

71691-3

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No. 71691-3-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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**JEFFREY HALEY,**

*Appellant,*

v.

**MJD PROPERTIES, LLC,**  
a Washington limited liability company,

*Respondent.*

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
JUN 29 11 19 05

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**BRIEF OF RESPONDENT**

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## I. INTRODUCTION

Appellant, Jeffrey Haley (“Haley”), assigns error to selective rulings of the trial court in this litigation. All of the trial court rulings were correct and should be affirmed.

Haley challenges the trial court’s grant of summary judgment dismissing his claim for “nuisance from a bright light shining in Haley’s bedroom window at night.” (Brief of Appellant, p. 4.) A legally placed driveway light is not a nuisance as a matter of law.

Haley next challenges the trial court’s dismissal of his claim that Respondent, MJD Properties, LLC, (“MJD”) planted “a tall tree out of spite, in violation of the spite structure statute.” (Brief of Appellant, p. 4.) A replacement tree is not a spite structure as a matter of law.

Finally, Haley claims the trial court order denying an award of fees and costs to him and declining to remand the case to the arbitrator following mandatory arbitration was error. (Brief of Appellant, p. 4.) Haley was not the prevailing party nor did he file a request for trial de novo following mandatory arbitration.

## **II. STATEMENT OF ISSUES**

A. Did the trial court correctly rule that a driveway light in a residential neighborhood which complies with local law does not constitute a statutory or common law nuisance?

B. Did the trial court correctly rule that a single tree planted to replace a tree destroyed by appellant is not a spite structure pursuant to RCW 7.40.030?

C. Did the trial court correctly rule in denying appellant an award of fees and costs following mandatory arbitration?

D. Did the trial court correctly rule that the matter should not be remanded to the arbitrator following mandatory arbitration when no trial de novo was requested?

## **III. STATEMENT OF THE CASE**

Respondent MJD and appellant Haley are adjacent property owners on Mercer Island, Washington. This lawsuit represents the third litigated matter appellant has brought before this court. See Court of Appeals No. 70649-7-I and No. 70232-7-I.

The present action for damages was instituted by MJD following appellant's trespass onto MJD property and removal of approximately ten

feet of a Weeping European beech tree situated entirely on MJD property.<sup>1</sup> This lawsuit was brought by MJD for timber trespass and outrage seeking treble damages. (CP 1-4.)

Haley answered the lawsuit claiming “a right to trim trees on Plaintiff’s property for view protection.” (CP 6.) He also filed several counterclaims including claims that MJD had removed a perennial plant from appellant’s property and created excessive light from a driveway light situated on MJD property. (CP 11.)

Prior to his trespass and tree cutting on MJD property, appellant had sought to obtain an easement to trim trees from the former owners of the MJD property. He issued a letter to the owners claiming a lawful right to trim trees on the neighbors’ property which impacted views. He provided a proposed form of “Easement to Trim Trees.” (CP 285, 293-296.)

MJD filed a motion for summary judgment to establish liability of Haley for unlawful tree-cutting on MJD property and for dismissal of Haley’s counterclaims. (CP 16-25.)

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<sup>1</sup> Photographs of the topped tree are found in the Declaration of Brian K. Gilles, Consulting Arborist. (CP 360 and 363.)

The trial court adjudged Haley liable for trespass onto MJD's property and injury to the tree situated entirely on MJD's property. Damages were to be determined in future proceedings. Additionally, all of Haley's counterclaims were dismissed with the exception of removal of the shrub on Haley's property which presented an issue of fact for further proceedings. Also, the issue of the driveway light as a statutory violation of Mercer Island ordinances was reserved for additional briefing. (CP 77-78.) Following briefing on the excessive lighting issue, the trial court granted summary judgment dismissing Haley's counterclaim for nuisance based on alleged excessive lighting. (CP 88.)

Following discovery, MJD moved for summary judgment on the issue of tree-cutting damages. MJD also sought an award of attorney's fees and costs for defense of frivolous counterclaims pursuant to RCW 4.84.085. MJD sought an award of attorney's fees and costs as sanctions based upon the trial court's prior order compelling Haley's attendance at his deposition. Haley had failed to appear and sit for his deposition which required MJD to file a motion to compel his attendance which was granted. (CP 244-46; CP 247-259.) The order to compel attendance at his deposition is found at CP 271-272.

The trial court denied MJD's motion for summary judgment and ordered transfer of the matter to mandatory arbitration after determining the amount in controversy did not exceed \$50,000. (CP 433.)

On the same date, the trial court reserved rulings until after arbitration on the issue of MJD's entitlement to attorney's fees based upon the court's Order Compelling Attendance at Deposition as well as MJD's request for attorney's fees for defense of frivolous counterclaims. (CP 434-435.)

The matter proceeded to arbitration. The arbitrator issued an award to MJD for treble damages in the total sum of \$8,100 and an award to Haley for treble damages resulting from the missing plant in the sum of \$99. (CP 116-117.)

Haley did not file a request for trial *de novo*. MJD filed its Motion for Judgment on Arbitration Award. (CP 118-119.) The trial court issued its Judgment on Arbitration Award (CP 199-200) in the principal sum of \$8,001 which recognized the arbitration award to MJD totaling \$8,100 offset by damages awarded to Haley in the sum of \$99. Thus, the net award in favor of MJD was \$8,001.00.

In conjunction with its Motion for Judgment on the Arbitration Award, MJD presented a Motion for an Award of Attorney's Fees and Costs.

(CP 127-131.) MJD requested attorney's fees and costs necessitated by the trial court's order compelling Haley's attendance at deposition. Additionally, fees for defense of frivolous counterclaims asserted by Haley were also requested. These requests were based upon the trial court's prior order reserving those fee issues until after the arbitration hearing had been completed. (CP 434-435.)

The trial court entered a Judgment on Arbitration Award awarding MJD judgment against Haley in the principal sum of \$8,001.00, filing fee in the sum of \$240.00; arbitration filing fee in the sum of \$200.00; service of process fee in the sum of \$69.50; plus court reporter fee and attorney's fees associated with the Order to Compel Attendance at Deposition in the sum of \$408.35 for a total judgment of \$8,918.85.

After entry of the judgment, Haley filed a motion for remand to the arbitrator to rule on Haley's Request for Fees. (CP 201-203.) The trial court entered an order denying Haley's motion for remand to the arbitrator. (CP 238.)

In his Notice of Appeal (CP 230-237) Haley seeks review of the following decisions by the trial court:

(1) The order dismissing Haley's counterclaim that the tree on MJD property is a "spite structure" in violation of RCW 7.40.030;

(2) The trial court's order dismissing Haley's counterclaim for nuisance from "excessive light" emanating from MJD's driveway light;

(3) The trial court's order denying an award of attorney's fees and costs to Haley; and

(4) The trial court's denial of Haley's Motion for Remand to the arbitrator to determine an award of fees and costs.

#### IV. ARGUMENT AND AUTHORITIES

A. *A legally placed driveway light does not constitute a nuisance as a matter of law.* Whether a particular activity is a nuisance is determined upon the facts of the case. Nuisance is defined in RCW 7.48.010 which states that actionable nuisance is "whatever is injurious to health or indecent or offensive to the senses, or an obstruction to the free use of property, so as to essentially interfere with a comfortable enjoyment of property." The term "unlawful and unreasonable" are synonymous. See *Karasek v. Peier*, 22 Wash. 419, 61 P. 33 (1900).

Haley claims MJD's driveway light casts excessive light onto Haley's property. (Brief of Appellant, p. 13.)

The unrefuted Declaration of John Pugh describes the light in question: “The light pole serves to protect the driveway and parking area of the MJD property. . . This light is essential for security and visibility in the driveway area.” (CP 69.)

Courts, when analyzing a nuisance claim between neighbors, have said rights in "the use and enjoyment of property are relative, but are also equal. Equity cannot restrict one land owner to confer benefits on the other." *Collinson v. John L. Scott*, 55 Wn.App. 481,488, 778 P.2d 534 (1989) citing *McInnes v. Kennell*, 47 Wn.2d 29, 38, 286 P.2d 713 (1955). The court ruled in *Collinson* that a lawfully erected building or structure cannot be complained of as a nuisance merely because it obstructs the view of a neighboring property.

A neighbor who lights his driveway will obviously shine light from one property onto a nearby property. Haley contends a light shining brightly on MJD's property gives Haley the right to restrict the light use to benefit Haley's property. This contention is forbidden by equity. The rights of adjoining landowners must be measured in relation to each other. MJD is not restricted from lighting the driveway. Haley cannot claim that MJD is

committing a nuisance. MJD was entitled to judgment as a matter of law dismissing this counterclaim for excessive light.

In response to MJD's motion for summary judgment on this issue, Haley claimed the driveway light violated the Mercer Island City Code and constituted a *per se* nuisance under the State nuisance statutes. (CP 48.)

At the summary judgment hearing on this issue, the court reserved ruling on the statutory violation issue. The court's order stated in part: "Bright light as a statutory violation (Mercer Island) is an issue to be determined." (CP 78.) The court called for additional briefing on this issue.

Both parties requested an opinion from the City of Mercer Island. The principal planner of the City of Mercer Island Development Services Group stated in a letter to both parties that, in his opinion, residential properties are exempt from the ordinance relied upon by Haley in his counterclaim. (CP 79-87.)

The trial court thereafter entered its order granting MJD's motion for summary judgment to dismiss defendant's counterclaim for nuisance based on alleged excessive lighting. (CP 88.)

Retreating from his statutory argument challenging the driveway light, Haley instead invokes general nuisance law to support his claim.

Haley cites one Washington case, *Riblet v. Spokane Portland Cement Co.*, 41 Wn.2d 249, 248 P.2d 380 (1952), overruled on other grounds. That case involved smoke and dust from a cement plant. It has no relevance to the factual or legal issues before this court.

Haley quotes at length from the court's opinion at p. 254. He fails to quote the following sentence from that same page which completely undermines his reliance upon that case or the other case he cites. The court stated: "Whether that decision with regard to an alleged nuisance or decisions in other cases relative to alleged nuisances will be controlling in a given case, is dependent purely and simply upon identity or similarity of facts and circumstances." A driveway light illuminating a driveway for security purposes has no identity or similarity with cement dust and smoke issuing from a commercial plant.

Haley cites *Anderson v. Guerrein Sky-Way Amusement Co.*, 29 A.2d 682 (Pa. 1943) claiming "excessive light inconsistent with the character of a neighborhood can constitute a nuisance." (Brief of Appellant, p. 17.) A drive-in movie theater was declared a nuisance for noise emanating from large amplifying horns causing disturbance to nearby residences. The case

has nothing to do with excessive light and Haley misrepresents this holding to the court.

Haley also relies upon application of the state Environmental Policy Act, RCW Ch. 43.21C, and WAC 197-11-960. (Brief of Appellant, p. 16.) The environmental checklist in the WAC regulations applies only to a determination whether an environmental impact statement is required for a project. No law supports Haley's implication that MJD was required to obtain an environmental impact statement before installing a driveway light.

**B. *A single replacement tree is not a "structure" pursuant to RCW 7.40.030.*** Haley claims the tree planted by MJD on MJD's property "significantly reduces the quality of views from. . . Haley's house. . ." (Brief of Appellant, p. 17.) He ignores that the new tree replaced the tree he butchered, which prompted this litigation.

Haley's view protection argument has no support under Washington common law or statute. Equity cannot restrict one land owner to confer a benefit on another land owner. See *Collinson, supra*, at 481, 485, citing *Karasek v. Peier, supra*.

RCW 7.40.030 does not apply to vegetation or trees planted by a neighbor on his own property. RCW 7.40.030 enjoins the malicious erection

of any “structure intended to spite, injure, or annoy a property owner.” A tree is not a “structure” within this statute. In *Karasek v. Peier, supra*, at p. 424, the court ruled that a fence was a structure within the meaning of the statute. However, the court adopted the Webster dictionary definition that a structure is something which is “built; especially a building of some size or magnificence; an edifice.” Additionally, the court held that a structure is “any production or piece of work artificially built up or composed of parts joined together in some definite manner. . . .”

A lone tree is not a structure subject to the prohibitions of RCW 7.40.030. Additionally, the statute is not intended to prohibit the erection of structures which are useful and enhance value or enjoyment of one’s land. See *Jones v. Williams*, 56 Wash. 588, 594, 106 P.166 (1910). In *Karasek v. Peier, supra*, and *Collinson v. John L. Scott, supra*, plaintiffs in both cases were unsuccessful at preventing construction that blocked their view or access to light because there was no easement for light, view, or air.

RCW 7.40.030 must be strictly construed for the protection of property rights. See *Jones v. Williams*, 56 Wash. 588, 593, 106 Pac. 166 (1910). The statute is not directed at structures which enhance the value,

usefulness and enjoyment of land, and which are not nuisances, regardless of the motive for their erection. *Jones, supra* at 593.

In the present action, John Pugh testified that the single replacement tree was planted to block MJD's view of Haley's property "which is in a constant state of disrepair." (CP 69-70.)

A single cedar tree does not constitute a structure by any stretch of the imagination. Certainly a row of trees could be deemed a structure, much like a fence, if the row of trees serve the same purpose. Here, the issue involves a single cedar tree planted approximately in the same location where Haley destroyed a preexisting weeping beech tree.

Haley misplaces reliance upon *Baillargeon v. Press*, 11 Wn.App. 59, 521 P.2d 746 (1974) which is readily distinguishable. At issue in that case was a "structure" consisting of a 6 foot high grape stake fence above a concrete block rockery or retaining wall adjacent to the property line. The case was remanded for lack of a finding by the trial court pursuant to RCW 7.40.030 that the fence would serve a useful or reasonable purpose.

In the present action, no "structure" is involved and the lone tree serves a useful and reasonable purpose replacing the tree destroyed by Haley.

Haley cites cases from other jurisdictions for his theory that live trees can be a spite fence. Yet each of the cases cited involved a series of trees comprising a fence.<sup>2</sup>

**C. *The trial court correctly ruled on the issue of costs and attorney's fees.*** It is unclear what Haley seeks in challenging the court's ruling on costs and fees. The judgment amount for costs and fees was awarded for Haley's failure to appear at his deposition. The judgment awarded court reporter appearance fees of \$45.85, and attorney's fees in the amount of \$362.50. (CP 199-200.) This award followed the trial court's prior ruling that fees and costs arising out of the Order Compelling Attendance at Deposition were reserved until after arbitration. (CP 434-435.) Haley does not appear to object to this award of fees and costs.

The remaining award of costs to MJD include \$240 filing fee, arbitration filing fee in the sum of \$200 and service of process fee in the sum of \$69.50. These costs totaling \$509.50 were awarded to MJD as prevailing party.

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<sup>2</sup> *Wilson v. Handley*, 97 Cal.App. 4th 1301, 119 Cal.Rptr.2d 263 (Cal. Ct. App. 2002) involved a row of evergreen trees. The case was remanded to determine whether the trees satisfied the spite fence statute. *Dowdell v. Bloomquist*, 847 A.2d 827 (R.I. 2004) involved four trees planted together for spite. *Peters, et al v. O'Leary*, 30 A.3d 825 (Me. 2011) involved 74 trees constituting a "structure in the nature of a fence."

No other costs or fees were awarded. There is no contractual or statutory basis for an award of attorney's fees to either party arising from the tree-cutting incident or Haley's missing shrub.<sup>3</sup> The court denied MJD's claim for attorney's fees for defense of frivolous counterclaims pursuant to RCW 4.84.185. (CP 196-198.)

Haley makes the unusual argument that since the claim for tree-cutting and the counterclaim for the missing shrub are unrelated to each other (not a compulsory counterclaim) the court should consider an analysis of each claim independent of the outcome of the other claim. Haley asserts that his \$99 claim "could have been brought in a separate proceeding," and thus he should be awarded fees as the "prevailing party." Brief of Appellant at p. 22. No authority is cited for this proposition. Presumably no authority exists.

Haley next claims he is entitled to fees pursuant to RCW 4.84.250 because he made a settlement offer which was "closer to the outcome than was MJD's best settlement offer." (Brief of Appellant, p. 22.) Haley's argument ignores reality. MJD was the substantially prevailing party with

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<sup>3</sup> The timber trespass and tree-cutting statutes are found at RCW 64.12.030 and RCW 4.24.630. RCW 64.12.030 controls this litigation. No attorney's fees are authorized by that statute. RCW 4.24.630 contains an attorney fee provision but its terms do not apply to actions governed by RCW 64.12.030. Thus, there is no statutory basis for attorney's fees in this action.

its arbitration award of \$8,100 which was offset by the \$99 award to Haley. The net result was a plaintiff's award of \$8,001.00. Additionally, there is nothing in the record supporting Haley's claim of a settlement offer equal to or greater than \$8,001.00.

Haley relies upon RCW 4.84.250 claiming he was the prevailing party on his \$99 offset from plaintiff's arbitration award. The law does not support Haley's position. A "prevailing party" is a party who receives a judgment in his/her favor. *Burman v. State of Washington*, 50 Wn.App. 433, 444, 749 P.2d 708 (1988); *Yakima Adjustment Serv. v. Durand*, 28 Wn.App. 180, 622 P.2d 408 (1981). Although such a judgment need not include the entire amount sought by the party, the judgment must be one rendered in the party's favor at the conclusion of the entire case. *Stott v. Cervantes*, 23 Wn.App. 346, 595 P.2d 563 (1979).

A plaintiff is a prevailing party entitled to costs under RCW 4.84.030, notwithstanding that the amount claimed by the plaintiff in an action is reduced by credits allowed to the defendant. *Dawson v. Shearer*, 53 Wn.2d 766, 337 P.2d 46 (1959).

Haley received a credit to the judgment against him in the sum of \$99. The net judgment was awarded to MJD in the sum of \$8,001.00. MJD was

properly entitled to costs and statutory attorney's fees. Sanctions were also awarded based upon the court's prior ruling.

MAR 6.3 provides that if, within 20 days after an arbitration award is filed, no party has sought a trial *de novo* pursuant to MAR 7.1, the prevailing party shall present to the court a judgment on the arbitration award for entry as a final judgment. The rule provides further that a judgment so entered is subject to all provisions of law relating to judgments in civil action, but it is not subject to appellate review.

Haley did not seek a trial *de novo*. Under these circumstances he is not entitled to further review, nor can Haley cite any authority for remanding this post-judgment proceeding to the arbitrator. His motion to the trial court for remand to the arbitrator was properly denied.

In *Trusley v. Statler*, 69 Wn.App. 462, 849 P.2d 1234 (1993) the appellate court reversed the trial court's fee award under RCW 4.84.250 following arbitration. Attorney's fees were not part of the arbitration award and consequently could not become part of the final judgment. The court stated at p. 465:

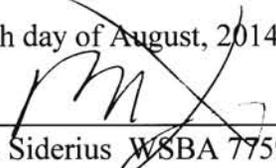
Both parties, by not asking for a trial *de novo*, accepted the arbitrator's award and may not alter it by requesting action by the Superior Court which would amend that award.

Haley also ignores the provisions of RCW 4.84.270. Pursuant to that statute, a defendant or party resisting relief, shall be deemed the prevailing party within the meaning of RCW 4.84.250, if the plaintiff recovers nothing, or if the recovery, exclusive of costs, is the same or less than the amount offered in settlement by the defendant, as set forth in RCW 4.84.280. RCW 4.84.280 requires an offer of settlement in the manner prescribed by applicable court rules. Haley can point to no offer of settlement filed with the court as required by this statute.

## V. CONCLUSION

The trial court rulings which are the subject matter of this appeal should be affirmed.

Respectfully submitted this 28th day of August, 2014.

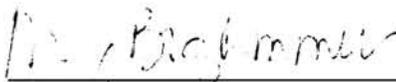
  
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**Declaration of Service:** The undersigned declares under penalty of perjury under the laws of the State of Washington that on the below date I mailed via U.S. Mail, first class, postage pre-paid and/or emailed a true copy of this document to:

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Dated: August 28, 2014

  
\_\_\_\_\_  
Mary Berghammer