in other properties he has owned (*id.* at 192-3). He started planting bamboo at his present residence early after he moved in (RP 3/3/09 at 76, 143), and planted the specific species of bamboo he did because in his experience it was green and colorful, it grew to 20 to 25 feet, it was easy to trim and maintain, it grew in a columnar fashion, and was not real aggressive (RP 3/3/09 at 194).

James experienced a number of incidents of vandalism

regarding poisoning his bamboo, the cutting of his other plants and throwing rocks and gravel onto his driveway (RP 3/3/09 at 159, 161-62; 101-04; 137-39; 140-43; 152-53). Mr. Cartwright admitted to at least one incident of poisoning the bamboo (RP 3/9/09 at 151). James filed for an anti-harassment order in King County District Court in June, 2006 (CP 53). The Cartwrights then filed to obtain an anti-harassment order against James based on conclusory allegations of James's conduct toward them and their minor child (CP 53-54). All of the incidents described were based solely on their own testimony, with no witness corroboration (*id.*). The district court entered a restraining order for a one-year period (CP 77-78). The order included the standard provision that James was not to keep the Cartwrights under surveillance (CP 78).

On October 1, 2006, the Cartwrights claimed they observed James taking pictures of them from his garage roof while they were working in their garden (CP 54). They were the only witnesses (*id.*). They called the police and reported the incident (CP 54, ¶ 6; 84-85). James stated that he was working on his roof, had a telephone in his hand and was not taking any pictures of the Cartwrights (CP RP 3/3/09 at 187-191). Based solely on the Cartwrights' complaint, James was charged with the criminal offense of violating the anti-harassment

order (CP 54, ¶ 6). During the pendency of the criminal charge, the district court renewed the anti-harassment order for ten years in June, 2007 (RP 3/9/09 at 151). All criminal charges against James were dismissed with prejudice on August 21, 2007 (RP 3/3/09 at 191; CP 290, ¶ 7).

**A. Underlying Lawsuit—Claims and Counterclaims.**

In 2007 James filed a lawsuit against the Cartwrights (CP 1-12). The complaint sought (a) to quiet title to certain property James was using south of a chain link fence marking a boundary between the two properties, and (b) damages for nuisance and malicious prosecution *Id.* The nuisance was alleged to have arisen from the Cartwrights' poisoning James' foliage, uprooting bamboo plants (CP 690, ¶ 44) and making false claims about James's violation of an anti-harassment order (CP 692, ¶ 53). The malicious prosecution claim was based on the allegation that the Cartwrights had falsely accused James of taking pictures of the Cartwrights from James's roof in violation of an anti-harassment order, leading to the criminal prosecution of James (CP 691-92, ¶ 52).

The Cartwrights filed a counterclaim contending that the bamboo James planted (starting in 2002) to provide privacy for his house was a "spite structure" causing them damage in violation of

RCW 7.40.030 (CP 118-122). They also alleged claims for nuisance and a frivolous action (CP 683, ¶ 6).

In addition, the Cartwrights sought damages for the alleged diminution in value of their home because of the existence of the ten-year anti-harassment order entered against James (CP 698, ¶ 25; RP 5/15/09 at 3, 6). An appraiser testified at trial that the fair market value of the Cartwrights' home was \$1 million as of August, 2008 (RP 3/5/09 at 151), and that because of "exterior external obsolescence" and the "principle of substitution," a buyer would discount the Cartwright property by 6% to 8% because of the existence of the anti-harassment order and the same amount because of the presence of the bamboo (*id.* at 152-53). Accordingly, the Cartwrights sought damages of \$120,000 to \$160,000 because of those two factors (RP 5/15/09 at 3,6).

**B. Dismissal of Malicious Prosecution Claims on Summary Judgment.**

The trial court in a pretrial order dismissed the malicious prosecution claim and the claims relating to malicious calls to the police on the basis of the anti-SLAPP statute (CP 423-24; CP 682, ¶ 4).

**C. Permanent Injunction Regarding Bamboo Entered 5/15/09 (CP 718-722).**

Following trial in 2009, the trial court dismissed all of James's

remaining claims (CP 699, ¶ 28). The court determined that James’s bamboo was a “spite structure,” as it was held together with ropes, poles, etc. (CP 695, ¶ 16; 696, ¶ 18), and that James should be enjoined from growing it higher than 12 feet (CP 696-96, ¶¶ 20-21). The court entered a Permanent Injunction requiring James to not let his bamboo grow taller than twelve feet and to control his bamboo so that it did not spread to the Cartwright property (CP 718-721).

The trial court also found that James’s bamboo “served the reasonable purpose of providing privacy for James’s property from the Cartwrights’ house and the Indian Trail and also served an aesthetic purpose for James, which the court concludes are reasonable purposes” (CP 696, ¶ 19). The Court entered an order permanently enjoining James “from erecting any structure on his property . . .[,] which structure has as one of its purposes to support the bamboo planted on the James Property to grow higher than its now existing height of twelve (12) feet” (CP 719, ¶ 1).<sup>1</sup>

**D. Rockery, Lateral Support and Stability of Slope Not Addressed in Permanent Injunction.**

There was no mention in the Permanent Injunction of the

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<sup>1</sup>The Permanent Injunction also dealt with James’s cedar board fence (CP 720, ¶ 4), outdoor lighting (CP 720, ¶ 5), and bamboo encroaching upon the Cartwright property (CP 720-21, ¶ 3), issues which are now moot.

rockery, the stability of the slope that it was on, or lateral support for the Cartwrights' swimming pool, or for that matter, the Cartwrights' swimming pool itself (CP 719-721). Such issues were also not raised in the pleadings (CP 1-10, 118-122, 291-92) nor addressed at trial (RP 3/2/09 to 3/10/09).

A provision in the Permanent Injunction provided that the trial court retained jurisdiction over the case “for the *sole purpose* of reviewing, as necessary, whether or not James is complying with this Permanent Injunction” [italics added] (CP 720, ¶ 6).

**E. Order of April 22, 2011 Purporting to Enforce Permanent Injunction With Respect to Rockery (CP 1001 - 1003).**

The Cartwrights filed a motion to enforce the Permanent Injunction on February 16, 2011 (CP 728-776). The motion sought an order finding James in contempt for, among other things, failing to prevent his bamboo from encroaching onto the Cartwright property, violating the Permanent Injunction by erecting structures to support the bamboo, refusing to remove certain lights, failing to reduce the height of his fence to 42 inches, and other claims (CP 729).

Of eight specific requests for relief, the motion also sought relief framed as follows: “An order finding that James removed portions of the rockery, which provides lateral support for the Cartwright pool,

and failed to return it to its prior condition. James should be ordered to return the rockery to its prior condition” (CP 729). Other than this bare request for relief, the Cartwrights’ motion of 2/16/11 made no reference to the rockery in connection with lateral support for the pool, made no reference to stabilization of the slope and made no argument as to why the relief requested was appropriate, or why this requested relief related to enforcement of the Permanent Injunction (CP 728-740).<sup>2</sup>

Teresa Wright submitted a declaration in support of the relief sought. Only one three-sentence paragraph of the thirteen pages (and 36 paragraphs) of her declaration addressed the rockery and lateral support issue, and that was as follows:

James also removed many large boulders from *our* rockery including one with a survey marker. The former owner of our property testified at trial that this rockery aided in the lateral support of the pool. The pool is now at risk due to James’ actions. James should be ordered to replace the rockery to its prior condition [*italics added*].

(CP 799, ¶ 32). (This declaration refers only to the *Cartwright* rockery, not the James rockery.)

Ms. Wright’s obviously hearsay statement about what Mr.

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<sup>2</sup>In their reply, the Cartwrights argued that “the removal of portions of the rockery located near the Cartwright pool . . . relate to some of the issues that this court addressed at trial, in particular, James’ malice towards the Cartwrights and his efforts to decrease the enjoyment of their property” (CP 889).

Friedman, the former owner of the Cartwright property, testified at trial was demonstrably wrong: he did not testify at trial that the *rockery* aided in the lateral support of the pool; he testified at trial in 2009, in connection with a completely different issue, merely that the rockery was “there to hold up the land” (RP 3/4/09 at 139-140). This was essentially the sole testimony at trial regarding the functionality of the rockery and lateral support for the pool.<sup>3</sup>

The trial court had also determined as a factual matter at trial that Mr. Friedman directed the surveyor to set the boundary line between the two properties (he originally owned both the Cartwright property and the James property) so that it ran in a semi-circular fashion around the swimming pool, “far enough away from the pool so as to provide the pool with lateral support” (CP 683-84, ¶ 11).<sup>4</sup> There

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<sup>3</sup>Ron Seale testified regarding a contested area in back of the rockery (RP 3/4/09 at 47). Mr. Cartwright also made a passing reference to the rockery at trial (RP 3/9/09 at 150).

<sup>4</sup>The Cartwrights later used Mr. Friedman’s pre-trial deposition, which was neither offered nor admitted at trial, as evidentiary support for their position that the rockery provided lateral support for their pool (CP 1595). Mr. Friedman stated at his deposition that “a swimming pool is a hole in the ground with a few pieces of wire and blown in stuff, it’s not much higher, not much harder than plaster, and therefore, the only thing that holds it together is the ground around it. And we were advised by people putting the pool in that hang on to the bank because that’s what holds the pool up there” (CP 1613). There is no mention of the rockery in this testimony. In addition, Mr. Friedman, in the context of the question he was asked, was merely explaining why the property line was curved, not whether the rockery

was no mention that the rockery—either the Cartwright rockery or the James rockery--provided any lateral support to the pool.

Ms. Wright’s hearsay-based, vague and conclusory assertion that the pool was “at risk” because of the removal of “many large boulders” was devoid of any factual support in the record—either at trial or post-trial—and was not based upon any evidence that she had expertise in engineering, lateral support, or the ability to assess risk to her swimming pool. As it was later made clear, the rockery *did not* provide lateral support for the Cartwrights’ pool.<sup>5</sup>

James opposed the Cartwrights’ motion with respect to the rockery, on the basis that (1) the rockery issue had not been raised at trial (CP 924, 927) and (2) the trial court had retained limited jurisdiction solely to enforce the Permanent Injunction, not to grant an order unrelated to issues not raised in the trial pleadings or addressed at trial (CP 924). James submitted a declaration stating that he had “done nothing to undermine the lateral support for the Cartwrights’ pool” (CP 936). He added that if the Cartwrights think he had undermined the lateral support, “they should provide me a report

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provided lateral support for the swimming pool. *Id.*

<sup>5</sup>Marc McGinnis, James’s geo-technical expert, later testified at a hearing on March 30, 2012, that the ground itself provided sufficient lateral support for the Cartwrights’ pool (RP 3/30/12 at 20).

from a competent professional so indicating, and I will take appropriate action. This is a subject which could have been addressed in mediation” (*id.*).

Nevertheless, based solely on the bare request for relief and the hearsay-based, vague, conclusory declaration of Ms. Wright mentioned above, the trial court on April 22, 2011, entered an order finding that “James removed portions of the rockery, which provides lateral support for the Cartwright pool, and failed to return it to its prior condition . . .” (CP 1002, ¶ 2.5). The order stated that

James shall replace the rockery, which provides lateral support for the Cartwright pool, that he moved and return it to its prior condition.

(CP 1003, ¶ 3.10).<sup>6</sup> While the apparent intent of this order was to preserve lateral support for the Cartwright pool, it did not on its face require James to maintain in perpetuity every rock in the rockery in exactly the same position.<sup>7</sup>

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<sup>6</sup>In its April 22, 2011 order, the trial court also found James in contempt for (1) failing to take any and all measures necessary to prevent his bamboo from encroaching upon the Cartwright property, and (2) erecting structures to support bamboo planted on his property to grow higher than twelve feet (CP 1001, ¶¶ 2.1 and 2.2). As noted elsewhere, James has removed all of the contested bamboo, and does not appeal the bamboo issues in this appeal.

<sup>7</sup>The trial court stated at the later 3/30/12 hearing: “There may not have been anything wrong with [James’s] removing the rocks. I ordered that they be put back. There are rocks there” (CP 3/30/12 at 60). James’s mother also testified that the rockery was substantially

Some six months later, apparently taking up James's offer noted above that James be sent a report "from a competent professional" indicating the problem, the Cartwrights' then-counsel, Valerie Villacin, sent a letter dated October 5, 2011, to James's counsel, asserting that James "has not returned the rockery to its prior condition." The letter went on to state:

As set forth in Mr. Roberts' [attached] geotechnical assessment report . . . , there is already evidence that the *hillside near the Cartwright pool is sliding* as a result of Mr. James' disruption of the rockery. Further, there is evidence of *new gaps between the pool edge and the adjacent concrete border, which is a result of the disruption of the rockery by Mr. James*. To comply with the court's order, Mr. James must replace the rockery to its prior condition, which will be verified by South Sound Geotechnical Consulting, so that defects caused by the rockery's original disruption is [sic] corrected when the rockery is replaced, and to avoid any future damage [italics added].

(CP 1365).

The main defects mentioned in the letter were the alleged *sliding of the hillside near the Cartwright pool* and ominous *new gaps* near the edge of the swimming pool. The letter stated that if James "did not comply with his obligations under the Permanent Injunction" within fourteen days, the Cartwrights would bring an enforcement motion (CP 1365).

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returned to its previous condition (CP 1516, ¶ 49).

James did not bother to respond. Ms. Wright had already stated that it was “futile and unnecessary” to attempt to negotiate with James (CP 790). James had offered to mediate, but Ms. Wright refused, stating that “we already litigated these issues . . .” (CP 790).<sup>8</sup> Ms. Wright acknowledged the obvious: there was a “contentions relationship between James and [her] family” (CP 792). James also did not believe any response he made would satisfy the Cartwrights (CP 1516, ¶ 61).

In addition, read carefully, Mr. Roberts’s report does not support Ms. Villacin’s assertions (CP 1351-62). Mr. Roberts in his report did not correlate any of James’s activities with the cracks in the deck near the Cartwright pool, as he stated “[i]t is difficult to establish a correlation with the gaps of the patio panels and pool edge with rockery activities considering the limited surface observations made at this time” (CP 1354). Indeed, Mr. Roberts believed that “[a]dditional geotechnical evaluations, including subsurface

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<sup>8</sup>In addition, when James had earlier used Susan Gainer as an expert regarding bamboo, Ms. Wright contacted her, read her a copy of the court decisions regarding the bamboo, and obtained copies of Ms. Gainer’s notes addressed to James (CP 834-36). The notes contained a statement that (based upon what Ms. Wright told Ms. Gainer), Ms. Gainer agrees “that in order for Devon [James] to comply with the court orders, [Cartwright bamboo expert] Favero [Greenforest]’s recommendations are correct” (CP 834). James could obviously reasonably be concerned that any other expert he used would be similarly co-opted.

explorations and monitoring would be required to further assess correlation of rockery activities to the gaps” (CP 1354).

Moreover, Mr. Roberts referred to a “planter box structure . . . functioning as a retaining structure or wall” at the base of the rockery on the James property, “based on pictures and information provided by Ms. Wright” (CP 1353-54). He opined that “[if] this structure and replacement rockeries were not designed and constructed properly, there is *increased risk* of wall/slope failure that *may* adversely impact the Wright property” [italics added] (CP 1354). His opinion was that “this structure and the rockery should be evaluated by a structural engineer . . .” *Id.* The pictures provided by Ms. Wright were inaccurately described, as the “planter box” had no retaining function.<sup>9</sup>

Mr. Roberts also believed that the weight of the trees in the rockery might adversely impact the slope over time (CP 1354), although this issue was not raised again.

Mr. Roberts further opined that “rockery activity . . . has impacted the Wright’s fence” (CP 1355). He noted the absence of soil at the base of one of the Wright fence posts (*id.*), although his report

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<sup>9</sup>James’s mother later explained that what Ms. Wright construed to be a planter box in the rockery area was really the use of wood braces to hold up large rocks during the building of James’s fence (CP 1846). There never was a planter box there (*id.*). Mr. McGinnis also confirmed that there was no planter box functioning as a retaining wall in the rockery (CP 1877).

stated that the upper portion of the soils in the area “are usually in a looser condition due to natural weathering processes” (CP 1355). Mr. Roberts’ report makes no reference to the claim that the *hillside near the Cartwright pool is sliding*, as mentioned by Ms. Villacin in her October 5, 2011 letter (CP 1365).

**F. Order of April 12, 2012 Enforcing Permanent Injunction and April 22, 2011 Order (CP 1670 - 1671).**

Approximately a year after the trial court ordered James to return the rockery to its prior condition in its 4/22/11 order, the Cartwrights filed a motion for an order compelling compliance with previous court orders, eventually set for March 30, 2012 (CP 1290-1341). The Cartwrights asked the trial court to impose a perpetual view easement over the James property limiting all vegetation to twelve feet, coupled with a perpetual servitude allowing the Cartwrights and their successors to enter upon the James property forever and cut down any vegetation deemed to be taller than twelve feet (CP 1300).<sup>10</sup>

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<sup>10</sup>The Cartwrights supported their view easement with the argument that James had “unlawfully replaced and supplemented his prior bamboo spite structures and plantings with non-bamboo spite structures and plantings that equally violate both this Court’s May 15, 2009 Permanent Injunction and its April 22, 2011 Contempt Order” (CP 1298). The Cartwrights contended that the new trees that James had planted were “supported by rope, wood, and rock structures that serve the same purpose as the spite structures that previously supported Plaintiffs’ bamboo plantings and that this Court ordered

In addition, the Cartwrights sought “to definitely compel Plaintiff to retain geotechnical engineer Timothy H. Roberts and any qualified structural engineer Mr. Roberts recommends to finally and properly restore Cartwrights’ rockery and lateral support” (CP 1291).

In support of the motion, Teresa Wright submitted a declaration dated March 7, 2012, to which was attached the report from geo-technical engineer Tim Roberts of South Sound Geotechnical Consulting (CP 1351-62). Ms. Wright stated that she “continued to see cracks develop in our pool deck that had not appeared before the Plaintiff [James] removed the rockery” (CP 1345, ¶ 10).

Modifying the rockery was important to James, as he had decided to sell his house and move out of the area (RP 9/7/11 at 16, 20). James realized by late 2011 that he could not live in his house anymore, and he decided to leave town (RP 9/7/11 at 16, 20). He listed the property for sale because of the “nightmare” this had become for him (*id.* at 12-13; CP 1534). In December of 2011, he took his wife and two young children and left the country (CP 1841). He was no obviously no longer interested in fighting about bamboo. As a postscript, James recently sold his house and no longer lives in the

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removed” (CP 1297). The trial court declined to impose a view easement, and clarified that the Permanent Injunction did not apply to all plants on the James property (CP 1671).

continental United States.

In the spring of 2012 James's house was listed for \$2 million and was vacant (CP 1501). James's real estate broker stated that "[t]he rockery had been very tastefully upgraded to add value to the property," and she had received positive comments from prospective purchasers about the landscaping, "and the rockery area in particular" (CP 1502). She further stated that from her experience, people who would purchase a home in the \$2 million price range expect the landscaping to be beautiful and tasteful (CP 1502). Comparison of a picture of the rockery before the reconfiguration (CP 1752) with two after the reconfiguration (CP 1541, 1565) shows the improvement in appearance. If James had to reconstruct the rockery according to unknown specifications required by the Cartwrights' agent—the exact relief requested by the Cartwrights—James could be faced with a very expensive undertaking.

Accordingly, James had retained a geo-technical engineer, Marc McGinnis, to evaluate the rockery and Ms. Wright's claim of cracks around the Cartwright pool deck caused by James's rockery work. James's expert stated in his report as follows:

The sloped area is comprised of soil that is only covered with rocks laid on the surface in an "Alpine" fashion at varying times over the years. A rockery is a near-vertical wall of stacked rocks that rest only on themselves, and

which is intended to protect a cut that would have been made into the soil behind it. This is not the case with the subject slope. The rocks covering the slope serve as landscaping and erosion control protection purposes only; there is no structural rockery in, or near, the subject area. The information provided to SSGC [Tim Roberts] by the Cartwrights that “the original rockery was constructed to provide lateral retaining support to the hillside for construct of the pool . . .”, is also incorrect and misleading. The pool is embedded into the ground away from the top of the slope and the rocks on the face of the slope lend no lateral support to the slope.

(CP 1876).

Mr. McGinnis also addressed loose soil around the Cartwrights’ fence:

While you [James] may have moved or reconstructed portions of the rock covering to the slope and planted trees on the slope over time, there are no areas where unsupported soil exists on the slope below your fence. On the Cartwright’s side of the fence is a row of rocks that apparently were placed some time ago in an attempt to hold back fill soil placed on the Cartwright’s side of the chain link fence. This is shown on the second attached photograph. The fence posts of their wood fence have been placed into the fill behind this row of rocks, which provide no substantial retention of the fill. Considering the loose condition of the fill, and the poor retention provided by the rocks and the concrete chunks, it is not a surprise that at least one of their [Cartwrights’] fence posts is exposed by soil settlement. This soil settlement is likely due to the loose, uncompacted nature of the fill soil and the lack of proper retention by the row of rocks beneath their fence.

(CP 1876).

Mr. McGinnis went on to opine that the cracks near the Cartwright pool had nothing to do with any work done on the rockery,

but most likely resulted from settling of the fill under the pool decking, the Cartwrights' jackhammering of concrete near the pool, and the exposed ground condition allowing precipitation to infiltrate into the loose soil (CP 1876-77).

Mr. Vanderhoef, the Cartwrights' counsel (and Ms. Wright's brother in law (CP 94)), submitted under penalty of perjury a declaration dated March 29, 2012, in which he stated "Mr. McGinnis confirms what Mr. Roberts suspected: The rockery in its current condition does not provide the lateral support to the Cartwrights' property that Mr. Friedman designed and maintained" (CP 1595). As noted above, there was never any evidence adduced in this case that Mr. Friedman "designed and maintained" the rockery to provide lateral support to anything.<sup>11</sup>

James believed that even if the trial court had jurisdiction to rule on the stability of the slope or the lateral support for the Cartwright pool, it was inappropriate to resolve factual disputes concerning these issues solely on the basis of declarations and erroneous citations to Mr. Friedman's testimony (CP 1414-1415). Accordingly, James filed a motion requesting an evidentiary hearing

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<sup>11</sup>Mr. McGinnis clearly stated in the portion of his report quoted above that the rockery never provided any lateral support to the Cartwrights' property, nor was it designed to, being just rocks on the surface of the soil (RP 3/30/12 at 41, 49).

(CP 1410). The Cartwrights opposed the motion (CP 1424-1428). In an order dated March 27, 2012, the trial court granted the motion and set the evidentiary hearing for March 30, 2012 (CP 1585-86). The issue at the hearing was apparently whether James had destabilized the slope by reconfiguring his rockery (RP 3/30/12 at 58).

In a separate order also dated March 27, 2012, the trial court required the removal of James's bamboo (CP 1583). James, through his mother who had his power of attorney, had already removed 90% of the bamboo on the property (CP 1523) and it is undisputed that the remaining bamboo covered by the order was removed. James does not appeal that order, and considers the issues related to the growth and extent of his bamboo essentially to be at an end, especially since he has sold the property and the Permanent Injunction no longer applies, since on its face it applied only to him and his agents.

At the evidentiary hearing, Mr. McGinnis testified consistently with his report, e.g., that his "opinion is that the current rockery is an alpine rockery that provides no lateral support, whatsoever; it's purely decorative, and its sole purpose -- the only benefit, really, of it is that it prevents some erosion" (RP 3/30/12 at 41; *id.* at 18, 49).

Mr. McGinnis explained the cracks around the Cartwrights' pool as follows:

A cracking pool deck does not mean that the slope's unstable; it means the ground is settling. \* \* \* I saw signs of indications that the pool deck has settled around the pool. I saw indications that that pile of rocks underneath that fence is allowing soil to come through; I did not see any indications of instability in either of the two fences [along the boundary of the Cartwright/James property above the rockery], or on the slope, itself.

So, there's ground settlement going on, over on the Cartwright property.

(RP 3/30/12 at 38). Mr. McGinnis summarized his testimony by saying that he "saw no indications of slope instability" (*id.* at 45).

Mr. McGinnis further testified that the Cartwrights, from their own property, could determine if there was lateral support for their swimming pool, e.g. determining the consistency of the soil around the pool (RP 3/30/12 at 21-22).

Mr. Roberts did not dispute any of this testimony (RP 3/30/12 at 50-55). He did, however, submit a declaration in support of the Cartwright's motion (CP 1622-43), in which he assumed that the rockery provided lateral support for the Cartwrights' pool because the court had so stated in its 4/22/11 order (CP 1622). Based on that assumption, he concluded that there was currently no lateral support for the Cartwrights' pool. *Id.*

Ms. Wright also testified briefly about what she thought was a planter box. When James's counsel attempted to cross examine her about whether the rockery was engineered, the trial court noted that

there was “no testimony about an engineer” (RP 3/30/12 at 57).

Toward the end of the hearing, the trial court, looking at the Cartwrights, stated:

The [Cartw]rights, it is true, could have paid for a study to be done on their property, to come in here with an answer to the question. They could have done that. And I don't necessarily blame them, considering the course of this litigation and the length of it, for not having done that study. But, if that study shows that, in fact, your land has not been destabilized, then I'm going to be more likely to assess the costs, or at least some of the costs of that [independent] engineer [to be appointed], depending on what is found, on you.

(RP 3/30/12 at 58).

Following the evidentiary hearing on March 30, 2012, the trial court entered no findings of fact or conclusions of law, but instead issued an order dated April 12, 2012, requiring the parties to engage an independent expert to advise the trial court on the following three questions:

- 1) whether any reconfiguration of the James property known as the 'rockery' done by or on behalf of Mr. James since the court's entry of it[s] Permanent Injunction [on May 15, 2009] has destabilized the Wright-Cartwright property in any way;
- 2) if the Wright-Cartwright property has been destabilized by Mr. James reconfiguration of the 'rockery' what, if anything can be done to secure and stabilize that Wright-Cartwright property; and
- 3) the estimated cost of any repair/reconfiguration/stabilization, if any.

(CP 1670-71).

Both parties agreed to the appointment of Mr. Kurt Merriman as the independent geo-technical expert to advise the trial court (CP 1864-65). He visited the property on May 2, 2012, and provided an e-mail “assessment” in roughly two hours after visiting the site (CP 1863). He noted:

I do not see any major problems associated with the rockery and plantings. I do not see evidence of slope stability issues or slopes that are over steepened or inherently unstable. I do not think there is a causative connection between the pool deck settlement and cracking and the rockery work on the James property.

(CP 1863).

He further opined that there were two “details that need to be cleaned up” in order to fully support the soil under the Cartwright property (CP 1863). The first related to “a steepened soil slope primarily between the two fences over a horizontal distance of about 25 feet starting at the James garage and running east” (*id.*) The suggested solution was putting a “2 or 3 block high wall” to support the soils between the two fences (*id.*).

The second detail was to replace treated timbers (which would eventually rot) with a “more permanent” solution: a small concrete wall under James’s fence (*id.*). Mr. Merriman concluded by stating “[n]either of these fixes is a big deal . . .” *Id.*

Jennifer James, James’s mother, acting under her power of

attorney from James, later had a crew of three landscapers replace the treated boards, the second detail mentioned by Mr. Merriman in his report, with a short block wall (CP 1841-42). The wall was put in as engineered by Mr. McGinnis and met with the approval of Mr. Merriman (*id.*; CP 1906). Ms. James had the work done after reading Mr. Merriman's email report in order to do her share to eliminate an issue so as to end this case (CP 1842-43). Ms. Wright tried to physically stop the work from being done, but was unsuccessful (CP 1844). The total cost of the work was \$800 (CP 2277).

**G. Order Dated June 28, 2012 on Defendants' Motion for Order Confirming Expert's Report.**

The Cartwrights filed a motion to have the trial court "confirm" the e-mail report of Mr. Merriman to the parties' counsel (CP 1674-1682). The Cartwrights also objected to the work Ms. James had done, complained that they had been given no advance notice of the work on the James property, and argued that the James work crew "further damaged the slope," causing additional soil collapse (CP 1678-79). The Cartwrights obtained a bid from Paul's Rockeries & Construction (CP 2052-53) and sought an order compelling James to pay in advance \$5,529.75 to that company "to complete the remaining work required by Mr. Merriman" (CP 1680), referring to the first detail raised by Mr. Merriman (CP 1863).

James had no objection to such confirmation, provided that the trial court was satisfied that its three questions had been satisfactorily answered (CP 1823).<sup>12</sup> The trial court entered an order on July 2, 2012 requiring Mr. Merriman to answer the same three questions posed in the trial court's 4/12/12 order (CP 1894-95).

#### **H. Independent Expert's Final Report.**

Mr. Merriman then submitted a final report dated August 10, 2012 (CP 1904-07). The final report quoted his earlier email analysis (CP 1863; 1905-06) and approved the fix for the second issue he had earlier noted (CP 1906). He then stated:

In my opinion, the recent repairs [which James's mother had done] have accomplished 99% of the suggested stabilization recommendations. The only remaining task is to protect the exposed soils on the low slope between the Wright-Cartwright fence (above) and the James fence (below). The protection can be completed by placing some crushed rock (5/8" or 3/4" minus material) to provide a uniform slope from the top of the exposed soil face under the Wright-Cartwright fence down to the back of the James fence. This would amount to about 6 to 8 inches of material over a horizontal distance of about 25 feet.

(CP 1906).

Mr. Merriman also answered the trial court's three questions as follows:

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<sup>12</sup>Facial examination of the report itself showed that it did not specifically address any actions James took with respect to the rockery, nor even mention James by name, except in reference to his ownership of the property (CP 1863).

Based on the information provided for my review, my observations made during two separate site visits, my understanding of the nature of the underlying soil type, and my experience, *it is my opinion that the reconfiguration of the James rockery performed by or on behalf of Mr. James has not destabilized the Wright-Cartwright property in any way.* Following both my site visits, I presented additional modifications to the rockery and slope that are required, in my opinion, to create a more “permanent” configuration. The modifications from my first site visit were completed. Once the additional work referenced in my July 19 email message is complete, it is my opinion that the slope between the two properties will be permanently stabilized. Both Mr. McGinni[.]s and Mr. Roberts agreed with this position at the time of our July 18 site visit [italics added].

(CP 1907).

**I. Order Dated September 7, 2012 Confirming Final Report of Independent Expert and Granting Award of Fees and Costs.**

In an order dated September 7, 2012, following a motion brought by the Cartwrights, the trial court accepted the conclusions of Kurt Merriman as outlined in his final report of August 10, 2012, and ordered James to complete the “second remediation step to stabilize the top of the slope” as outlined on page 2 of the final report, at James’s expense, according to a plan proposed by James and either accepted by the Cartwrights or approved by the trial court (CP 2024). The order also required James to “pay all of [the Cartwrights’] reasonable attorneys’ and experts’ fees and expenses related to the prevailing efforts to enforce the Court’s April 22, 2011 Order and the

securing [sic] stabilization of the slope . . .” (CP 2024).

James moved for reconsideration (CP 2026-28) on the basis that the third page of Mr. Merriman’s final report modified his earlier “detail” (CP 2027-28). The trial court granted reconsideration on 10/17/12 (CP 2232-33), which permitted James to put some gravel in the area as proposed by Mr. Merriman as the final fix. James got a bid to have this work done for \$300 (CP 2277).

The second page of the order also set a schedule for the Cartwrights to submit a fee request, followed by a response by James, and a reply by the Cartwrights (CP 2025). James’s counsel inadvertently did not file a reply, erroneously thinking the second page of the order contained merely a signature line, so the trial court entered findings (CP 2234-2240) and a judgment (CP 2241-43) on October 18, 2012 awarding the Cartwrights \$64,672.60 in attorney’s fees and expert witness fees (*id.*).

James timely filed a motion for reconsideration of that judgment (CP 2026-28). The trial court on 11/21/12 granted reconsideration, vacated the judgment for attorney’s fees and permitted James to file an additional response regarding the attorney fee issue (CP 2360-61). The trial court also allowed the Cartwrights attorney’s fees for responding to the motion for reconsideration and

for any additional response, in an amount to be determined (*id.*).

While the motion for reconsideration was pending, the Cartwrights on 10/19/12 filed a request for an additional \$5,790.65 in attorney fees (CP 2244-46).

James had argued that while the Cartwrights prevailed on the issue of bamboo encroachment onto the Cartwrights' property, they did not prevail on (1) their attempts to limit the height of all the vegetation on the James property to 12 feet, to specifically include a view easement, and (2) their claims that James did something to his rockery to cause cracks near the Cartwright pool, put the pool "at risk," cause the hillside to slide or generally to undermine lateral support for the Cartwright property (CP 1839).

**J. Award of \$75,179.08 in Attorney's/Expert Fees to the Cartwrights.**

Following the vacation of the earlier award to the Cartwrights of \$64,672.60 in fees, the trial court after reconsideration determined in an order dated December 6, 2012 that the Cartwrights should be awarded \$49,429.50 in attorney's fees and expenses and \$6,012 in experts fees and expenses, for a total of \$55,441.50 (CP 2440). The fees covered the period from November 14, 2011 to July 19, 2012 and from September 7 to 21, 2012 (CP 2439, ¶ 2.4). A judgment on the

order was entered on December 20, 2012 (CP 2481-82) James timely filed a notice of appeal of that award (CP 2514).

In findings and an order dated 1/10/13, the trial court determined that James should pay the Cartwrights an additional \$19,737.58 in attorney's fees and expenses incurred after September 21, 2012 (CP 2506). The trial court on 2/1/13 entered an "Updated Judgment Summary," really a judgment, in the amount of \$75,179.08 against James (CP 2547-48). The amount of \$75,179.08 is the sum of \$55,441.50 and \$19,737.58. James timely filed a notice of appeal (CP 2555-2559). All the appeals were consolidated by order of this Court.

The trial court issued an additional judgment *nunc for tunc*, labeled "Judgment Summary–Amended," on March 13, 2013 in the amount of \$75,179.08 (CP 2561-62). The additional judgment was intended to correct a scrivener's error in the judgment entered on February 1, 2013 (CP 2561).

James contends in this appeal that the overwhelming majority of the attorney's fees incurred by the Cartwrights after March 15, 2012 related to the rockery and the slope destabilization issues, and certainly the Cartwrights should not receive attorney's fees for their unsuccessful attempts to establish a view easement over the James property, nor their pursuit of the rockery lateral support and

destabilization issues, for which James had no legal responsibility.

## **II. SUMMARY OF ARGUMENT**

After retaining limited post-trial jurisdiction solely to enforce its Permanent Injunction, which dealt primarily with the height and spread of James's bamboo, the trial court erroneously—in the guise of enforcing the Permanent Injunction-- entered an order dated 4/22/11 requiring James to restore his rockery to its former condition, based on the Cartwrights' false allegation that James's work on the rockery undermined the lateral support for their swimming pool. This order exceeded the limited jurisdiction retained by the trial court and was thus void. *Cole v. Harveyland LLC*, 163 Wn. App. 199, 205, 258 P.3d 70 (2011); *Angelo Property Co., LP v. Hafiz*, 167 Wn. App. 789, 274 P.3d 1075 (2012). It was, in effect, a new injunction, for which the authority of the trial court had not been properly invoked.

The trial court should have rejected the Cartwrights' efforts to have the trial court address the rockery, lateral support and slope destabilization claims, as the issues involved in such claims (a) were not within the scope of any pleadings (CP 1-10, 118-122, 291-92), (b) were not raised at trial (RP 3/2/09 to 3/10/09), (c) were not mentioned in the Permanent Injunction (CP 718-722), (d) were not adequately investigated by the Cartwrights, even though such claims

could have been investigated (CP 1461-62; RP 3/30/12 at 21-22), (e) were based on false and incomplete information the Cartwrights gave to Mr. Roberts, their geo-technical expert (CP 1459, 1465-66), (f) were unsupported by admissible or substantial evidence (CP 799, ¶ 32), and most importantly (g) were beyond the limited jurisdiction retained by the trial court (jurisdiction being retained in the Permanent Injunction “for the sole purpose of reviewing, as necessary, whether or not James is complying with this Permanent Injunction”) (CP 720).

The 4/22/11 order was also not supported by substantial evidence, since it was based solely on the Cartwrights’ hearsay, vague, conclusory and unsupported claim that James’s removal of some rockery rocks was undermining the lateral support for the Cartwrights’ pool and thus putting it “at risk” (CP 799, ¶ 32). As it turns out, the Cartwright pool was never at risk. The rockery was neither engineered nor designed to provide lateral support (RP 3/30/12 at 41, 49). It was simply a collection of rocks sitting on the landscape and was “purely decorative” (RP 3/30/12 at 41; *id.* at 18, 49).

Entry of the 4/22/11 order regarding rockery restoration also had the effect of depriving James of his constitutional right to a jury trial on contested factual issues and the valuable property right of configuring his rockery in order to sell his house at the maximum

price. The order also violated James's right to due process of law, as (1) the rockery issues never came up at trial and were never addressed in any pleadings and (2) the rockery issues became a slowly-shifting and movable target, beginning with the claim that removal of some rockery rocks was causing cracks along the side of the Cartwrights' pool, shifting to the claim that the removal was undermining lateral support for the pool, shifting again to the claim that the hillside near the Cartwrights' pool was sliding, and ending up with the claim that the rockery slope was destabilized. Parties "should not be required to guess against which claims they will have to defend." *Kirby v. City of Tacoma*, 124 Wn. App. 454, 470, 98 P.3d 827 (2004).

The trial court compounded the error by entertaining the Cartwrights' subsequent motions to enforce the 4/22/11 order as to the rockery, which eventually led to an evidentiary hearing, appointment of an independent expert, and the independent expert's report concluding that *the reconfiguration of the James rockery performed by or on behalf of Mr. James has not destabilized the Wright-Cartwright property in any way* (CP 1907), a conclusion supported by overwhelming evidence. The trial court nevertheless required James to correct two minor naturally-occurring conditions (not affecting current slope stability but *permanent* stability) mentioned in the independent expert's report. The trial court

characterized the rockery and stabilization issues as a “tempest in a teapot” (CP 2437, first ¶ 2.5), but James was forced to vigorously defend the rockery issues, as acceding to the Cartwrights’ request that James reconfigure his rockery as determined by the Cartwrights’ expert could have been an enormous and expensive undertaking.

Had the trial court rejected the Cartwrights’ attempt to have the trial court order James to restore his rockery to some prior condition, in the guise of enforcing the Permanent Injunction, this case would have been over in the spring of 2012, when James entirely removed the bamboo which the Cartwrights claimed blocked their view of Puget Sound. The trial court should certainly not have awarded substantial attorney’s fees to the Cartwrights for pursuing claims outside the trial court’s limited retained jurisdiction, and upon which they did not prevail, in any event.

Ultimately the trial court awarded the Cartwrights attorney’s fees and expert fees amounting to \$75,179.08, of which some \$57,000 resulted from their “enforcement” efforts regarding the rockery and its stabilization and their efforts to obtain judicially a view easement over the James property. This fee award is improper, as the trial court (1) exceeded its limited retained jurisdiction in even considering the amorphous rockery issues, (2) did not have the authority to award attorney’s fees for violation of its 4/22/11 order, as that order

contained no attorney fee provision, (3) awarded fees for claims upon which the Cartwrights did not prevail (rockery/slope destabilization and view easement), and (4) disregarded the Cartwrights' block billing.

### III. LEGAL ARGUMENT

#### **A. This Court Reviews the Trial Court's Judgment and Conclusions of Law De Novo.**

Issues of law are reviewed on appeal de novo. *Wingert v. Yellow Freight Systems, Inc.*, 146 Wn.2d 841, 847, 50 P.3d 256 (2002). Issues of statutory interpretation are also reviewed de novo. *Hartson Partnership v. Goodwin*, 99 Wn. App. 227, 231, 991 P.2d 1211 (2000). Findings of fact are reviewed for substantial evidence. *Cent. Puget Sound Reg'l Transit Auth. v. Miller*, 156 Wn.2d 403, 419, 128 P.3d 588 (2006).

Moreover, to the extent that the parties' arguments before the trial court were based upon written materials only, the court of appeals stands in the same position as the trial court and reviews the record de novo. *Indigo Real Estate Services, Inc. v. Wadsworth*, 169 Wn. App. 412, 417, 280 P.3d 506, 508 (2012), citing *Housing Authority of city of Pasco & Franklin County v. Pleasant*, 126 Wn. App. 382, 387, 109 P.3d 422 (2005); *Ameriquist Mortgage v. Attorney General*, 177 Wn.2d 467, 478, 300 P.3d 799, 804 (2013); *See*

*Spokane Police Guild v. Wash. State Liquor Control Bd.*, 112 Wn.2d 30, 35-36, 769 P.2d 283 (1989).

In these post-trial proceedings, the trial court entered no findings of fact or conclusions of law based on oral testimony. Actually, the testimony of Mr. Roberts (RP 3/30/12 at 50-55) did not contradict anything stated by Mr. McGinnis (RP 3/30/12 at 18-49). Many of the orders were entered without oral argument. Accordingly, this Court should engage in de novo review.

**B. The Trial Court's Post-Trial Retained Jurisdiction Was Limited to Enforcement of the Permanent Injunction, and the Court Did Not Retain Jurisdiction to Enter the 4/22/11 Order Requiring James to Restore his Rockery, Since the Rockery Was Not Mentioned in the Permanent Injunction; Hence the Order as to the Rockery Was Void.**

Whether a trial court had subject matter jurisdiction over a controversy is a question of law, which an appellate court reviews de novo. *Young v. Clark*, 149 Wn.2d 130, 132, 65 P.3d 1192 (2003). Lack of subject matter jurisdiction renders a trial court powerless to decide the merits of the case. *Skagit Surveyors & Eng'rs, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 556, 958 P.2d 962 (1998). A judgment entered by a court lacking subject matter jurisdiction is void; and a party may challenge such judgment at any time. *Cole v. Harveyland LLC*, 163 Wn. App. 199, 205, 258 P.3d 70 (2011); see also, *In re Marriage of Ortiz*, 108 Wn.2d 643, 649, 740, P.2d 843 (1987) (citing

*Dike v. Dike*, 75 Wn.2d 1, 7, 448 P.2d 490 (1968) (quoting with approval from *Robertson v. Commonwealth*, 181 Va. 520, 536, 25 S.E.2d 352 (1943))).

A party can avoid an unappealed judgment which was void when entered. *Marley v. Department of Labor and Industries*, 125 Wn.2d 533, 539-41, 886 P.2d 189 (1994). A judgment is void if the court lacked subject matter jurisdiction. *Singletary v. Manor Healthcare Corp.*, 166 Wn. App. 774, 782, 271 P.3d 356 (2012).

In *Angelo Property Co., LP v. Hafiz*, 167 Wn. App. 789, 274 P.3d 1075 (2012), the court of appeals held that the trial court had no authority to rule on the merits of any claims not included within the court's jurisdiction. *Angelo* at 821-22. Accordingly, the court of appeals vacated all rulings after entry of an order on 8/15/08 when the trial court exceeded its jurisdiction. *Angelo* at 824-25.

Here, the trial court retained jurisdiction limited solely to "reviewing . . . whether or not James is complying with [the] Permanent Injunction" (CP 720). Neither the rockery, stabilization of the slope nor lateral support for the Cartwrights' pool was mentioned in the Permanent Injunction. Accordingly, the trial court had not retained jurisdiction to order James to return his rockery to its former condition, and hence that portion of the order dated 4/22/11 requiring him to do so was void.

It follows that the further orders regarding the rockery based on the void order of 4/22/11 were also void. *Angelo, supra*, 167 Wn. App. at 824-25. These include the questions raised by the trial court in its 4/12/12 order (CP 1670-71), the 6/28/12 order raising those same questions (CP 1894-95), the order of 9/7/12 confirming the final report of Mr. Merriman (CP 2023-25), the 10/17/12 order requiring James to complete “final remediation” of the top of the slope (CP 2232-33), the 12/6/12 award of attorney’s fees based on rockery issues (CP 2432-41), the judgment of 12/20/12 for attorney’s fees (CP 2481-83), the order dated 1/10/13 granting additional attorney’s fees (CP 2503-06) and the subsequent 2/1/13 judgment and the *nunc pro tunc* order dated 3/13/13 based thereon (CP 2547-49 and 2561-62).

**C. The Trial Court’s 4/22/11 Order Deprived James of Two Valuable Constitutional Rights: Trial by Jury and Due Process of Law.**

The trial court’s order of 4/22/11 deprived James of his right to jury trial, guaranteed by the constitution. The Washington Constitution, Article I, § 21 provides that “[t]he right of trial by jury shall remain inviolate.” If the Cartwrights had raised their claims through an appropriate pleading, James could have requested a jury trial. The Cartwrights’ failure to do so prejudiced James and caused him to lose a valuable right.

The trial court’s order of 4/22/11 also deprived James of the

constitutional right of due process of law. Procedural due process constrains governmental decision making that deprives individuals of liberty or property interests within the meaning of the due process clause. *Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). Due process is a flexible concept; the exact contours are determined by the particular situation. *Mathews*, 424 U.S. at 334. But an essential principle of due process is the right to notice and a meaningful opportunity to be heard. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985) (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed. 865 (1950)).

A meaningful opportunity to be heard means "at a meaningful time and in a meaningful manner." *Mathews*, 424 U.S. at 333 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965)). The United States Supreme Court "consistently has held that some form of hearing is required before an individual is finally deprived of a property interest." *Mathews*, 424 U.S. at 333. Determining what process is due in a given situation requires consideration of (1) the private interest involved, (2) the risk that the current procedures will erroneously deprive a party of that interest, and (3) the governmental interest involved. *Mathews*, 424 U.S. at 335; *Spence v. Kaminski*, 103 Wn.App. 325, 335, 12 P.3d 1030 (2000).

Here James has a property right in maintaining his rockery as he chooses, as well as an interest in defending claims which would diminish that property right to configure and maintain his rockery. This right includes the ability to understand what claims were being raised, to prepare a defense, and to utilize available discovery methods and motion practice to flesh out and test the claims. Unable to send discovery requests or file a summary judgment motion to test the pleadings (because there were no pleadings about the rockery issues), James could do no more than deny that he had done anything to diminish the lateral support for the Cartwrights' pool.

Furthermore, James had no way to pin down and address the real issue. The Cartwrights' claim started with their unsupported fear that because James removed "many large boulders" from the Cartwright rockery, diminishment of lateral support for their pool put it "at risk" (CP 799, ¶ 32). The claim then transformed itself into one alleging that the "hillside near the Cartwright pool" was sliding (CP 1365). Ms. Wright then noted new cracks in her pool deck (CP 1345, ¶ 10). At the evidentiary hearing the issue was whether James had destabilized the slope by reconfiguring his rockery (RP 3/30/12 at 58). The Cartwrights later argued that James "removed the rocks and soil that formed the top of the rockery" (CP 1765). James was next required by the trial court to replace pressure-treated timber with

concrete blocks so that the timber would not rot years from now and potentially cause problems, and to reduce the natural “ravelling” on the slope by spreading crushed rock in certain places (CP 2024). The Cartwrights’ approach and the trial court’s orders effectively required James to prove a negative and respond to claims shifting as constantly as the Cartwrights could make them up, thereby denying James the right to due process of law.

**D. Even if the Trial Court Had Retained Jurisdiction Over the Rockery, its Decision on the Rockery and Slope Issues Was an Abuse of Discretion.**

By ruling on a matter not mentioned in the Permanent Injunction and over which it had not retained jurisdiction (the rockery), the trial court in the very least exceeded its procedural powers, resulting in an abuse of discretion. See, *Swan v. Landgren*, 6 Wn. App. 713, 716-17, 495 P.2d 1044 (1972) (trial court improperly ordered default when trial was scheduled); *Friedlander v. Friedlander*, 80 Wn.2d 293, 304-05, 494 P.2d 208 (1972). The trial court, if it were going to take up the issue of the rockery, should have at least required the parties to supplement the pleadings under CR 15(d) so that the rockery issue could have been addressed in an orderly way. *Kirby, supra*, 124 Wn. App. at 470 (CR 15 specifically provides for amendment to add claims to an action). Failing to do so constituted an abuse of discretion. *Swan, supra*.

**E. The Trial Court's Decision Was Not Based Upon Substantial Evidence.**

Substantial evidence is "a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true." *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003). A motion based on unfounded assumptions, stray statement and unsupported statements fails to make a sufficient factual showing to be relied upon. *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79, 90 n. 6, 148 L.Ed.2d 373, 121 S.Ct. 513 (2000).

The court considers only admissible evidence. *Burmeister v. State Farm Insurance Co.*, 92 Wn. App. 359, 365, 966 P.2d 921 (1998). Declarations must be based upon personal knowledge. *Charbonneau v. Wilbur Ellis Co.*, 9 Wn. App. 474, 477, 512 P.2d 1126 (1973) (evidence in affidavit not based upon personal knowledge held to be incompetent evidence); *Sea Farms v. Foster & Marshall*, 42 Wn. App. 308, 311, 711 P.2d 1049 (1985) (holding that "[w]ithout a recitation of specific facts upon which the affiant's conclusions are based," the court cannot consider the affidavit).

Ms. Wright's hearsay, vague and conclusory statement that the rockery provided lateral support for her pool and that her pool was "at risk" (CP 799, ¶ 32) was not based upon personal knowledge and was inadmissible, and hence the trial court should not have considered it.

There was thus no substantial basis to enter the order of 4/22/11 regarding the rockery. James objected to Ms. Wright's hearsay and argumentative statements (RP 3/8/11 at 16; CP 1498-1500).

Even more importantly, Ms. Wright was undisputedly wrong. The rockery provided no lateral support for her pool (RP 3/30/12 at 41; *id.* at 18, 49). Her pool is and never was "at risk," at least not at risk based on any conduct or activity of James.

Furthermore, the Cartwrights' expert confirmed that he could do further investigation about any lateral support issue from the Cartwright property (CP 1461-62). However, he was not asked to make such investigation (CP 1462).<sup>13</sup> He was thus simply a tool used by the Cartwrights to pursue their agenda.

In addition to failing to conduct any kind of reasonable investigation to determine the merits of their claims, the Cartwrights withheld information from their own expert (their jackhammering around their pool and the repair of their pool deck) (CP 1459) and misinformed him (claiming the rockery was engineered and that James

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<sup>13</sup>The trial court erred in excusing the Cartwrights' failure to conduct further investigation on account of "the course of this litigation and the length of it . . ." (RP 3/30/12 at 58). The length of the litigation gave the Cartwrights sufficient time to investigate, and the course of the investigation should have warned them that their claims might well be litigated. Parties have a duty to investigate their claims. CR 11.

had removed a portion of a rockery *on their property*) (CP 1465).<sup>14</sup>

The bottom line is that James did nothing to alter the lateral support for the Cartwright pool, and therefore when he completed his rockery work, he returned the rockery to its prior condition, because it had the same lateral support. James therefore complied with the court's 4/22/11 order. The trial court acknowledged that its order could reasonably be read this way.<sup>15</sup>

Moreover, Mr. Merriman, the trial court's independent expert who did not testify orally in this case, stated in his final report that the *reconfiguration of the James rockery performed by or on behalf of Mr. James has not destabilized the Wright-Cartwright property in any way* (CP 1907). This opinion reinforces the inescapable conclusion that the trial court's decision as to the rockery is not supported by substantial evidence. The trial court therefore erred in ordering James

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<sup>14</sup>Mr. Roberts testified at his deposition that Ms. Wright told him that the "rockery was designed by an engineer at the time when the houses were originally constructed" (CP 1465). Ms. Wright's statement was false. Mr. Roberts went on to state that "if it's reported to me that the rockery was engineered originally, then it tends to imply that it was originally constructed per some engineer design to provide some support to that hillside" (CP 1466). Mr. Roberts was not familiar with the term "alpine rockery" (CP 1467). Mr. Roberts's deposition was admitted as Exhibit 2 at the evidentiary hearing on 3/30/12.

<sup>15</sup>The trial court stated at the 3/30/12 hearing: "There may not have been anything wrong with [James's] removing the rocks. I ordered that they be put back. There are rocks there" (CP 3/30/12 at 60).

to pay the Cartwrights' attorneys' and experts' fees related to the cartwrights' "prevailing efforts" to enforce the 4/22/11 order and securing stabilization of the slope (CP 2024).

Finally, the trial court erred in *sua sponte* striking the declaration of Jennifer James (CP 1670). Although the declaration contained inadmissible content, parts of the declaration were admissible and should have been considered. The trial court's order was also unclear, in that Jennifer James submitted two declarations dated March 28, 2012 (CP 1503-1517 and CP 1520-1531), and the admissible parts of each should have been considered.

**F. The Award of Attorney and Expert Fees to the Cartwrights Relating to the Rockery/Slope Destabilization Was Improper.**

The Permanent Injunction provided that "Defendants [the Cartwrights] may raise the issue of award of attorney fees and costs at hearing pursuant to enforcement of this order" (CP 720, ¶7). Pursuant to that provision, the trial court awarded attorney's fees and costs to the Cartwrights of \$75,179.08 (CP 2562). Of this amount, \$14,844 related to attorneys' fees and expenses with respect to bamboo and plant issues before March 15, 2012; \$41,460 related to the rockery and slope destabilization issues; and the vast majority of the balance of \$18,875.08 related to attorney's fees incurred after September 21, 2012 in litigation over the amount and extent of the attorney's fees to be

awarded to the Cartwrights.<sup>16</sup>

Since the rockery/stabilization issues were outside the scope of the Permanent Injunction, they were also outside the scope of this attorney fee clause in the Permanent Injunction. The order entered on 4/22/11 (CP 1001-1003) contained no attorney's fee clause for its violation. Accordingly, the trial court had no authority to award attorney fees based on a violation of that order, and such award was error.

Some of the attorney's fees awarded to the Cartwrights clearly related to their unsuccessful efforts to establish a view easement over the James property, to have various allegedly offending plants removed from the James property, and to have the rockery returned to its prior condition, whatever that was. These efforts, upon which the

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<sup>16</sup>Mr. Vanderhoef's time records show that he worked on bamboo issues up until about March 15, 2012 (CP 2177). After that, he worked virtually exclusively on rockery/slope stabilization issues related to the evidentiary hearing, requested by James, which was held on March 30, 2012, and subsequent rockery-related issues (CP 2177-2197). The total attorney's fees requested during the period covered by those bills and relating to rockery issues was \$39,610 (*id.*). The resulting improper fees were thus \$39,610 plus the \$1,850 allowed for Mr. Roberts (CP 2440), totaling \$41,460. The trial court never explained why James should have to pay for Mr. Roberts's fees, other than "the parties should bear their own costs for unnecessary litigation regarding the rockery issue" (CP 2440). Since all of the litigation regarding the rockery was unnecessary from both the jurisdictional and "substantial evidence" standpoint, the Cartwrights should at least have borne Mr. Roberts's fees. The additional attorney award of \$19,737.58 (CP 2503) was also improper, as it related to obtaining attorney's fees on account of previous legal proceedings (rockery and view easement issues) on which the Cartwrights did not prevail.

Cartwrights had the burden of proof, were unsuccessful (CP 1671). The independent geo-technical expert stated that James did nothing to cause destabilization of the rockery slope (CP 1907), and therefore the Cartwrights should not have been awarded fees for these unsuccessful efforts. *ACLU v. Blaine School District No. 503*, 95 Wn. App. 106, 118, 975 P.2d 536 (1999) (requested fee may be reduced if hours billed are excessive or unnecessary). The party seeking fees has the burden to establish the reasonableness of the fee request. *Mahler v. Szucs*, 135 Wn.2d 398, 433, 957 P.2d 632, 966 P.2d 305 (1998).

The trial court is required to segregate attorney fees for compensable claims from non-compensable claims. *Loeffelholz v. Citizens for Leaders With Ethics and Accountability Now (C.L.E.A.N.)*, 119 Wn. App. 665, 690-92, 82 P.3d 1199 (2004). The burden is on the party seeking the fees to segregate. *Id.* at 690; *Kastanis v. Educ. Employees Credit Union*, 122 Wn.2d 483, 501-02, 859 P.2d 26 (1993). Here the Cartwrights failed to make such a segregation, and the trial court erred in entering an excessive attorney fee award.

The trial court acknowledged at the hearing on 3/30/12 that the Cartwrights “do not have a view easement on their property; and so, I am not going to order, as you [the Cartwrights] requested, that the vegetation on the James property be kept to 12 feet. I don’t think that is proper under the law in this case” (RP 3/30/12 at 61). Thus the

Cartwrights clearly did not prevail on that time-consuming issue.

In summary, the Cartwrights did not prevail on the post-trial view easement, replanting, and rockery issues, so the fees related to those activities (and in obtaining attorney's fees related to those activities) should have been segregated and disallowed.

**G. The Trial Court's Award of Fees Based on Block Billing and Overhead Costs Was Improper.**

"Block billing" is the use of "billing entries that specify only the daily activities, but that do not specifically indicate how much time was spent on each individual task." *Ideal Instruments, Inc. v. Rivard Instruments, Inc.*, 245 F.R.D. 381, 390 (N.D.Iowa 2007). Block billing makes "it impossible for the court to meet its responsibility of determining with a high degree of certainty that the hours billed were reasonable." *Role Models v. Brownlee*, 353 F.3d 962, 970 (D.C.Cir.2004).<sup>17</sup>

Accordingly, many courts apply an across-the-board deduction for block billing. *Lahiri v. Universal Music and Video Distribution Corp.*, 606 F.3d 1216, 1222-23 (9th Cir. 2010) (court's reducing 80% of

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<sup>17</sup>See, *Collins v. Clark County Fire District No. 5*, 155 Wn. App. 48, 104, 231 P.3d 1211 (2010) (claim that attorney's "block-billing" method "combined numerous tasks into a single time entry," which prevents the "effective segregation" of unsuccessful claims).

attorney's billable hours by 30% for block billing was permissible).<sup>18</sup>

Just some of the numerous examples of the Cartwrights' attorney's block billing are the following:

10/1/12	3.4 hours	5 activities	\$1,462.00
10/2/12	3.9 hours	4 activities	\$1,677.00
10/18/12	.8 hours	3 activities	\$ 344.00
10/19/12	1.5 hours	2 activities	\$ 645.00
<b>Total 9.6 hours</b>			<b>\$4,128.00</b>

(CP 2471). See also entries for 3/20/12 (CP 2178) and 3/30/12 (CP 2179).

There is no way the trial court nor this Court could reasonably review these block-billed entries to determine the reasonableness of the time and underlying activities. Accordingly, even if the trial court did not otherwise disallow this time, as argued above, this Court should significantly reduce this time because of block billing.

The Cartwrights also recovered "disbursements" for photocopy expenses, "interest," and an unidentified "filing fee/records search" totaling \$322.85 (CP 2171, 2176, 2182, 2188, 2170, 2193, 2469, 2473, 2480). There is no legal basis for recovering these "disbursements."

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<sup>18</sup>See also See, e.g., *Huntair, Inc. v. ClimateCraft, Inc.*, 254 F.R.D. 677 (N.D.Okla. 2008) ("general 15 percent reduction is appropriate due to block-billing and vague time entries"); *Ideal Instruments, Inc.*, *supra*, 245 F.R.D. 381, 390 (court "may properly apply a twenty-percent across-the-board reduction for claims for activities that lack the required 'direct' relationship to responding to the sanctionable conduct" due to block billing).

Washington courts hold that as to costs "only those defined by RCW 4.84.010 may be taxed." *Nordstrom, Inc. v. Tampoulos*, 107 Wn.2d 735, 743, 733 P.2d 208 (1987) (telephone and photocopying expenses not allowed because not specified in statute). In addition, such disbursements are generally part of the overhead built into an attorney's hourly rate. *Collins, supra*, 155 Wn. App. at 104 (the attorney's hourly rate includes the value for such "overhead" as secretarial work, photocopies, long-distance telephone conversations, and postage). Accordingly, the above disbursements should be disallowed.

#### **H. Appellant Is Entitled to Attorney's Fees.**

The Permanent Injunction states that "Defendants may raise the issue of award of attorney fees and costs at [a] hearing pursuant to enforcement of this order" (CP 720, ¶ 7). Where attorney's fees are provided in a contract to be awarded to the prevailing party, reasonable fees must be awarded. *Singleton v. Frost*, 108 Wn.2d 723, 733, 742 P.2d 1224 (1987). The prevailing party is one in whose favor the judgment is entered. *Kysar v. Lambert*, 76 Wn.App. 470, 493, 887 P.2d 431 (1995).

Where a statute authorizes fees to the prevailing party, they are available on appeal as well as in the trial court. *Eagle Point Condominium Owners Association v. Coy*, 102 Wn. App. 697, 716, 9 P.3d 898 (2000). Also, to the extent that the Cartwrights may obtain

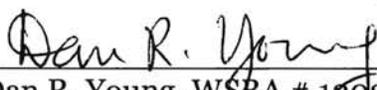
fees under the terms of the Permanent Injunction if they are forced to bring a valid enforcement action, equity would equally require that the Cartwrights be subject to paying attorney's fees if they bring an invalid enforcement action. See, RCW 4.84.330, applying mutuality of attorney's fees in a contractual setting. This Court should therefore order that James is equitably entitled to attorney's fees at the trial court level and on appeal with respect to all matters litigated after March 15, 2012, including the rockery and view easement issues, upon which James clearly prevailed.

#### **IV. CONCLUSION**

For the reasons set forth above, this Court should reverse the trial court's judgment for attorney's fees, and either remand the matter to the trial court (to a different judge) with instructions to reduce any attorney fee judgment by the fees and costs the Cartwrights incurred in pursuing rockery issues, or this Court should simply reduce the attorney/expert fee award. James should be awarded attorney fees for his successful defense in the trial court of the Cartwrights' claims and on appeal.

RESPECTFULLY SUBMITTED: September 25, 2013.

**Law Offices of Dan R. Young**

By   
Dan R. Young, WSBA # 12020  
Attorney for Appellant James

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

DEVON JAMES, a married man,

Plaintiff,

v

TERESA ANN WRIGHT and THOMAS LEE  
CARTWRIGHT,

Defendants

NO 07-2-23873-5 KNT

JUDGMENT SUMMARY – AMENDED

This Amended Judgment corrects a scrivener's error found on page 2, line 12 of the  
Judgment entered February 1, 2013

**I     JUDGMENT SUMMARY**

1 Judgment Creditors	Teresa Ann Wright and Thomas Lee Cartwright
2 Attorneys for Judgment Creditor	Stephen P VanDerhoef, WSBA No 20088 Cairncross & Hempelmann 524 Second Avenue, Suite 500 Seattle, Washington 98104-2323
3 Judgment Debtor	Devon James
4 Attorneys for Judgment Debtor	Dan R Young Law Offices of Dan R Young 1000 Second Avenue, Suite 3310 Seattle, WA 98104

JUDGMENT SUMMARY - 1

CAIRNCROSS & HEMPELMANN P S  
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5 Principal Judgment Amount	\$75,179 08
6 Post-Judgment Interest Rate	12%

**II CLERK'S ACTION REQUIRED**

The Clerk of the Court is instructed to enter upon the docket of judgments a judgment against Devon James in the amount set forth herein

**III ORDER AND JUDGMENT**

THIS MATTER came before the Court on Defendants' properly noted and served Notice of Presentation of Judgment against Plaintiff Devon James Defendants having appeared through their counsel and Plaintiff having appeared through his counsel, and the Court having reviewed the papers and pleadings on file herein, now, therefore it is hereby

**ORDERED, ADJUDGED AND DECREED**

1 As outlined in the prior Findings, Conclusions, and Orders of this Court, Defendants are hereby awarded judgment against Plaintiff in the amount of \$75,179 08

2 Defendants are entitled to seek modification of the Judgment to the extent they have incurred or continue to incur additional reasonable attorneys' and experts' fees and expenses after January 8, 2103 related to their prevailing efforts to enforce the Court's April 22, 2011 Order and securing the stabilization of the slope, and for any other reason approved by the Court

3 Interest at the rate of 12% per annum shall accrue on this judgment until paid There being no just reason for delay, judgment as aforesaid shall be entered forthwith

DATED this 13<sup>th</sup> day of March, 2013, *nunc pro tunc to February 1, 2013.*

  
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JUDGE HOLLIS HILL

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SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

DEVON JAMES, a married man,

Plaintiff,

v

TERESA ANN WRIGHT and THOMAS  
LEE CARTWRIGHT,  
Defendants

NO 07-2-23873-5 KNT

FINDINGS, CONCLUSIONS, AND  
ORDER GRANTING DEFENDANTS'  
PETITION FOR ADDITIONAL  
ATTORNEYS' FEES

THIS MATTER came before the Court on Defendants' Second Request for  
Additional Attorneys' Fees. The Court has considered its prior orders in this case, the  
records and files herein, and the following

- 1 Defendants' Second Request for Additional Attorneys' Fees,
- 2 Declaration of Stephen Vanderhoef in Support of Defendants' Second  
Request for Additional Attorneys' Fees and Exhibit A attached thereto,
- 3 Plaintiffs' Objections to Defendants' Request for Additional Attorneys' Fees,
- 4 Defendants' Reply to Plaintiff's Objections to Defendants' Second Request  
for Additional Attorneys' Fees,
- 5 Declaration of Stephen Vanderhoef in Support of Defendants' Reply,

//  
//

FINDINGS CONCLUSIONS AND ORDER  
GRANTING DEFENDANTS' PETITION  
FOR ADDITIONAL ATTORNEYS' FEES 1

JUDGE HOLLIS R. HILL  
King County Superior Court  
Courtroom 3J  
Norm Maleng Regional Justice Center  
401 Fourth Avenue North  
Kent WA 98032 4429

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## I Background

1 1 On December 6, 2012 this Court entered an award of defense attorney fees  
2 incurred before September 21, 2012 This order addresses defendants' request for fees from  
3 that date forward

## VI Legal Basis for Attorneys' Fees and Expenses

3 1 In determining the amount of reasonable attorney fees to award, Washington  
7 law calls for the Court to perform a "lodestar" calculation

8 Under this method, there are two principal steps to computing an award of  
9 fees First, a "lodestar" fee is determined by multiplying a reasonable hourly  
10 rate by the number of hours reasonably expended on the lawsuit Second, the  
11 "lodestar" is adjusted up or down to reflect factors, such as the contingent  
12 nature of success in the lawsuit or the quality of legal representation, which  
13 have not *already* been taken into account in computing the "lodestar" and  
14 which are shown to warrant the adjustment by the party proposing it

15 *Bowers v Transamerica Title Insurance Co*, 100 Wn 2d 581, 593-94 (1983)

16 The lodestar methodology affords trial courts a clear and simple formula for deciding  
17 the reasonableness of attorney fees in civil cases and gives appellate courts a clear record  
18 upon which to decide if a fee decision was appropriately made *Mahler v Szucs*, 135 Wn 2d  
19 398, 433 (1998)

20 The standard for documentation supporting a petition for attorney fees and expenses  
21 is set forth in *Bowers*, 100 Wn 2d at 597

22 [For an attorney fee award] the attorneys must provide reasonable  
23 documentation of the work performed This documentation need not be  
24 exhaustive or in minute detail, but must inform the court, in addition to the  
25 number of hours worked, of the type of work performed and the category of  
26 attorney who performed the work (i e, senior partner, associate, etc )

"Where the attorneys in question have an established rate for billing clients, that rate  
will likely be a reasonable rate " *Bowers*, 100 Wn 2d at 597

Cairncross drafted this Petition for fees Fees may be recovered for presenting a  
request for attorney fees in Washington or defending the entitlement to fees *See e g, Fisher*

1 *Properties, Inc v Arden-Mayfair, Inc* , 115 Wn 2d 364, 378 (1990) Therefore, Defendants  
2 are entitled to recover the attorneys' fees and expenses incurred in submitting their Petition  
3 for fees and expenses and subsequent efforts to secure this Order and judgment against  
4 Plaintiff

#### 5 **IV REASONABLENESS OF DEFENDANTS' FEES**

6 4 1 The Cairncross firm maintained a regular, hourly billing rate for each of their  
7 timekeepers in this case and provided this Court with rates and billing records which were  
8 sufficiently detailed describing the rates, experience and efforts that comprise their attorneys'  
9 fees and expense petition The hourly rates charged are reasonable

10 4 2 For the work done in pursuit of prevailing claims the fees and time incurred  
11 by Cairncross were reasonable for the most part However, for the reasons stated below the  
12 Court has reduced some of amounts requested

13 4 3 Because plaintiff prevailed in his September 14, 2012 Motion for  
14 Reconsideration/Clarification by order dated October 17, 2012 defendant is not entitled to  
15 fees pertaining to its response to that motion Because defendants did not strike their fee  
16 dated 9/27/12 for work done on this motion the Court reduces their award by \$344 00

17 4 4 Because the Declaration of Teresa Wright filed November 28, 2012 was  
18 partially stricken the Court reduces the fees requested for its preparation by \$860 00

19 4 5 Because defendants did not prevail in their opposition to plaintiff's Motion for  
20 Supercedeas Bond the Court reduces the fees requested by \$2930 00

21 4 6 Because award of fees regarding appeal of this matter are premature the Court  
22 reduces the fees billed November 6, 2012 by \$645 00

23 4 7 Except as mentioned above defendants are entitled to hours billed as indicated  
24 in the Declaration of Stephen Vanderhoef dated January 4, 2013 in the amount of \$2012 00  
25

#### 26 **IV ORDER**

1 IT IS HEREBY ORDERED that

2 4 1 Defendants' Petition for Attorneys' and Experts' Fees and Expenses is  
3 GRANTED as follows

4 4 2 Plaintiff Devon James is hereby ORDERED to pay defendants \$ 19,737 58  
5 in attorneys' fees and expenses Judgment shall be entered in that amount

6 DATED this 10th day of January, 2013

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10 Judge Hollis Hill

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HONORABLE HOLLIS HILL

**FILED**  
KING COUNTY, WASHINGTON

DEC 20 2012

SUPERIOR COURT CLERK

BY JULIE WARFIELD  
DEPUTY

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

DEVON JAMES, a married man,

Plaintiff,

v.

TERESA ANN WRIGHT and THOMAS LEE  
CARTWRIGHT,

Defendants.

NO. 07-2-23873-5 KNT

JUDGMENT SUMMARY

**I. JUDGMENT SUMMARY**

- 1. Judgment Creditors: Teresa Ann Wright and Thomas Lee Cartwright
- 2. Attorneys for Judgment Creditor: Stephen P. VanDerhoef, WSBA No. 20088  
Cairncross & Hempelmann  
524 Second Avenue, Suite 500  
Seattle, Washington 98104-2323
- 3. Judgment Debtor: Devon James
- 4. Attorneys for Judgment Debtor: Dan R. Young  
Law Offices of Dan R. Young  
1000 Second Avenue, Suite 3310  
Seattle, WA 98104
- 5. Principal Judgment Amount: \$55,441.50
- 6. Post-Judgment Interest Rate 12%

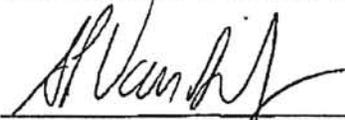
JUDGMENT SUMMARY - 1

CAIRNCROSS & HEMPELMANN, P.S.  
ATTORNEYS AT LAW  
524 2nd Ave, Suite 500  
Seattle, WA 98104  
office 206 587 0700 fax 206 587 2308



1 Presented by:

2 CAIRNCROSS & HEMPELMANN, P.S.

3 

4 \_\_\_\_\_  
5 Stephen P. VanDerhoef, WSBA No. 20088  
6 Attorneys for Defendants Teresa Ann Wright  
7 and Thomas Lee Cartwright  
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JUDGMENT SUMMARY - 3

CAIRNCROSS & HEMPELMANN, P.S.  
ATTORNEYS AT LAW  
524 2nd Ave, Suite 500  
Seattle, WA 98104  
office 206 587 0700 fax 206 587 2308

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

DEVON JAMES, a married man,

Plaintiff,

v.

TERESA ANN WRIGHT and THOMAS LEE  
CARTWRIGHT,

Defendants.

NO. 07-2-23873-5 KNT

FINDINGS, CONCLUSIONS AND ORDER  
GRANTING DEFENDANTS' PETITION FOR  
ATTORNEYS' AND EXPERTS' FEES AND  
EXPENSES

THIS MATTER came before the Court on Defendants' Motion for Attorney and Expert Fees and Costs. The Court has considered its prior orders in this case and the following:

1. Defendants' Petition for Attorneys' and Experts' Fees and Expenses;
2. Declaration of Teresa Ann Wright in Support of Petition for Fees and the exhibits attached thereto;
3. Declaration of Stephen VanDerhoef in Support of Petition for Fees and the exhibits attached thereto;
4. Plaintiff's Motion for Reconsideration;
5. Declaration of Dan Young;
6. Declaration of Jennifer James;
7. Defendant's Opposition to Plaintiff's Second Motion for Reconsideration;

- 1 8. Declaration of Stephen VanDerhoef in Support of Opposition to Second
- 2 Motion for Reconsideration;
- 3 9. Plaintiff's Reply to Defendant's Opposition;
- 4 10. Defendant's Reply to Plaintiff's Opposition to September 21, 2012 Petition
- 5 for Attorney's Fees;
- 6 11. Non hearsay portions of Declaration of Teresa Wright, filed 11/28/12;
- 7 12. Plaintiff's Motion to Strike, dated 12/3/12;
- 8 13. Supplemental Declaration of Dan Young, dated 12/3/12;
- 9 14. Defendants' Response to Motion to Strike; and
- 10 15. The records and files herein.

11 NOW, THEREFORE, the Court having thoroughly considered the record before it makes the  
12 following FINDINGS AND CONCLUSIONS:

13 **I. Background**

14 1.1 On September 7, 2012, this Court issued its Order granting defendants'  
15 Motion to Confirm the final report of Kurt Merriman and for an award of fees and costs (the  
16 "Order Awarding Fees and Costs" or the "Order").

17 1.2 Previously, at the conclusion of a lengthy and difficult trial in 2009, the Court  
18 issued findings of fact and conclusions of law that found plaintiff had created a nuisance by,  
19 among other things, installing structures to support bamboo plantings along the parties'  
20 shared boundary which were "intended to spite injure and annoy the [defendants], and that  
21 caused significant damage to [defendants'] enjoyment of their property by significantly  
22 damaging their view and by causing them significant clean up responsibilities given the way  
23 that the bamboo grows."<sup>1</sup>

24 1.3 The Court also issued a Permanent Injunction that

25 ...permanently enjoin[ed] Plaintiff Devon James and his spouse, officers,  
26 agents, servants, and employees from erecting any structure on his property,

---

<sup>1</sup> Conclusion of Law 16, Findings of Fact and Conclusions of Law, entered on May 15, 2009.

1 which structure has as one of its purposes to support the bamboo planted on  
2 the James Property to grow higher than its now existing height of twelve (12)  
3 feet.<sup>2</sup>

4 The Court found that, in addition to its inherent authority to compel compliance with its  
5 orders, the defendants may be entitled to an award of attorneys' fees and costs related to any  
6 action they take to properly enforce the Permanent Injunction:

7 Defendants may raise the issue of award of attorneys' fees and costs at  
8 hearing pursuant to this order.<sup>3</sup>

9 James appealed the Court's Conclusions and Permanent Injunction but then abandoned that  
10 appeal.

11 1.4 In 2011, the defendants sought relief from plaintiff's bamboo encroaching and  
12 his systematic removal of their rockery in the course of building additional structures to  
13 support additional plantings.<sup>4</sup>

14 1.5. On April 22, 2011, this Court issued its Contempt Order that reaffirmed its  
15 nearly two-year-old Permanent Injunction. The Court found:

16 Under the terms of the May 15, 2009 Permanent Injunction and Chapter 7.21  
17 RCW, [Defendants are] entitled to attorney fees and costs that were incurred  
18 to pursue enforcement of this court's permanent injunction.<sup>5</sup>

19 The Contempt Order prohibited plaintiff

20 ...from replacing any of the bamboo along the shared property line with  
21 anything other than an "ornamental shrub species that is not invasive. Such  
22 planting must be maintained at a height no more than 12 feet from the lowest  
23 point of the Indian Trail."<sup>6</sup>

24 <sup>2</sup> *Paragraph 1*, Permanent Injunction, entered on May 15, 2009.

25 <sup>3</sup> *Id.* at *Paragraph 7*.

26 <sup>4</sup> See Defendants' February 16, 2012 Motion for Order to Show Cause Re: Contempt and to Enforce and/or  
Clarify the Terms of May 15, 2009 Order which resulted in the Court's April 22, 2011 Order On Defendants'  
Motion for Contempt and for an Order Enforcing and/or Clarifying the Terms of the May 15, 2009 Permanent  
Injunction ("Contempt Order").

<sup>5</sup> *Paragraph 2.6*, April 22, 2011 Order on Defendants' Motion for Contempt and for an Order Enforcing and/or  
Clarifying the Terms of the May 15, 2009 Permanent Injunction ("Contempt Order").

<sup>6</sup> *Id.* at *Paragraph 3.6*.

1 The Court also found that

2 ...[plaintiff] removed portions of the rockery, which provides lateral support  
3 for the Cartwright pool and failed to return it to its prior condition.<sup>7</sup>

4 As a result, the Court ordered Plaintiff to

5 ...replace the rockery, which provides lateral support for the [defendants']  
6 pool, that he moved and return it to its prior condition.<sup>8</sup>

7 And the Court ordered that

8 ...[plaintiff] shall pay attorney's fees and costs to [defendants] for fees and  
9 costs incurred to enforce this Court's May 15, 2009 permanent injunction.<sup>9</sup>

10 1.6 Plaintiff failed to comply with the Contempt Order and thus forced defendants  
11 to compel plaintiff to abide by the Contempt Order's requirements.

## 12 **II. Prevailing Efforts to Enforce the April 22, 2011 Order**

13 As reflected in this lawsuit's extensive docket and the Court's orders dated February  
14 24, 2012, March 27, 2012, April 12, 2012 and September 7, 2012, it was only through  
15 defendants' non-litigation and litigation efforts since October 2011 that plaintiff was forced  
16 to abide by the Court's requirements to prevent his bamboo from encroaching on the  
17 defendants' property, restore the rockery to its condition before plaintiff removed portions of  
18 it, maintain a Court-imposed 12 foot height limit on vegetation, and remove and refrain from  
19 installing additional spite structures to support the growth of additional and substitute  
20 vegetation. Following is the Court's analysis of those issues upon which defendant did and  
21 did not prevail.

22 2.1 In October, 2011 plaintiff's counsel sent a letter to defense counsel in an effort  
23 to resolve perceived violations of the Contempt Order. Plaintiff ignored this letter until  
24 January, 2012 when plaintiff filed an unsuccessful motion for entry upon defendant's land for  
25

26 <sup>7</sup> *Id.* at Paragraph 2.5.

<sup>8</sup> *Id.* at Paragraph 3.10.

<sup>9</sup> *Id.* at Paragraph 3.11.

1 the purpose of digging up remaining bamboo. Plaintiff acknowledges that defendants  
2 prevailed on this motion.

3 2.2 Following plaintiff's unsuccessful effort in January defendants brought a  
4 motion to compel compliance with the Contempt Order. On March 28, 2012 the Court  
5 ordered plaintiff to hire a named bamboo removal expert to complete the bamboo removal on  
6 plaintiff and defendants' property at plaintiff's expense. Defendants prevailed on that portion  
7 of their motion that sought abatement of the remaining bamboo.

8 2.3 On April 12, 2012 the Court ordered plaintiff to limit the height and  
9 configuration of replacement plantings necessary to affect the Contempt Order. Defendants  
10 prevailed on this motion.

11 2.3 Because the parties hired competing experts to opine on the subject of the  
12 appropriate way to restore the rockery as required by the Contempt Order the Court held a  
13 hearing on March 30, 2012 the result of which was a court order for a mutually agreed upon  
14 geotechnical expert to determine the scope of the project. Ruling was reserved as to who  
15 would bear the cost of expert services.

16 2.4 On May 2, 2012, the jointly selected geotechnical expert Kurt Merriman  
17 reported that there were two rockery modifications that needed to be done in order to support  
18 permanently the soil under defendant's property. Plaintiff went ahead on his own and  
19 attended to the first modification. On June 6, 2012 defendants moved for an order confirming  
20 Mr. Merriman's findings and seeking payment of over \$5,000 to complete the second  
21 modification - permanent stabilization of some loose soil on the slope between the two  
22 properties. On July 19, 2012 Mr. Merriman reported that 99% of the remediation work was  
23 done and that the final fix, the spreading of gravel over a space between the parties' two  
24 parallel fences adjacent to the rockery would cost less than \$500.00. On August 13, 2012,  
25 with this report in hand defendants again moved for an order confirming this expert report.  
26 On September 10, 2012 the court confirmed the expert report and ordered James to complete

1 the slope remediation. This order resulted in plaintiff's successful motion to reconsider and  
2 correct that the final remediation required spreading gravel at a cost of less than \$500 as  
3 suggested by Mr. Merriman rather than the over \$3,000-\$5,000 fix requested by defendants.

4       2.5     The litigation that ensued following the court's March 28, 2012 order for  
5 abatement of bamboo can best be described as a tempest in a teapot brought on by the  
6 intransigence of both parties. Had the parties agreed to have their own experts meet with Kurt  
7 Merriman or another neutral they could have resolved the final \$500 fix without involving  
8 their lawyers and the court. Therefore, neither party prevailed on the final death throes of this  
9 litigation - the battle over how to accomplish the final remediation, and who should pay what  
10 for it.

11       2.5     Because defendants were forced to compel plaintiff's compliance with the  
12 Permanent Injunction and the Contempt Order, this Court required, through its September 7,  
13 2012 Order Awarding Fees and Costs, that "[p]laintiff Devon James pay all of defendants'  
14 reasonable attorneys' and experts' fees and expenses related to the prevailing efforts to  
15 enforce the Court's April 22, 2011 Order and securing stabilization of the slope...."<sup>10</sup> The  
16 Court required defendants to file their petition for fees no later than September 21, 2012 and  
17 required plaintiff to file any response to that petition no later than September 28, 2012.  
18 Defendants timely filed their petition for fees and costs with supporting declarations and  
19 exhibits to establish the amount of fees and costs pursuant to the Court's Order Awarding  
20 Fees and Costs. Plaintiff filed no response. On October 18, 2012 the Court awarded  
21 attorney's fees based on defendant's unopposed motion. On October 29, 2012 plaintiff filed  
22 a Motion to Reconsider the attorney fee award, claiming that plaintiff's counsel had  
23 inadvertently failed to file his response to defendant's motion. On November 21, 2012 the  
24 Court granted plaintiff's motion to reconsider and vacated the attorney fee award pending  
25 review of plaintiff's response and defendant's reply. Defendants are entitled to their fees

26 \_\_\_\_\_  
<sup>10</sup> Order Awarding Fees and Expenses dated September 7, 2012, at 2:24-26

1 resulting from plaintiff's counsel's error in not responding to the initial petition for fees.

2 Defendants are also entitled to fees incurred in presenting their fee petition.

3 **III. Legal Basis for Attorneys' Fees and Expenses**

4 3.1 In determining the amount of reasonable attorney fees to award, Washington  
5 law calls for the Court to perform a "lodestar" calculation:

6 Under this method, there are two principal steps to computing an award of  
7 fees. First, a "lodestar" fee is determined by multiplying a reasonable hourly  
8 rate by the number of hours reasonably expended on the lawsuit. Second, the  
9 "lodestar" is adjusted up or down to reflect factors, such as the contingent  
nature of success in the lawsuit or the quality of legal representation, which  
have not *already* been taken into account in computing the "lodestar" and  
which are shown to warrant the adjustment by the party proposing it.

10 *Bowers v. Transamerica Title Insurance Co.*, 100 Wn.2d 581, 593-94 (1983).

11 The lodestar methodology affords trial courts a clear and simple formula for deciding  
12 the reasonableness of attorney fees in civil cases and gives appellate courts a clear record  
13 upon which to decide if a fee decision was appropriately made. *Mahler v. Szucs*, 135 Wn.2d  
14 398, 433 (1998).

15 The standard for documentation supporting a petition for attorney fees and expenses  
16 is set forth in *Bowers*, 100 Wn.2d at 597:

17 [For an attorney fee award] the attorneys must provide reasonable  
18 documentation of the work performed. This documentation need not be  
19 exhaustive or in minute detail, but must inform the court, in addition to the  
number of hours worked, of the type of work performed and the category of  
attorney who performed the work (i.e., senior partner, associate, etc.)

20 "Where the attorneys in question have an established rate for billing clients, that rate  
21 will likely be a reasonable rate." *Bowers*, 100 Wn.2d at 597.

22 Cairncross also drafted this petition for fees. Fees may be recovered for presenting a  
23 request for attorney fees in Washington or defending the entitlement to fees. *See e.g., Fisher*  
24 *Properties, Inc. v. Arden-Mayfair, Inc.*, 115 Wn.2d 364, 378 (1990). Therefore, defendants  
25 are entitled to recover the attorneys' fees and expenses incurred in submitting their petition  
26

1 for fees and expenses and subsequent efforts to secure this Order and judgment against  
2 plaintiff.

#### 3 **IV. Reasonableness of Defendants' Fees**

4 4.1 The Cairncross and Smith Goodfriend firms maintained a regular, hourly  
5 billing rate for each of their timekeepers in this case and provided this Court with rates and  
6 billing records which were sufficiently detailed describing the rates, experience and efforts  
7 that comprise their attorneys' fees and expense petition. The hourly rates charged are  
8 reasonable.

9 4.2 For the work done in pursuit of prevailing claims the fees and time incurred  
10 by Cairncross and Smith Goodfriend were reasonable under the circumstances. Smith  
11 Goodfriend's efforts on the issue of contempt order compliance were limited to compiling  
12 and presenting the October 2011 letter which sought plaintiff's compliance. Cairncross'  
13 efforts were more extensive and necessitated by plaintiff's failure to abide by court orders.  
14 Defendants incurred these fees to compel compliance with the court's April 22, 2011  
15 contempt order.

16 2.4 Smith Goodfriend's efforts totaled \$1155.00 in fees. Cairncross' efforts on  
17 prevailing claims totaled \$48,274.50 which represents reasonable fees incurred during the  
18 time period beginning November 14, 2011 and ending July 19, 2012 while enforcing the  
19 injunction and for the time period beginning September 7-21, 2012 incurred in pursuing the  
20 claim for fees and costs.

#### 21 **V. Experts' Fees and Expenses**

22 3.1 Defendants seek judgment for Contempt Order expenses incurred in hiring  
23 experts to consult and to work on their property to remove bamboo and reconfigure rocks and  
24 steps. The Court has reviewed entries on the invoices submitted as well as the declarations  
25 submitted in support and in opposition to these fees. The court finds some but not all the  
26 requested fees and expenses are reasonable. The \$837.00 for Mr. Greenforest is reasonable.

1 The factual basis provided does not establish that all fees of Seattle Bamboo/Mr. Magnotti  
2 were for work required by court order nor do they support a finding that the amount charged  
3 for the work itself is reasonable. Based on the submissions of both parties the court finds that  
4 a fee of \$2325.00 for Mr. Magnotti is reasonable. The court finds that a reduced fee of  
5 \$1850.00 for Tim Robert's work is reasonable based on the court's determination that the  
6 parties should bear their own costs for unnecessary litigation regarding the rockery issue. For  
7 this reason the defendants will bear their own costs for the work of Mr. Merriman. Further,  
8 defendants are awarded \$500.00 found to be a reasonable amount for step repair/replacement.  
9 Defendants are awarded \$500.00 for final warrantied bamboo removal. Finally, the court  
10 finds insufficient basis to award \$100.00 for replacement of a shrub.

11 **VI. ORDER**

12 IT IS HEREBY ORDERED that:

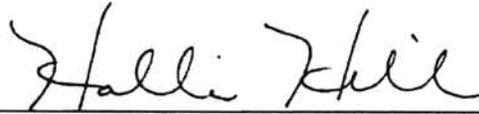
13 4.1 Defendants' Petition for Attorneys' and Experts' Fees and Expenses is  
14 GRANTED as follows:

15 4.2 Plaintiff Devon James is hereby ORDERED to pay defendants \$ 49,429.50 in  
16 attorneys' fees and expenses and \$ 6,012.00 in experts' fees and expenses for a total of  
17 \$55,441.50. Judgment shall be entered in that amount.

18 4.3 Should the parties be unable to resolve the issue of additional fees and costs,  
19 no later than December 19, 2012, defendants shall submit evidence supporting their request  
20 for any additional reasonable fees and expenses. Any response and reply thereto must be  
21 filed by December 28, 2012 and January 4, 2012 respectively. This Court will review any  
22 such evidence and determine whether any additional reasonable fees should be awarded to  
23 defendants and will enter the appropriate order and judgment.  
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DATED this 6th day of December, 2012.



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Judge Hollis Hill

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**FILED**  
KING COUNTY, WASHINGTON  
MAY 15 2009  
SUPERIOR COURT CLERK  
BY JULIE WARFIELD  
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF KING

DEVON T. JAMES, a married man,  
Plaintiff,

NO. 07-2-23873-5 KNT

vs.

PERMANENT INJUNCTION

TERESA ANN WRIGHT and THOMAS LEE  
CARTWRIGHT, wife and husband,  
Defendants.

REAL PROPERTY JUDGMENT SUMMARY

Grantor: Devon T. James, a married man  
Grantee: Teresa Ann Wright and Thomas Lee Cartwright,  
wife and husband  
Abb. Legal Description: PTN OF GOVT LOT 1, 25-23-3 E W.M., KING  
COUNTY  
APN 252303-9013

THIS MATTER having come before the Court upon presentation by Defendants Thomas  
Cartwright and Theresa Wright after trial without jury on March 2-6 and March 9-10, 2009; the  
Court having heard and received evidence, having entered its Findings of Fact and Conclusions  
of Law, which are incorporated herein by reference, and the Court being fully advised,

PERMANENT INJUNCTION - 1

**ORIGINAL**

**CURRAN LAW FIRM P.S.**  
555 West Smith Street  
Post Office Box 140  
Kent, Washington 98035-0140  
(T) 253 852 2345 / (F) 253 852 2030

1 IT IS HEREBY ADJUDGED, ORDERED, and DECREED as follows:

2 1. This Court permanently enjoins Plaintiff Devon James and his spouse, officers,  
3 agents, servants, and employees from erecting any structure on his property located at  
4 16313 Maplewild Avenue SW, Burien, Washington (King County Assessor's Parcel No. 252303-  
5 9013, which is legally described in Exhibit A attached hereto) (hereafter "the James Property"),  
6 which structure has as one of its purposes to support the bamboo planted on the James  
7 Property to grow higher than its now existing height of twelve (12) feet. The term "structure" as  
8 used herein, includes but is not limited to any piece of work artificially built up or composed of  
9 parts joined together in some definite manner, such as by use of ropes, guy lines, stakes, poles,  
10 lattice work, netting, and/or any other such means. The height of twelve (12) feet shall be  
11 measured from that elevation that exists on the lowest point on the six (6) foot easement  
12 adjoining Lot 37, Three Tree Point (unrecorded), which six (6) foot easement is legally  
13 described as:

14 Beginning at the most Westerly corner of Lot 36A of Seacoma Beach Division  
15 Number 3, according to Plat recorded in Volume 16 of Plats at Page (s) 25,  
16 records of King County, Washington;  
17 Thence North 49° 45' West 6 feet;  
18 Thence South 40° 15' West 120 feet  
19 Thence South 49° 45' East 6 feet;  
20 Thence North 40° 15' East 120 feet to the point of beginning of said 6 foot strip of  
21 land.

22 (the six (6) foot easement is referred to herein as the "Indian Trail")

23 2. The Court orders James to dismantle and remove the substantial planter box in  
24 the southeast corner of Lot 37, Three Tree Point (unrecorded) that currently holds most of the   
25 bamboo. The planter box must be dismantled and removed within sixty (60) days of this date.

3. This Court further permanently enjoins Devon James and his spouse, officers,  
agents, servants, and employees from allowing any of the bamboo planted on the James  
Property and any additional bamboo that may be planted from time to time, and its rhizomes,

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1 culms, branches, or any part of it, to encroach upon the property located at 16309 Maplewild  
2 Avenue SW, Burien, Washington (King County Assessor's Parcel No. 252303-9011), now  
3 owned by the Defendants. James is ordered to take any and all measures necessary to prevent  
4 the bamboo planted on the James Property from encroaching onto the 16309 Maplewild  
5 property.

6 4. The Court further enjoins the cedar board fence that James erected parallel to  
7 the Indian Trail on portions of Lots 37 and 38, Three Tree Point (unrecorded) and extended from  
8 the Indian Trail downhill on Lot 37 towards the waterfront and orders that the fence be reduced  
9 in height to 42" off the ground or be removed. James must complete the reduction in height or  
10 removal within sixty (60) days of this date.

11 5. The Court further enjoins James and his spouse, officers, agents, servants, and  
12 employees from installing additional outdoor lighting on his property that would have the effect  
13 of shining into Defendants' windows. ~~Plaintiff is further enjoined to ensure that existing halogen light on the south roof peak not direct light at defendant's house.~~ Plaintiff is further enjoined to ensure that ~~existing halogen light on the south roof peak not direct light at defendant's house.~~

14 6. This Court shall retain jurisdiction over this case for the sole purpose of ~~house,~~  
15 reviewing, as necessary, whether or not James is complying with this Permanent Injunction. In ~~house,~~  
16 the event that the Defendants raise an argument that James is not complying with or reasonably ~~house,~~  
17 dealing with the terms of this Permanent Injunction, this Court, under its continuing jurisdiction, ~~house,~~  
18 shall review the matter and at that time make a determination and entry of an additional order, ~~house,~~  
19 as necessary, to accomplish the terms of this Permanent Injunction. ~~house,~~

20 7. If any provision of this injunction is violated and the Cartwrights, in subsequent  
21 litigation, are successful in proving a violation of this injunction, the Cartwrights shall be entitled  
22 to a judgment against James for their reasonable attorneys' fees and costs related to or arising  
23 from their enforcement efforts.

24 ~~Defendants~~ may raise the  
25 ~~issue of award of attorney fees~~  
and costs at hearing pursuant to  
enforcement of this order.

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DATED this 15 day of May 2009.

Hollis R. Hill  
The Honorable Hollis Hill

Presented by:

**CURRAN LAW FIRM, P.S.**

John M. Casey  
John M. Casey, WSBA #24187  
Attorney for Defendants

APPROVED AS TO FORM;  
NOTICE OF PRESENTATION WAIVED:

**LAW OFFICES OF DAN R. YOUNG**

By: Dan R. Young  
Dan R. Young, WSBA # 12020  
Attorney for Plaintiff

**CURRAN LAW FIRM P.S.**  
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719

EXHIBIT "A"

THAT PORTION OF GOVERNMENT LOT 1, IN SECTION 28, TOWNSHIP 28 NORTH,  
RANGE 3 EAST WM, IN KING COUNTY, WASHINGTON, DESCRIBED AS FOLLOWS:

BEGINNING AT A POINT WHICH IS SOUTH 43°55'55" WEST 1180.26 FEET FROM THE  
NORTH QUARTER CORNER OF SAID SECTION 28, WHICH POINT IS ALSO SOUTH  
40°15' WEST 80 FEET FROM THE MOST WESTERLY CORNER OF LOT 38 A OF  
SEACOMA BEACH DIVISION NUMBER 3, ACCORDING TO PLAT RECORDED IN  
VOLUME 16 OF PLATS AT PAGE(S) 25, RECORDS OF KING COUNTY, WASHINGTON;  
THENCE NORTH 40°15' EAST 19.53 FEET;  
THENCE NORTH 48°45' WEST 18.11 FEET;  
THENCE NORTH 40°15' EAST 10 FEET TO THE TRUE POINT OF BEGINNING;  
THENCE SOUTH 40°15' WEST, A DISTANCE OF 10 FEET;  
THENCE SOUTH 48°45' EAST, A DISTANCE OF 18.11 FEET;  
THENCE SOUTH 40°15' WEST, A DISTANCE OF 19.53 FEET TO SAID POINT WHICH IS  
SOUTH 40°15' WEST 80 FEET FROM THE MOST WESTERLY CORNER OF LOT 38 A,  
SEACOMA BEACH DIVISION NUMBER 3;  
THENCE SOUTH 48°45' EAST 36.31 FEET;  
THENCE SOUTH 40°15' WEST, A DISTANCE OF 22.99 FEET;  
THENCE SOUTH 40°08'21" EAST 20.24 FEET TO A POINT ON A CURVE WHOSE  
CENTER LIES SOUTH 82°01'30" EAST 39 FEET;  
THENCE SOUTH ALONG SAID CURVE TO THE RIGHT, THROUGH A CENTRAL ANGLE  
OF 69°53'30", AN ARC DISTANCE OF 47.57 FEET;  
THENCE SOUTH 81°55' EAST, A DISTANCE OF 43.20 FEET;  
THENCE NORTH 41°17'12" EAST, A DISTANCE OF 3.20 FEET;  
THENCE SOUTH 48°45' EAST, A DISTANCE OF 14.80 FEET TO THE NORTHWESTERLY  
MARGIN OF MAPLEWILD AVENUE SOUTHWEST;  
THENCE SOUTH 70°15' WEST, A DISTANCE OF 33.08 FEET;  
THENCE NORTH 48°45' WEST TO THE HIGH TIDE LINE OF PUGET SOUND;  
THENCE NORTHEASTERLY ALONG SAID HIGH TIDE LINE, A DISTANCE OF 89.50  
FEET, MORE OR LESS, TO A POINT THAT BEARS NORTH 48°45' WEST FROM THE  
TRUE POINT OF BEGINNING;  
THENCE SOUTH 48°45' EAST TO THE TRUE POINT OF BEGINNING;  
EXCEPT THAT PORTION THEREOF LYING WITHIN THE FOLLOWING DESCRIBED 6  
FOOT STRIP OF LAND;

BEGINNING AT THE MOST WESTERLY CORNER OF LOT 38 A OF SEACOMA BEACH  
DIVISION NUMBER 3, ACCORDING TO PLAT RECORDED IN VOLUME 16 OF PLATS AT  
PAGE(S) 25, RECORDS OF KING COUNTY, WASHINGTON;  
THENCE NORTH 48°45' WEST 6 FEET;  
THENCE SOUTH 40°15' WEST 120 FEET  
THENCE SOUTH 48°45' EAST 6 FEET;  
THENCE NORTH 40°15' EAST 120 FEET TO THE POINT OF BEGINNING OF SAID 6  
FOOT STRIP OF LAND;

(ALSO KNOWN AS A PORTION OF LOTS 37, 38 AND 38 A, THREE TREE POINT,  
ACCORDING TO THE UNRECORDED PLAT THEREOF);

TOGETHER WITH SECOND CLASS TIDELANDS ADJOINING, AS CONVEYED BY THE  
STATE OF WASHINGTON, TO THE LINE OF MEAN LOW TIDE;

TOGETHER WITH AN EASEMENT FOR WALKWAY OVER A 6 FOOT STRIP OF LAND  
DESCRIBED AS FOLLOWS:

BEGINNING AT THE MOST WESTERLY CORNER OF LOT 38 A OF SEACOMA BEACH  
DIVISION NUMBER 3, ACCORDING TO PLAT RECORDED IN VOLUME 16 OF PLATS AT  
PAGE(S) 25, RECORDS OF KING COUNTY, WASHINGTON;  
THENCE NORTH 48°45' WEST 6 FEET;  
THENCE SOUTH 40°15' WEST 120 FEET;  
THENCE SOUTH 48°45' EAST 6 FEET;  
THENCE NORTH 40°15' EAST 120 FEET TO THE POINT OF BEGINNING OF SAID 6  
FOOT STRIP OF LAND.

2007 113 000821

**FILED**

KING COUNTY, WASHINGTON

Honorable Hollis Hill  
Hearing Date: March 8, 2011 at 8:30 a.m.

APR 2 2 2011

SUPERIOR COURT CLERK  
BY JULIE WARFIELD  
DEPUTY

SUPERIOR COURT OF WASHINGTON COUNTY OF KING

DEVON T. JAMES, a married man,  
Plaintiff,

No. 07-2-23873-5 KNT

v.

ORDER ON DEFENDANTS'  
MOTION FOR CONTEMPT AND  
FOR AN ORDER ENFORCING  
AND/OR CLARIFYING THE  
TERMS OF THE MAY 15, 2009  
PERMANENT INJUNCTION

TERESA ANN WRIGHT and THOMAS  
LEE CARTWRIGHT, husband and wife,  
Defendants.

**I. Judgment Summary**

A.	Judgment creditor	<u>Teresa A. Wright &amp; Thomas Cartwright</u>
B.	Judgment debtor	<u>Devon T. James</u>
C.	Principal judgment (Greenforest)	\$ 932.40
D.	Interest to date of judgment	\$
E.	Attorney fees	\$ <u>TBD</u>
F.	Costs	\$ <u>TBD</u>
G.	Principal judgment shall bear interest at 12% per annum	
H.	Attorney fees, costs and other recovery amounts shall bear interest at 12% per annum	
I.	Attorney for judgment creditor	<u>Valerie A. Villacin</u>
J.	Attorney for judgment debtor	<u>\$932.40</u>

**II. Findings**

***This Court Finds:***

- 2.1 James is in contempt of this court's May 15, 2009 permanent injunction that required him "to take any and all measures necessary to prevent the bamboo planted on the James Property from encroaching" onto the Wright property. James has failed to adequately ensure that the preventative measures that he has undertaken will in fact prevent the encroachment of bamboo onto the Wright property. (Permanent Injunction no. 3)
- 2.2 James is in contempt for violating this court's May 15, 2009 permanent injunction by erecting structures to support the bamboo planted on his property to grow higher than twelve feet. (Permanent Injunction no. 1)

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- 2.3 James has rebuilt the “rather substantial planter box” that this court referenced in its Findings of Fact (FF no. 17) dated May 15, 2009. To the extent that this structure exceeds or will exceed the “lowest point on the Indian Trail” it is in violation of the covenant described in the Special Warranty Deed referenced in this court’s FF no. 23. Further, to the extent that this box is being used as support to grow his bamboo higher than twelve feet, it is in violation of this court’s May 15, 2009 permanent injunction. (Permanent Injunction No. 1). The Court makes no finding in this regard.
- 2.4 James has removed survey markers between the properties, which Cartwright had previously paid to establish.
- 2.5 James removed portions of the rockery, which provides lateral support for the Cartwright pool, and failed to return it to its prior condition.
- 2.6 Under the terms of the May 15, 2009 Permanent Injunction and Chapter 7.21 RCW, Cartwright is entitled to attorney fees and costs that were incurred to pursue enforcement of this court’s permanent injunction.

### III. Order

11 *It is Ordered:*

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- 3.1 As set forth in the above findings of fact, James is in contempt of the May 15, 2009 permanent injunction.
- 3.2 To ensure compliance with this court’s May 15, 2009 Permanent Injunction, James shall fully comply with the recommendations of Favero Greenforest as set forth in his July 17, 2010 report attached to the Declaration of Greenforest provided in support of Defendants’ Motion for Contempt, in order to ensure that the preventative measures effected will permanently, or as close to permanently as possible, prevent the encroachment of the James bamboo onto the Cartwright property. The bamboo includes any and all bamboo originating from the James property regardless of whether the bamboo pre-existed James’ ownership of the property. The preventative measures shall include, but are not limited to, removing the existing bamboo along the shared property line, installing a proper seamless barrier, and re-planting any bamboo to no closer than three to five feet from the shared boundary.
- 3.3 If James fails to comply with the recommendations of Favero Greenforest within 60 days of this order, James shall pay \$200 per day until he meets full compliance. Alternatively, James must completely remove any bamboo within three feet of Cartwright/James shared property line and replace it with an ornamental shrub species that is not invasive. Such planting must be maintained at a height no more than 12 feet from the lowest point of the Indian Trail.
- 3.4 James is enjoined from constructing any new planter box to exceed the lowest point on the Indian Trail. To the extent James replants bamboo in a new planter box that exceeds twelve feet, James shall reduce the height of the bamboo to twelve feet or dismantle the box entirely.
- 3.5 To the extent that any structure or property, including steps, on the Wright property is removed or disturbed to effect the removal of bamboo that originated from the James property, James shall assume all reasonable costs for its

1 replacement to ensure that the property is left in a close to equal state as before its  
2 disturbance. Wright has the option to make any of the necessary arrangements for  
3 the replacement or repair that will occur on her property. In that event, James has  
4 20 days to pay the cost of any invoice once it is submitted to him. If Wright is  
5 required to pay the cost because of James' failure to do so, Wright will be entitled  
6 to a judgment for the cost, plus prejudgment interest of 12%, and any fees and  
7 costs incurred to obtain judgment and collect.

8 3.6 Within two weeks of this order, James shall remove any structures that are being  
9 used to support the bamboo planted on his property to grow higher than twelve  
10 feet. Any bamboo that exceeds twelve feet shall be immediately reduced to  
11 twelve feet. James shall be sanctioned \$200 for each day after two weeks that he  
12 fails to comply with this provision.

13 3.7 If not already removed, within two weeks of this order James is ordered to  
14 remove the light located at the peak of his roof as described in Finding of Fact no.  
15 40 from this court's May 15, 2009 Order. If James fails to remove this light  
16 within two weeks, he shall be sanctioned \$200 for each day he fails to remove this  
17 lights.

18 3.8 Within two weeks of this order, James is ordered to remove the driveway lights  
19 identified in Exhibit 7 of the Declaration of Teresa Wright. If James fails to  
20 remove these lights within two weeks, he shall be sanctioned \$200 for each day  
21 he fails to remove this lights. James may maintain a security light on his  
22 driveway which is not shining up onto the Cartwright property.

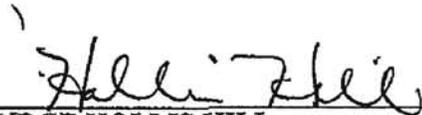
23 3.9 James shall pay for the cost of replacing the survey markers between the two  
24 properties that he removed within 30 days of the date of this order. In the event  
25 that James' newly installed fence is located on the Cartwright property after re-  
establishment of the survey markers, James shall remove the fence.

3.10 James shall replace the rockery, which provides lateral support for the Cartwright  
pool, that he moved and return it to its prior condition.

3.11 James shall pay attorney fees and costs to Cartwright for fees and costs incurred  
to enforce this court's May 15, 2009 permanent injunction. The parties' attorneys  
are ordered to confer regarding fees and if necessary, defense counsel may submit  
an accounting to the Court.

3.12 James shall pay the costs of \$932.40, which Cartwright incurred to retain Favero  
Greenforest to address James' violation of this court's May 15, 2009 permanent  
injunction. James shall also pay any additional costs incurred for Mr.  
Greenforest's services to ensure compliance with the permanent injunction. To  
the extent there is a dispute with regard to the reasonableness of Mr. Greenforest's  
fees incurred after this court's order, either party can bring a motion before this  
court to address the issue.

25 DATED: April 22, 2011

  
\_\_\_\_\_  
JUDGE HOLLIS HILL

**FILED**  
KING COUNTY, WASHINGTON

APR 12 2012

SUPERIOR COURT CLERK  
BY JULIE WARFIELD  
DEPUTY

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

DEVON T. JAMES, a married man,

Plaintiff,

v.

TERESA ANN WRIGHT and THOMAS  
LESS CARTWRIGHT, wife and husband,

Defendants.

NO. 07-2-23873-5 KNT

ORDER RE ENFORCEMENT OF  
PERMANENT INJUNCTION

This matter came before the undersigned judge on Defendants' Motion for Order Compelling Compliance. The Court has reviewed all submissions except the Declaration of Jennifer James which is stricken because it is replete with inadmissible hearsay, opinion, speculation and otherwise incompetent evidence, and the Court being fully advised,

IT IS HEREBY ORDERED as follows:

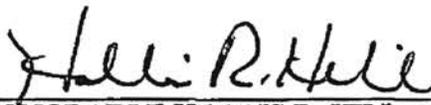
1. The geotechnical engineers who testified on March 30, 2012 regarding this Motion, Marc McGinnis and Tim Roberts, are to propose a third independent geotechnical engineer to visit the Wright-Cartwright and James properties for the purpose of advising the Court 1) whether any reconfiguration of the James property known as the "rockery" done by or on behalf of Mr. James since the Court's entry of it Permanent Injunction has destabilized the Wright-Cartwright property in any way; 2) if the Wright-Cartwright property has been destabilized by Mr. James reconfiguration of the "rockery" what, if anything can be done to secure and

1 stabilize that Wright-Cartwright property; and 3) the estimated cost of any  
2 repair/reconfiguration/stabilization, if any. The parties are to provide a report of the  
3 independent engineer to the Court no later than April 20, 2012 unless agreement is  
4 reached as to a later date and the Court is so advised.

- 5 2. Plantings installed to replace bamboo pursuant to paragraph 3.3 of this Court's  
6 4/22/11 Order must be maintained at a height no greater than 12 feet above the  
7 lowest point of the Indian Trail. No ornamental plantings not referred to in the  
8 preceding sentence which were installed since the issuance of the May 15, 2009  
9 Permanent Injunction may be supported to grow above 12 feet. This height limit  
10 does not apply to unsupported plantings.
- 11 3. The Court reserves ruling on assessment of fees and costs related to this Motion.
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13 DONE IN OPEN COURT this 12th day of April, 2012.

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16 HONORABLE HOLLIS R. HILL

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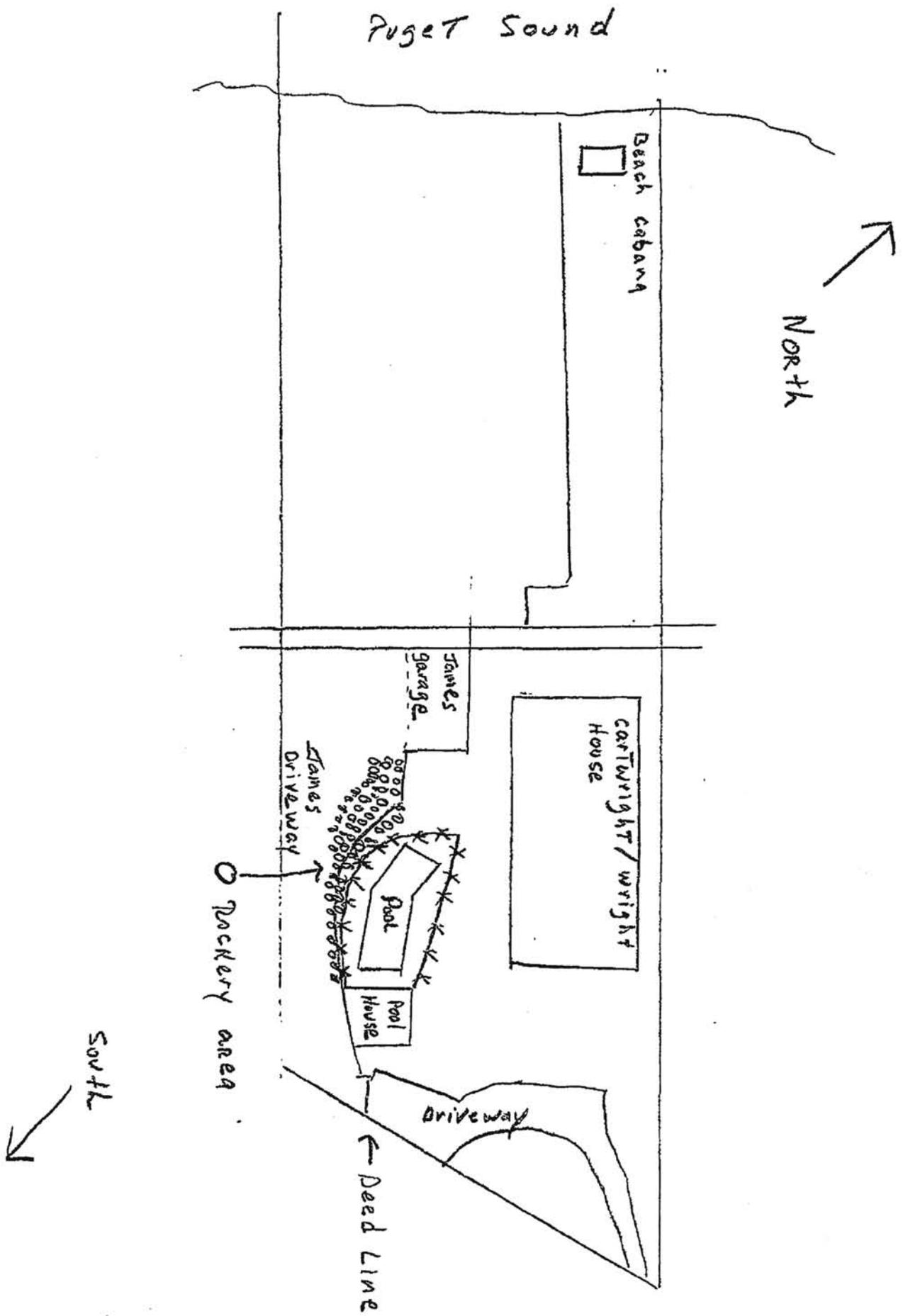
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DECLARATION OF SERVICE

I, Dan R. Young, declare to be true under penalty of perjury under the laws of the State of Washington as follows:

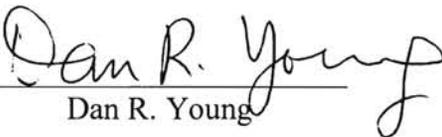
1. I am an attorney representing the appellant Devon James in this action.
2. On September 26, 2013, I sent by the USPS, first class mail with pre-paid postage

affixed, a copy of the foregoing Brief of Appellant to the following:

Stephen P. Van Derhoef, Esq.  
Cairncross & Hempelmann, P.S.  
524 2<sup>nd</sup> Avenue, Suite 500  
Seattle, WA 98104

Howard Goodfriend, Esq.  
Smith Goodfriend, P.S.  
1619 8th Avenue North  
Seattle, WA 98109-3007

Dated: September 26, 2013, at Seattle, Washington.

  
\_\_\_\_\_  
Dan R. Young

SEP 27 10 2:32