

No. 69615-7-I

COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON

MIT D. TILKOV and SUSAN L. TILKOV, in their individual capacities
and as a marital community; TIBOR GAJDICS; KATHRYN LYNNE
COTTER; and SANDRA D. HULME,

Appellants/Cross-Respondents,

v.

DAVID L. DUNCAN, in his individual capacity; BLACK PINES, LLC, a
Washington limited liability company,

Respondents/Cross-Appellants.

REPLY BRIEF OF RESPONDENTS-CROSS APPELLANTS

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A. INTRODUCTION

Here in the Evergreen State, we should be hesitant to enact laws that can be used to force the destruction of healthy trees and other vegetation that provide the unique and beautiful environment we all enjoy. Whether it is this philosophy or some other principle that caused our Legislature to cautiously draft our spite structure statute, this Court should uphold its plain language. Trees are not spite structures with no reasonable or useful purpose other than to harass neighbors.

Nor should one neighbor's long-established love for and careful cultivation of trees, or his desire for a reasonable amount of privacy, suddenly be painted as something malicious simply because his neighbors sued him over easement claims.

David Duncan and Black Pines LLC did nothing out of spite or malice here, and did not injure their neighbors in the reasonable and legal use of their own land.

B. REPLY ON STATEMENT OF THE CASE

In their brief responding to Duncan's cross-appeal on two spite structure findings by the trial court, Cross-Respondents Tilkov and Cotter (collectively, "Tilkov") recite some facts that are immaterial to the issues on cross-appeal, and must be distinguished from the relevant facts. Br. of Cross-Resp'ts at 25-27. The history of development of the fence itself

(first the wire fence and then the six-foot wood fence) is immaterial. The trial court did not find that the whole fence was a spite structure. Only the top foot of the fence, which was termed the “extender,” was found to qualify under the statute. CP 1066. The trial court found that the fence itself served a useful, non-spiteful purpose of protecting Duncan’s vegetation and privacy. CP 1060.

Tilkov also irrelevantly repeats his claims that the fence extender blocked his views. Br. of Cross-Resp’ts at 25, 27, 30, 45. The trial court concluded that Tilkov and Cotter could not sustain their spite structure claim on the basis of loss of views, because they own no view easement and have no “common law right to a view easement over the Black Pines Property.” CP 1066. Tilkov has not challenged this ruling on appeal, so any facts regarding loss of views are immaterial. Only facts regarding the alleged “loss of light and air” are relevant. *Id.*

Regarding his alleged loss of light and air, Tilkov points to the following evidence supporting the finding that the fence extender blocked light and air: (1) Tilkov’s own trial testimony at RP 55; (2) the “obvious” blockage recorded in photographs in the record, and the trial court’s site visit. Br. of Cross-Resp’ts at 27.

Taking each of these factual assertions in turn, none demonstrates blockage of light and air by the fence extender. Tilkov’s testimony at RP

55 discusses only his claim that the *fence* interfered with light, not the *fence extender*:

Q. Are – is the fence and the trees, are they starting to impact the light, the natural light that’s coming into your window?

A. Not yet, they’re not high enough to do that, as we saw.

Q. Is it darker? Is it darker on your property because –

A. Well, it’s darker by the fact that the fence is there. I mean, it is dark.

VRP 54-55. The photographs, which Tilkov claim are “obvious” support for the trial court’s findings, demonstrate no discernible difference in light or air between the six-foot fence alone and the fence with the extender. Ex. 22. Finally, the trial court did conduct an on-site visit, but made no findings of fact referencing that visit. There is no finding that the trial court observed any blockage of light or air during that visit. The findings of fact reference only exhibits and testimony. CP 1057-64. Thus, any “evidence” from that visit is not part of the record on appeal.

Tilkov describes Duncan’s testimony regarding the filling in the fence extender as “impeachment” of Duncan’s claim that he filled in gaps in the top of the fence for reasons other than spite. Br. of Cross-Resp’ts at 38-39. Ironically, the cited testimony proves what Duncan has claimed all along: that he filled in gaps in the fence extender not out of spite for his neighbors, but for privacy:

Q. Okay. Any other fences that you've put up on the subject property?

A. Not a new fence, but recently I've been closing in the fence that adjoins Bells Grove on the north side of the one acre...*just for more privacy*, because it seems like the neighbors north of that property are somewhat hostile. *It's a little more peaceful for me to be enjoying my property if it's solid.*

RP 222-23 (emphasis added).

Tilkov ignores his own questionable actions in allowing a wild rose bush to grow higher than the fence extender while simultaneously claiming that the fence extender is depriving him of light and air. Tilkov testified and demonstrated with photographs that he was encouraging the growth of wild roses to at least the height of the top of the fence with the extender if not higher. VRP 49; Exs. 22, 23. He testified that the wild roses grew quite high and pre-existed the fence extender, and was annoyed when Duncan cut them back. VRP 52-53.

C. SUMMARY OF ARGUMENT IN CROSS-REPLY

The Washington Supreme Court has already ruled that the term "structure" in RCW 7.40.030 refers to something artificially built, something constructed. Tilkov argues that this Court should ignore that binding precedent in favor of other cases that are not precedential and/or apply different statutes and legal theories. Our Legislature meant what it wrote when it refused to use the word "fence" or define a "structure" as

being natural vegetation. This Court should faithfully interpret the spite structure statute according to its plain language and Supreme Court precedent.

The trial court did not have substantial evidence that a few of the many trees Duncan planted, unlike all the others, were spite structures under the operative test. It also did not have substantial evidence that the top one foot of Duncan's fence was spiteful or interfered with any neighbor's rights under that same test.

The trial court's spite structure findings and accompanying injunctions should be reversed.

D. ARGUMENT IN CROSS-REPLY

- (1) Whether Tilkov Agrees or Disagrees With the Supreme Court's Interpretation of RCW 7.40.030, It is Binding Washington Precedent and Has Been for 100 Years

The trial court found that of all the many trees Duncan planted over the years, 16 Cypress trees near the Tilkov and Cotter properties were "spite structures" under RCW 7.40.030. Appendix A at 11. The trial court ordered their removal, and enjoined Duncan from having *any* vegetation on the Black Pines property more than six feet in height within ten feet of the Tilkov and Cotter boundaries. *Id.*

Duncan argued on cross-appeal that the trial court improperly included trees in the definition of spite structure, contrary to all existing

precedent interpreting RCW 7.40.030. Br. of Cross-Appellants at 32-37. Duncan cited *Karasek v. Peier*, 22 Wash. 419, 426, 61 P. 33, 35 (1900) and *Jones v. Williams*, 56 Wash. 588, 106 P. 166 (1910). *Karasek* defined “structure” under the statute as “any production or piece of work *artificially* built up or composed of parts joined together in some definite manner; *any construction.*” *Karasek*, 22 Wash. at 424. Duncan argued that had the Legislature intended to include naturally growing vegetation in its spite structure statute, it easily could have done so, citing *Town of Clyde Hill v. Roisen*, 111 Wn.2d 912, 767 P.2d 1375, 1376 (1989) and the reasoning in *Dalton v. Bua*, 47 Conn. Supp. 645, 648, 822 A.2d 392, 395 (Super. Ct. 2003). *Id.*

Tilkov responds to *Karasek* by trying to downplay its importance, and ignore its holding. Br. of Cross-Resp'ts at 30-31. Tilkov claims that the Supreme Court’s interpretation of “structure” as something “artificially built up or composed of parts joined together in some definite manner, any construction,” *Karasek*, 22 Wash. at 425 is “too limiting,” is “absurd,” and “fails to carry out the intent of the statute.” *Id.*

Whether Tilkov approves of the Supreme Court’s holding or not, this Court must follow it. *State v. Watkins*, 136 Wn. App. 240, 246, 148 P.3d 1112 (2006); *Satterlee v. Snohomish County*, 115 Wn. App. 229, 233, 62 P.3d 896 (2002), *review denied*, 150 Wn.2d 1008 (2003). Even if this

Court disagrees, it is bound by the decisions of our state Supreme Court and errs when it fails to follow them. *MP Med. Inc. v. Wegman*, 151 Wn. App. 409, 417, 213 P.3d 931 (2009) (citing *1000 Virginia Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566, 578, 146 P.3d 423 (2006)).

Tilkov's assertion that reserving the definition of "structure" to manmade and artificial constructions somehow violates intent by the Legislature is equally unavailing. The intent of the Legislature is gleaned first and foremost from the plain language it uses in writing statutes. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318, 320 (2003). "Our starting point must always be "the statute's plain language and ordinary meaning." *Nat'l Elec. Contractors Ass'n v. Riveland*, 138 Wn.2d 9, 19, 978 P.2d 481 (1999). When the plain language is unambiguous—that is, when the statutory language admits of only one meaning—the legislative intent is apparent, and courts will not construe the statute otherwise. *State v. Wilson*, 125 Wn.2d 212, 217, 883 P.2d 320 (1994). Just as court "cannot add words or clauses to an unambiguous statute when the legislature has chosen not to include that language," *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003), they may not delete language from an unambiguous statute. *Davis v. Dep't of Licensing*, 137 Wn.2d 957, 963, 977 P.2d 554 (1999).

Courts may interpret statutes, but they may not rewrite statutes. *In re Parentage of C.A.M.A.*, 154 Wn.2d 52, 69, 109 P.3d 405, 414 (2005). “Courts do not amend statutes by judicial construction, nor rewrite statutes ‘to avoid difficulties in construing and applying them.’” *Millay v. Cam*, 135 Wn.2d 193, 203, 955 P.2d 791 (1998) (citations omitted). “[T]here is a difference between adopting a saving construction and rewriting legislation altogether.” Laurence H. Tribe, *American Constitutional Law* § 12–30 at 1032 (2d ed. 1988). Courts show greater respect for the Legislature by preserving the legislature's fundamental role to rewrite the statute rather than undertaking that legislative task themselves. *In re C.A.M.A.*, 154 Wn.2d at 69.

The plain meaning of “structure” in RCW 7.40.030, as announced by our Supreme Court and uncontroverted since its inception, is something artificial and not natural. The Legislature chose not to include naturally grown objects such as trees, bushes, or vegetation in its definition of “structure.” It was not for the trial court, nor for any court, to alter that definition on the Legislature’s behalf.

Tilkov urges this Court to ignore *Karasek* and instead follow its own ruling in *Lakes at Mercer Island Homeowners Ass’n v. Witrak*, 61 Wn. App. 177, 810 P.2d 27, *review denied*, 117 Wn.2d 1013 (1991). Tilkov avers that *Witrak’s* conclusion that “fences, walls, or shrubs” in a

restrictive covenant could be interpreted to include trees planted in a line at a boundary, should be grafted onto the definition of “structure” in RCW 7.40.030.

Witrak is distinguishable on so many grounds that it is virtually irrelevant here. First, the *Witrak* court was interpreting a restrictive covenant, not a statute. *Witrak*, 61 Wn. App. at 179. The rules this Court must apply in construing a restrictive covenant are far different from those governing statutory interpretation: this Court emphasized the “collective interests of the homeowners” and applied the Berg “context rule” that governs contracts. *Id.* at 181. Second, the restrictive covenant at issue in *Witrak* actually defined “fence” to include “shrub.” *Id.* at 179. Therefore the only question before the Court was whether there was any logic in discerning between trees and shrubs. *Id.* at 182. The statute at issue here does not use the word “fence,” nor does it define “structure” to include shrubs. Third, the *Witrak* court was not applying RCW 7.40.030, nor did it have to contend with Supreme Court precedent defining “structure” as used in the statute. Here, this Court is faced with a statute that says “structure,” and that term has already been interpreted by the Supreme Court. The analysis here is independent of *Witrak*.

Tilkov cites two foreign jurisdictions for support of his definition of a row of planted trees as a “structure.” Br. of Cross-Resp'ts at 33.

However, both of the statutes in those cases are distinguishable: they both interpret statutes written broadly to prohibit a spiteful “fence or other structure in the nature of a fence.” *Wilson v. Handley*, 97 Cal. App. 4th 1301, 1304, 119 Cal. Rptr. 2d 263 (2002); *Dowdell v. Bloomquist*, 847 A.2d 827, 829 (R.I. 2004). Also, the statute in *Dowdell* specifically defined “fence” to include “hedge,” rendering the analysis there similar to this Court’s ruling in *Witrak*: when “fence” is defined to include “hedge,” excluding trees from the reach of the spite structure statute would be improper when there was expert testimony at trial that the trees in question were a “hedge” or a “fence.” *Dowdell*, 847 A.2d at 830.

These foreign cases do nothing more than to emphasize why it is important to be faithful to the language crafted by the Legislature. Washington’s statute does not contain the terms “fence other structure in the nature of a fence.” It does not define “structure” to include hedges or other vegetations. Our Legislature could have written the statute using the same language as these other states. It did not. This Court should not accept Tilkov’s invitation to rewrite our law.

Finally, Tilkov contends that excluding trees from the definition of “structure” would be an “absurd” interpretation of the spite structure statute. Br. of Cross-Resp’ts at 30.

It is true that courts “will avoid [a] literal reading of a statute which would result in unlikely, absurd, or strained consequences.” *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 148 Wn.2d 224, 239, 59 P.3d 655 (2002), *cert. denied*, 538 U.S. 1057 (2003). However, this canon of construction must be applied sparingly. *See Duke v. Boyd*, 133 Wn.2d 80, 87, 942 P.2d 351 (1997) (“Although the court should not construe statutory language so as to result in absurd or strained consequences, neither should the court question the wisdom of a statute even though its results seem unduly harsh.” (citation omitted)). Application of the absurd results canon, by its terms, refuses to give effect to the words the legislature has written; it necessarily results in a court disregarding an otherwise plain meaning and inserting or removing statutory language, a task that is decidedly the province of the Legislature. *Point Roberts Fishing Co. v. George & Barker Co.*, 28 Wash. 200, 204, 68 P. 438 (1902). This raises separation of powers concerns. *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 311, 268 P.3d 892, 900 (2011). If a result is conceivable, the result is not absurd. *Id.*

It is conceivable that when the Legislature drafted the spite structure statute, it intended to exclude trees and other vegetation from the definition of “structure.” Unlike human-made objects, which can be

expressly built to serve no other purpose than to blight neighborhoods and act as malicious eyesores, vegetation has an inherently beautifying and beneficial purpose. Trees and shrubs are beautiful, they help to prevent erosion, and they enhance the value of land. Many property owners spend thousands of dollars to enrich and beautify their property with landscaping, including trees and other vegetation. As pointed out in Duncan's opening brief of cross-appellants, Washington State has a particularly rich tradition of valuing and preserving natural vegetation. It is not absurd to suggest that the Legislature did not intend to allow neighbors to seek court orders to rip out valuable trees because those neighbors have a grievance over some other issue.

Trees are not spite structures under RCW 7.40.030. They are not artificially constructed by a builder. They are naturally growing and enhance property values. The trial court's ruling to the contrary should be reversed.

- (a) Under This Court's *Baillargeon* Decision, Sufficient Evidence Did Not Support Conclusion that the Cypress Trees Were Spite Structures

The trial court found that the 16 Cypress trees were spite structures. Appendix A at 10. The court distinguished those particular trees from the many other trees Duncan had cultivated and enjoyed and

concluded they alone were planted with malicious intent to annoy or injure Tilkov and Cotter. *Id.*

Again, under *Baillargeon v. Press*, 11 Wn. App. 59, 521 P.2d 746, review denied, 84 Wn.2d 1010 (1974), three part test, substantial evidence must exist that (1) the trees damaged Tilkov's or Cotter's enjoyment of their property in some significant degree; (2) the trees were designed as the result of malice or spitefulness primarily or solely to injure and annoy the adjoining landowners; and (3) the trees serve no really useful or reasonable purpose. *Baillargeon*, 11 Wn. App. at 66 (emphases added).¹

In his brief of cross-appellant, Duncan argued that under the second and third prongs of the *Baillargeon* test, substantial evidence does not support the findings that the Cypress trees were primarily planted to injure and served no useful or reasonable purpose.

Tilkov responds that there was evidence of animosity between the parties. Br. of Cross-Resp'ts at 37-38. He claims that the timing of the

¹ Under the first prong of the test regarding the adjoining landowner's enjoyment, a court cannot restrict one property owner's use in order to "confer a benefit on the other." *Id.*, quoting *McInnes v. Kennell*, 47 Wn.2d 29, 35, 286 P.2d 713, 716 (1955). In other words, a property owner may not, through use of the spite structure statute, obtain a benefit he did not otherwise have at the expense of his neighbor. *Id.* The trial court mentioned that the Cypress trees blocked Tilkov's and Cotter's views, Appendix A at 7, but in its conclusions of law made clear that the enjoyment lost was light and air, not views. Appendix A at 11. For clarity, this Court should affirm that Tilkov and Cotter could not maintain any claim under RCW 7.40.030 for any injury to their views. This is important, because the suggestion that they can sue Duncan for injury to their views could perpetuate the cycle of endless litigation that appears to be forming here.

planting of the 16 trees in question, as opposed to the hundreds of other trees large and small that Duncan planted all over his property throughout the years, means that those trees, as opposed to all the others, served no reasonable or useful purpose and were merely spiteful. *Id.*

If Duncan had never planted a tree on his property, and then were sued and suddenly began to plant trees only along his neighbor's property line in order to block his view, then Tilkov's suggestion that the trees were merely spiteful nuisances might carry more weight. This is not the case. Duncan had a love of trees and a planting plan that preexisted any animosity his neighbors showed him by suing him.

It is not enough, under the *Baillargeon* test, for a party to assert that they are displeased with a particular aspect of their neighbor's property use. They must demonstrate that the structure of which they complain serves *no* reasonable or useful purpose.

Tilkov simply cannot, on this record, demonstrate that the Cypress trees serve *no* reasonable or useful purpose. Duncan planted the trees for their beauty and privacy, and there is no dispute that they serve that purpose. Appendix A at 4; VRP 194.

Trees are not a nuisance, and on this record they were not planted primarily to spite neighbors. The trial court erred in finding that sufficient

evidence supported its conclusion that all three elements of the *Baillargeon* test were satisfied here.

- (b) According to the Law of the Case, Tilkov Has No Claim to View Rights, and There Is No Evidence that One Additional Foot of Fence Obstructs Light or Air

There is currently a seven-foot fence between the Black Pines property and the Tilkov property.² Appendix A at 6.³ The trial court found that the first six feet of the fence was reasonable and useful, but the top foot of the fence was a spite structure. *Id.* at 9. The court found that this top foot deprived Tilkov of his “common law right” to light and air. *Id.* at 11. The trial court ordered demolition of the top of the fence, and enjoined Duncan from having any fence over six feet at the property boundary line, regardless of its design. *Id.* The trial court acknowledged and concluded as a matter of law that Tilkov had no right to preserve his view over Duncan’s or Black Pines’ land through force of law stating: “No easement has been granted to Tilkov or Cotter for a view over the Black Pines Property, and they have no common law right to a view

² None of the other plaintiffs’ properties were involved in the dispute over the “extender.” Appendix A at 10.

³ The trial court found, and it is undisputed, that the fence complies with all zoning codes and regulations. *Id.*

easement over the Black Pines Property.” CP 1066. Tilkov did not challenge this ruling on appeal.

Tilkov nevertheless argues that he does have a legal right to a view over his neighbor’s property, citing *Baillargeon* and a Michigan case upon which it relied. Br. of Cross-Appellants at 46. Tilkov claims, incorrectly, that Duncan relies upon *Collinson v. John L. Scott, Inc.*, 55 Wn. App. 481, 778 P.2d 534 (1989) for this proposition. *Id.*⁴

Tilkov’s failure to contend with the trial court’s conclusion regarding view rights is fatal. Because Tilkov has not challenged this conclusion of law, it is the law of the case. *King Aircraft Sales, Inc. v. Lane*, 68 Wn. App. 706, 717, 846 P.2d 550, 556 (1993). Tilkov and Cotter have no common law or contractual right to views over Duncan’s property.

The reason that Tilkov’s failure to establish a legal right to a view dooms his argument is that the spite structure statute may not be used to confer upon one party a legal right to which he was not otherwise entitled:

A mandatory injunction is a harsh remedy, and courts of equity will not resort to it unless the right thereto is clear. Rights of adjoining landowners in the use and enjoyment of their property are relative, but they are also equal. Equity cannot restrict one landowner to confer a benefit on the other. It is only when an unreasonable or unlawful use of land by one property owner infringes upon some right of

⁴ Duncan cites *Collinson* for its declaration that there is no common law right to *light and air* in Washington. Br. of Cross-Appellants at 42.

another in the reasonable use and enjoyment of his land that equity will intervene.

McInnes v. Kennell, 47 Wn.2d 29, 38, 286 P.2d 713, 718 (1955), citing *Riblet v. Spokane-Portland Cement Co.*, 41 Wn.2d 249, 254, 248 P.2d 380 (1952), appeal after remand, 45 Wn.2d 346 (1954).

The *McInnes* language regarding property rights was quoted by the *Baillargeon* court and incorporated into the test under RCW 7.40.030. *Baillargeon*, 11 Wn. App. at 66. Again, under the *Baillargeon* test, no structure is a spite structure unless it damages the adjoining landowner's rights in enjoyment of his or her property in some significant degree. *Baillargeon*, 11 Wn. App. at 66.

Tilkov's reliance on *Wimberly v. Caravello*, 136 Wn. App. 327, 149 P.3d 402 (2006) is misplaced. Br. of Cross-Resp'ts at 47. In fact, *Wimberly* precisely demonstrates how a party can prove a legal right to a view: by obtaining one through a covenant. *Wimberly*, 136 Wn. App. at 331. In *Wimberly*, Division Three of this Court noted that the covenants at issue had the express purpose "to protect property values and views." *Id.* Tilkov has no such right, and thus cannot create it by use of the spite structure statute.

Thus, if Tilkov has no preexisting legal right to a view over Duncan's property, under *Baillargeon* he cannot obtain an injunction to

restrain Duncan's free use and enjoyment of his property in order to obtain that right. Tilkov's claim that he has a right under RCW 7.40.030 to remove trees or fencing to preserve a view fails.

Regarding Duncan's challenge to the claim that the additional one foot of fence "extender" turned a reasonable use of property into a spite structure by blocking light and air, Tilkov has little to say. Br. of Cross-Resp'ts at 48.

As explained in Duncan's opening brief of cross-appellant, there is no evidence that the top foot of the fence blocked Tilkov's enjoyment of light or air, but the first six feet did not. Br. of Cross-Appellants at 41-44. Multiple views from Tilkov's house of the seven-foot fence shows plenty of light reaching the camera; the fence does not appear to be close enough to his residence to directly block any light or air from reaching his windows. Ex. 22. One can still see distant lowland trees and sky in photos both with and without the extender. *Id.* Again, Tilkov never testified nor presented any evidence demonstrating that the extra foot on the fence blocked any light or air from coming to his property. He simply said that the fence made his property "darker." RP 55. However, the fence is not at issue. Only the extender is challenged. Thus, that testimony is irrelevant.

Tilkov claim of interference with light and air is belied by his own use of his property. Tilkov testified and demonstrated with photographs that he was encouraging the growth of wild roses to at least the height of the top of the fence with the extender if not higher. VRP 49; Exs. 22, 23. He testified that the wild roses grew quite high and pre-existed the fence extender, and was annoyed when Duncan cut them back. VRP 52-53. It is inconsistent with logic to argue that an extra foot of fence blocks light and air, when an eight foot rosebush on Tilkov's own property is steadily growing along his fence line.

In order to sustain the trial court's ruling that the fence extender was a spite structure, there had to be a finding, supported by substantial evidence, that a seven foot-high interfered with Tilkov's light and air in a way that the six-foot fence did not. There is no such evidence.

E. CONCLUSION

This endless litigation regarding the easement route should at last concluded by affirming the trial court's dismissal under the doctrines of collateral estoppel and res judicata, as well as the undisputed facts.

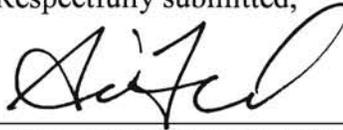
The remedies of injunction and abatement should be reserved for those instances where one property owner has maliciously deprived another of a substantial rightful use of property. That is simply not the case here. Property owners should not be able to restrict their neighbor's

land use rights to obtain benefits for themselves that they otherwise do not enjoy.

The trial court's ruling should be affirmed as to the easement claims and the denial of spite structure claims as to most of the trees on Duncan's and Black Pines' property. However, the trial court's rulings that the 16 Cypress trees and top foot of fence were spite structures should be reversed. Duncan should be awarded his attorney fees on appeal.

DATED this 19th day of August, 2013.

Respectfully submitted,



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APPENDIX

1 FINDINGS OF FACT

2 1. All of the Plaintiffs own lots in what is typically known as "Bell's Grove,"
3 which is located in Point Roberts, Whatcom County, Washington. Plaintiffs Mit D. and
4 Susan L. Tilkov ("Tilkov") own that real property legally described in Exhibit A to the
5 First Amended Complaint to Quiet Title in Easement, Breach of Easement, Trespass,
6 and Violation of RCW 7.40.030 (filed October 21, 2011, Sub No. 52) ("First Amended
7 Complaint"). Plaintiff Kathryn Lynne Cotter ("Cotter") owns that real property legally
8 described in Exhibit C to the First Amended Complaint. Plaintiff Tibor Gajdics
9 ("Gajdics") owns that real property legally described in Exhibit B to the First Amended
10 Complaint. Plaintiff Sandra Hulme ("Hulme") owns that real property legally described
11 in Exhibit M to the First Amended Complaint. The properties owned by Hulme and
12 Gajdics are not contiguous to any property owned by Defendants.

14 2. Defendant David L. Duncan ("Duncan") owns that real property located in
15 Whatcom County, Washington legally described in Exhibit D to the First Amended
16 Complaint ("Duncan Property"). The Duncan Property is not contiguous to any property
17 owned by Plaintiffs. Defendant Black Pines, LLC ("Black Pines") is a Washington
18 limited liability company and owns that property legally described as follows:

19 The east 13 acres of the west 33 acres of Government Lot 1, Section
20 11; Township 40 North, Range 3 West of W.M.
21 Excepting therefrom the North 1470 feet thereof.
22 Also except that portion thereof lying south of Edwards Drive.
23 Also except the right-of-way for Edwards Drive.
24 Situate in Whatcom County, Washington.

25 Plaintiffs' Exhibit 26. ("Black Pines Property"). Duncan originally acquired the Black
Pines Property and Duncan Property together from Stanley Vincent Bell on or about

1 October 16, 2000, and recorded a statutory warranty deed on November 18, 2000.
2 Plaintiffs' Exhibit 10. Duncan is the sole owner of Black Pines.

3 3. The Black Pines northern property line is the southern property line for the
4 property owned by Tilkov and Cotter. There is a strip of land between the Tilkov and
5 Cotter properties whose southern property line is a portion of the northern property line
6 of the Black Pines Property that is owned by the Bell's Grove Property Owners of Point
7 Roberts ("Bell's Grove Association"). The general configuration of the properties is
8 shown on Plaintiffs' Exhibit 1, which is attached hereto and incorporated by reference as
9 Exhibit A.
10

11 4. Each Plaintiff is a member of the Bell's Grove Association. In 2005, the
12 Bell's Grove Association commenced a lawsuit against Duncan seeking to quiet title in
13 an easement allowing Bell's Grove Association members to use a particular portion of
14 the Duncan Property, and to cross the Duncan Property and Black Pines Property to get
15 to the beach, Bell's Grove Property Owners of Point Roberts v. David L. Duncan,
16 Whatcom County Superior Court Cause No. 05-2-02831-5 ("Bell's Grove Action"), which
17 culminated in 2007 with the entry of Findings of Fact and Conclusions of Law ("2007
18 Findings") and a Judgment ("2007 Judgment"). The 2007 Judgment required Duncan to
19 allow Bell's Grove Association members use of the beach on the Duncan Property and
20 identified parameters for the location of the access route across the Duncan Property
21 and the Black Pines Property to get to the beach. The 2007 Findings are set out in
22 Plaintiffs' Exhibit 7, and the 2007 Judgment is at Plaintiffs' Exhibit 8, all of which are
23 incorporated herein by reference.
24

1 5. Duncan short platted the Black Pines Property into two lots and the
2 Duncan Property into three lots.

3 6. Tree planting is one of Duncan's hobbies. He enjoys working with trees,
4 planting them, pruning them, and watching them grow over time. Mr. Duncan bought the
5 property with tree planting in mind. He began working on planting plans for this property
6 while he was still living in California in 2001 through 2003. Since approximately 2003,
7 Duncan has planted many trees on the Duncan Property and the Black Pines Property.
8 Duncan implemented his planting plan without regard for the effect of his actions on
9 Tilkov, Cotter, and the other neighbors in Bell's Grove. There are also several trees and
10 shrubs that grew naturally on the property, were not planted by Duncan, and/or pre-
11 existed Duncan's ownership. The following plantings are of particular relevance to this
12 case:
13

14 a. Duncan began planting several forest-like, uneven rows of Cypress
15 trees in 2003 parallel to Edwards Drive on the Duncan Property.

16 b. Duncan planted a grove of Poplar trees consisting of three rows of
17 ten trees running north to south on Lot 1 of the Black Pines Property, which lot is
18 generally south of the Cotter property. As part of a later installation of a septic mound
19 on Lot 1, Duncan relocated some of the Poplars near the Cotter boundary, and included
20 them as part of an expanded grove that added two additional rows running north to
21 south on the east side of the original grove. These additional two rows of Poplars were
22 planted by Duncan after the Bell's Grove Action was concluded. Relocation of the
23 pathway caused Duncan to rethink his planting pattern and he decided to expand the
24

1 grove to the east. The most northerly row of poplars in the original grove was cut down
2 by unknown persons. The Court finds that the poplar grove has a different quality to it
3 and that its planting was not spiteful.

4 c. Duncan later planted nine Cypress trees on Lot 1 generally running
5 in a row east to west, and from 7 to 10 feet from the Cotter property line. These trees
6 are "fast growing" and will likely reach heights of 60-70 feet, and have a spread of 15-25
7 feet wide. Plaintiffs' Exhibit 5, pages 58-59. These trees were planted after entry of the
8 Judgment in the Bell's Grove Action.

9 d. Duncan has planted an additional seven Cypress trees on Lot 2 of
10 the Black Pines Property within 10 feet of the Tilkov Property line in an irregular
11 staggered row amongst pine tree that he planted earlier and around an existing
12 Hawthorne tree on the fence line. These trees are "fast growing" and will likely reach
13 heights of 60-70 feet, and have a spread of 15-25 feet wide. Plaintiffs' Exhibit 5, pages
14 58-59. These trees were planted after entry of the Judgment in the Bell's Grove Action.

15 7. Duncan has also constructed a fence along the common boundary line
16 between the Black Pines Property and the properties owned by Tilkov and Cotter. He
17 first installed a wire fence, but in 2007 started to fill in this fence with wood, making it a
18 total of six feet high. Duncan filled in the wire fence with wood to have more privacy
19 from the property owners of Bell's Grove who had recently sued him and to protect the
20 vegetation on his property from being cut or damaged.

21 8. Duncan continued to fill in or construct a wood fence across the common
22 boundary lines of the Tilkov and Cotter properties. In 2007, just after the Bell's Grove

1 Action finished, Tilkov trimmed wild rose bushes growing on the Black Pines Property
2 side of the fence to match the height of the wire fence. Exhibit 23, page 4. Tilkov did
3 this cutting without seeking Duncan's permission, but the Court finds that Tilkov's
4 actions were not particularly unreasonable or intrusive. Duncan responded to this
5 action by sending Tilkov a letter denouncing his action and threatening to sue him for
6 timber trespass.

7
8 9. In April 2010, Duncan began to install an "extender" on the 6-foot high
9 fence, in front of, inter alia, Tilkov's Property. The extender is essentially solid,
10 interferes with light and air, and one can't see through it. Plaintiffs' Exhibit 22; Plaintiffs'
11 Exhibit 23, pp. 7-8 and 12-13. There is no evidence in the record that the fence with the
12 extender violates any provision of County code and Plaintiffs make no such contention.

13 10. Duncan installed a new footpath across the Black Pines Property and
14 Duncan Property for the Bell's Grove Association following the Bell's Grove Action. The
15 new route was different than had been used by Bell's Grove residents, and the portion
16 on the Black Pines Property did not line up with the portion on the Duncan Property.
17 Bell's Grove Association sought to have the Court require that the two segments of the
18 path line up. During this process, Duncan represented to the Court that the Bell's Grove
19 Association could use any portion of the right-of-way they wished. Exhibit 42. The
20 Court reserved ruling on the motion.

21
22 11. In May 2009, the Bell's Grove Association attempted to install a gravel
23 walkway in the Whatcom County right-of-way that runs along the southern boundary of
24 the Black Pines property to link the two trails. No permission was obtained from

1 Whatcom County or Mr. Duncan to do this work. The evidence regarding the
2 subsequent events concerning this gravel walkway was inconclusive as to whether and
3 to what extent Mr. Duncan took steps to undo the work done by the Association. What
4 is clear to the court on this subject is that these events amount to further evidence of
5 conflict between the parties.

6
7 12. Duncan has installed a septic system on the Black Pines Property that
8 parallels the Cotter property, is approximately three feet high, is sandy, and difficult to
9 walk up and down. The planted Cypress trees along the Cotter property are located
10 between this mound and the fence running on the common boundary line. Duncan has
11 also installed a solid wood fence running north and south on the Black Pines Property
12 on either side of the approximately 7-foot wide path for the Bell's Grove residents.
13 These fences create a physical barrier between the east (Lot 2) and west (Lot 1) sides
14 of the Black Pines Property. The Cypress trees planted near the Tilkov Property have
15 or will fill in to prohibit walking between the fence line and the trees unless the branches
16 are pruned back as the trees grow.

17
18 13. This Court finds that all of the above-referenced Cypress trees in
19 paragraphs 6(c) and (d) of the Findings were planted by Duncan near the Tilkov and
20 Cotter properties. While they do not currently shade either of the Plaintiffs' properties,
21 all of them will likely grow to a potential height of 60-70 feet and have a spread of 15-25
22 feet. These Cypress trees and the fence extender damage the enjoyment of the Tilkov
23 and Cotter in a significant degree, including, but not limited to, by blocking light, air, and
24 views from portions of each of the properties. The Cypress trees will likely create a 60-

1 to 70-foot high wall directly in front of the Tilkov and Cotter properties.

2 14. This Court finds that the Cypress trees referenced above in paragraphs
3 6(c) and (d) of the Findings, and the fence extender in front of the Tilkov property were
4 designed primarily or solely to injure and annoy Tilkov and Cotter. This finding is based
5 upon the historical animosity of the parties; the fact that the parties were involved in a
6 prior lawsuit over the location of the path; the nature, character, location, and use of the
7 fence extender and the Cypress trees; the timing of Duncan's actions, the dispute with
8 Tilkov over the cutting of roses, and the fact that Duncan had previously advocated for
9 the use of landscaping to protect water views of upland properties. Exhibit 19.
10

11 15. This Court finds that the Poplar grove in particular, and the rest of the
12 trees planted by Duncan in general, were not planted by Duncan as a result of his
13 malice or spitefulness, or primarily or solely to injure and annoy the adjoining
14 landowners because the planting of the grove and the other trees occurred prior to the
15 commencement of the Bell's Grove Action. Finally, these trees are not planted closely
16 enough (within ten feet) to the northern Black Pines' property line and therefore do not
17 have the same impact on the Tilkov and Cotter properties as the 16 trees referenced
18 above.
19

20 16. This Court finds that the Cypress trees referenced above in paragraphs
21 6(c) and (d) of the Findings, and the fence extender in front of the Tilkov property, serve
22 no really useful or reasonable purpose. This finding is based upon a lack of a really
23 useful reasonable purpose of these items in relationship to the stated reason advanced
24 by Duncan for their presence, including to gain privacy, create an enjoyable forest
25

1 configuration, and as part of a potential footpath that would run through the trees on the
2 Black Pines Property. The fence extender does not provide any more protection of
3 Duncan's vegetation or privacy than the prior six-foot high fence. The extender and
4 Cypress trees referenced above in paragraphs 6(c) and (d) of the Findings as installed
5 or planted are not serving to provide any more privacy or forest configuration than could
6 be obtained without the items, and the potential "path" between the Cypress trees and
7 fence line cannot be installed as proposed, given the proximity of the trees to the fence,
8 the difficulty in getting over the septic mound, and the installation of a fence running
9 north and south between Lots 1 and 2 of the Black Pines Property. There is no walking
10 space available now between the Cypress and Duncan's fence along the property with
11 Tilkov. The above-referenced trees do not serve any purpose for the pathway desired
12 by Duncan. The trees do not serve any purpose to provide color that could not be
13 accomplished from different trees, or different locations that do not impact Duncan's
14 neighbors.
15

16 17. This Court finds that the configuration of the Cypress trees referenced
17 above in paragraphs 6(c) and (d) of the Findings have caused or will cause them to
18 grow together in a generally uniform manner to create wall-like structures upwards of
19 60-70 feet high.
20

21 CONCLUSIONS OF LAW

22 1. This Court has jurisdiction over the parties, and venue is appropriate in
23 this Court.

24 2. Plaintiffs seek equitable relief under RCW 7.40.030, which provides:

1 An injunction may be granted to restrain the malicious erection, by any
2 owner or lessee of land, of any structure intended to spite, injure or
3 annoy an adjoining proprietor. And where any owner or lessee of land
4 has maliciously erected such a structure with such intent, a mandatory
5 injunction will lie to compel its abatement and removal.

6 The standards for proving entitlement to relief under this provision are the following:

7 (1) that the structure damages the adjoining landowner's enjoyment of
8 his property in some significant degree; (2) that the structure is designed
9 as the result of malice or spitefulness primarily or solely to injure and
10 annoy the adjoining landowner; and (3) that the structure serves no
11 really useful or reasonable purpose.

12 Baillargeon v. Press, 11 Wn.App. 59, 66, 521 P.2d 746 (1974).

13 3. The Court concludes that relief under RCW 7.40.030 is only available to a
14 person who owns property directly contiguous to the property on which the complained
15 of structure has been placed. For this reason, Hulme and Gajdics cannot seek recovery
16 under RCW 7.40.030. Nor can any of the Plaintiffs seek recovery for any activities on
17 the Duncan Property.

18 4. The extender located on the fence between the Black Pines Property and
19 the property owned by Tilkov is a "structure," as that term is used in RCW 7.40.030.
20 The 16 Cypress trees are planted in a manner that has resulted, or will result, in them
21 growing together to form screens, and in this form are structures under RCW 7.40.030.
22 The Court concludes that limiting RCW 7.40.030 to a built-up structure out of
23 dimensional lumber would be inconsistent with the intention of the statute.

24 5. The Court further concludes that RCW 7.40.030 is an overlay to zoning
25 laws, and therefore a lawful use can violate the statute if it is unreasonable and the
elements set out above are established. The Court concludes that a structure that

1 complies with local zoning regulations may still be found to violate RCW 7.40.030.

2 6. No easement has been granted to Tilkov or Cotter for a view over the
3 Black Pines Property, and they have no common law right to a view easement over the
4 Black Pines Property.

5 7. The Court concludes that Tilkov and Cotter do have a common law right to
6 at least a reasonable modicum of light and air. The fence extender and the Cypress
7 trees along and within ten feet of the fence-line interfere with Tilkov's and Cotter's
8 common law right to light and air.

9 8. Based upon the Court's findings of fact, which are incorporated herein by
10 reference as conclusions, this Court concludes that Duncan has violated RCW 7.40.030
11 by installing the extender on the fence line, and by planting the Cypress trees
12 referenced above in paragraphs 6(c) and (d) of the Findings. The Court concludes that
13 these actions are an unreasonable use of the Black Pines Property, and infringe upon
14 the reasonable uses and enjoyment of the Tilkov and Cotter properties. This Court
15 concludes that Tilkov and Cotter are entitled to equitable relief in the form of abatement
16 of these items and a permanent injunction prohibiting Defendants from constructing,
17 planting, having, or installing any fence, hedge line or plant within ten feet of the
18 common property lines with the Tilkov Property and the Cotter Property, above six feet
19 in height as measured from the ground adjacent to any fence, hedge line or plant. This
20 permanent injunction is personal in nature and does not run with the land, and therefore
21 only extends to Defendants and any other owner of the Defendants' property that is
22 related to any of the Defendants, but not to any independent third person.
23
24

1 9. This Court concludes that relief relating to the extender between the Black
2 Pines Property and the Tilkov Property shall occur through complete removal within 60
3 days following entry of a Judgment. Defendants shall be entitled to trim back the tall
4 hedge that grows over the extender from Tilkov's Property to the extent that doing so is
5 necessary to perform this work.

6 10. This Court concludes that relief relating to the Cypress trees within 10 feet
7 of the Tilkov and Cotter Properties shall occur through abatement within 60 days
8 following entry of a Judgment in one of two ways (or using a combination of the two
9 ways) at the discretion of Defendants:

10 a. Some or all of the Cypress trees referenced with paragraphs 6(c)
11 and (d) of the Findings and within ten feet of the Tilkov Property or the Cotter Property
12 shall be removed; or

13 b. Any remaining of the Cypress trees referenced with paragraphs
14 6(c) and (d) of the Findings and within ten feet of the Tilkov Property or the Cotter
15 Property shall be trimmed and hereinafter maintained at a height no higher than six feet
16 above ground, as measured from the base of each tree.

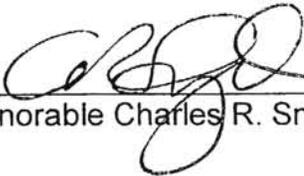
17 11. Based upon the Findings of Fact, this Court concludes that Defendants'
18 planting of the Poplar grove and the rest of the trees on Defendants' property does not
19 violate RCW 7.40.030.

20 12. The Court finds and concludes that Plaintiffs are the substantially
21 prevailing parties, and entitled to recoverable attorneys' fees and costs.

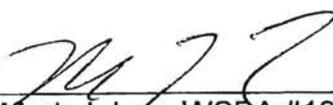
22 13. Any and all Findings of Fact are incorporated herein to the extent they are

1 a conclusion of law.

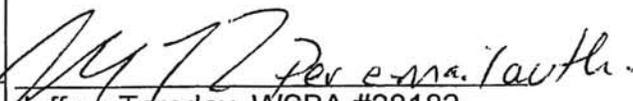
2 DATED this 22 day of October, 2012.

3
4 
5 _____
Honorable Charles R. Snyder

6 Presented by:

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8 
9 _____
10 Mark J. Lee, WSBA #19339
11 of Brownlie Evans Wolf & Lee, LLP
Attorneys for Plaintiffs

12 Approved as to form:

13
14 
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16 Jeffrey Taraday, WSBA #28182
17 of Lighthouse Law Group PLLC
18 Attorneys for Defendants
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24

DECLARATION OF SERVICE

On said day below I emailed a courtesy copy and deposited in the U.S. Postal Service for service a true and accurate copy of the Reply Brief of Respondents-Cross Appellants in Court of Appeals Cause No. 69615-7-I to the following:

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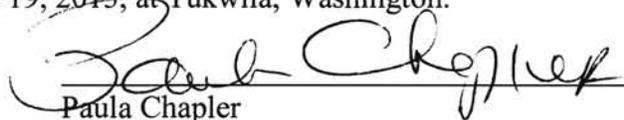
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Original sent by ABC Legal Messengers for filing with:

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: August 19, 2013, at Tukwila, Washington.


Paula Chapler
Talmadge/Fitzpatrick